A STUDY OF THE JUDICIAL RECORDS OF NOMINEES FOR THE SUPREME COURT OF APPEAL, COMPETITION APPEAL COURT, ELECTORAL COURT AND HIGH COURT

APRIL 2011

CONTENTS AND LIST OF CANDIDATES

INTRODUCTION

Background to the Democratic Governance and Rights Unit (DGRU)

1. The DGRU has been commissioned by the Chief Justice, as head of the JSC, to prepare a report on the judicial records of the shortlisted candidates for the forthcoming interviews in April 2011.

2. The DGRU is an applied research unit within the Public Law Department at the University of Cape Town. It is primarily concerned with the relationship between rights and governance. Its work focuses on the intersection between public administration, with the challenge of public accountability, on the one hand, and the realization of constitutionally-enshrined human rights on the other. Currently, one of the DGRU's main projects focuses on judicial selection in South Africa.

Background to this report

3. The DGRU has compiled a report on the judicial records of candidates for each of the JSC interviews since the JSC hearings for four Constitutional Court positions in September 2009. The intention of this report is to assist the JSC by providing an objective insight into the judicial records and judicial philosophy of the short-listed candidates.

Methodology of this report

4. The research is not intended to be a comprehensive summary of candidates' judicial records. Therefore, the research should be seen as trying to provide selected examples of a candidate's judicial record, in order to assist commissioners in their questioning of the candidates.

5. We attempted to be fair to all the candidates in selecting material for the research, and the material to be included should not be seen as an implicit endorsement of any one candidate. However, some candidates have more extensive track records than others, or would have written more judgments.

6. Where candidates did not have any judgments which seem to fall within the parameters of the report, we included any judgments that would give an indication of their judicial qualities.

7. The research focuses on candidates' judgments which relate to constitutional issues, or which would shed light on candidates' understanding of constitutional values.

8. If no such judgments were found, then the dates on which cases were heard and judgments delivered (where that information was available) is noted, in order to provide evidence of a candidate's industry.

9. The importance of a judgment, in terms of whether it broke new ground, and relatedly, where it was a concurring or dissenting judgment, is included in the scope of our research, in order to show a candidate's independence of mind. In some cases, concurring or dissenting judgments are included even if they do not fall within the 'constitutional' focus of the report.

10. Where available, selected academic articles written by candidates are included.

Submission

11. We would like to take this opportunity to reiterate our previous submissions regarding our understanding of the attributes which may be said to make up the 'ideal South African judge'. These submissions have previously been made to the JSC, but are repeated here for the sake of convenience.

12. The DGRU is of the view that the appointment of judges to all levels of the judiciary ought to be governed by the same broad considerations, although certain specific factors will clearly have to be taken into account for specialist courts. This submission seeks to offer a modest contribution to assist the JSC as it conducts the process, by reiterating the DGRU's thoughts on the attributes that should be looked for when determining the recommendations for appointment to the bench. First, what are the attributes that should be found in the 'ideal' South African judge and which together inform and constitute the two constitutional lodestars for appointment, namely according to section 174(1) of the Constitution, that judges must be "fit and proper" and "appropriately qualified"?

13. On this, we submit that the following attributes represent a principled approach to answering this difficult question[1]. The criteria that a candidate be 'fit and proper' for appointment might be distilled into five categories:

    a. A commitment to constitutional values and to apply the underlying values of the Constitution (human dignity, freedom and equality), with empathy and compassion,

[1] This set of attributes draws on the research of Susannah Cowen, a practising advocate and Senior Research Associate of the DGRU. Her paper, *Judicial selection: A Timely Debate* can be found at: http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf

and with due regard to the separation of powers and the vision of social transformation articulated by the Constitution.

b. Independence of mind: Judges must have the courage and disposition to act independently and free from partisan political influence and private interests alike[2].

c. A disposition to act fairly and impartially and an ability to act without fear, favour or prejudice.

d. High standards of ethics and honesty: For the rule of law to be respected, the reputation and probity of the bench should be a non-negotiable pre-requisite.

e. Judicial temperament: Though a somewhat elastic term, this may encompass qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.

14. The JSC is obliged not only to consider whether candidates meet these criteria, but – importantly – also to consider the need for the judiciary to reflect both the racial and gender composition of the South African population. This is, of course, an obligation which is fundamental to the legitimacy of the South African legal system.

15. In terms of the relationship between sections 174(1) and (2), we submit that while there is no hierarchy amongst the two sets of provisions, and neither should succumb to the other, nor does it represent a 'zero sum game'. Candidates must be "fit and proper", and "appropriately qualified", but due consideration must also be given to the "need for the judiciary to reflect broadly the racial and gender composition of South Africa". If sections 174(1) and (2) are applied correctly, choosing an ideal judge and achieving equity, diversity and representation is necessarily an inter-related and complementary process.

16. Clearly, the process of interviewing candidates provides an opportunity to assess whether or not they meet the constitutional standard set in section 174(1). Questions should, we respectfully submit, be directed in a consistent fashion towards criteria such as those that we outline above. In particular, we suggest that it will be necessary for commissioners to ask questions about a candidate's "judicial philosophy". We understand "judicial philosophy" to include a candidate's commitment to constitutional values, as well as their views on issues

[2] While individuals may well hold, or have held, political or ideological affiliations, and while a judge's values will influence their approach to adjudication, 'independence of mind' refers to the capacity to put the Constitution first and to not slavishly follow 'the line' of any one political or private party or interest.

such as the role of the judiciary, constitutional interpretation, and ethical and ideological issues relevant to the judicial function.

Acknowledgments

17. Under the guidance of Professor Richard Calland, this research was carried out by Abongile Sipondo, researcher and advocacy manager of the DGRU; Gwenaelle Dereymaeker, research associate of the DGRU; and Anisa Mahmoudi and Sarai Chisala Tempelhoff, research assistants of the DGRU.

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University of Cape Town
24 March 2011

SELECTED JUDGMENTS

S v MOKOENA 2008 (5) SA 578 (T)

Argument and decision on the constitutional validity of certain provisions of the Criminal Procedure Act 51 of 1977 , as amended by Act 32 of 2007, during the course of proceedings for the imposition of sentence in terms of s 52 of the Criminal Law Amendment Act 105 of 1997.

Bertelsmann held:

"In De Kock NO and Others v Van Rooyen 2005 (1) SA 1 (SCA) (2004 (2) SACR 137; [2006] 2 All SA 227), Cameron JA, speaking on behalf of the unanimous court, underlined that, as a matter of general principle, constitutional issues should not be addressed prior to the decision of factual issues or matters of law without any constitutional implications, unless such decision is necessary for a proper assessment of the non-constitutional issues at stake." [Paragraph 24]

"The Constitution of the Republic of South Africa, 1996, defines a child as a person under the age of 18 years. (Section 28(3).)" [Paragraph 33]

"Section 28, dealing with the rights of the child, clearly differentiates between rights that accrue especially to children and the fundamental rights that exist for the benefit of every person, including children, with the exception of the right to vote and to seek public office, which is G expressly reserved for 'adult citizens' in s 19(3) (a) and (b) ." [Paragraph 34]

"Kruger 'The Protection of Children's Rights in the South African Constitution: Reflections on the First Decade' (2007) 70 THRHR 239 emphasises that some of the fundamental rights contained in the Bill of Rights that are not repeated in s 28(2) are particularly important for children and identifies the right to equality; the right to dignity; the right to bodily and psychological integrity; and the rights to individual autonomy encapsulated in the rights to privacy, freedom of religion, freedom of expression and freedom of association as the most important of these." [Paragraph 36]

"The critical provision setting children's rights apart from other fundamental rights, and thereby creating the only instance of precedence of one fundamental right above others, is s 28(2) of the Constitution, which unequivocally declares that: The child's best interests are of paramount importance in every matter concerning the child." [Paragraph 37]

"The Constitution thereby imports and gives content to the Republic's ratification and adoption of the principal international instruments protecting the interests of children. These include the United Nations Convention on the Rights of the Child, passed in 1989 and ratified by South Africa in 1995....." [Paragraph 38]

“A constitutional injunction is powerless to protect a child from being victimised and traumatised by criminal activity. All the more should it be incumbent upon the criminal law and criminal procedure and upon the courts, their functionaries and practitioners who regulate its procedure and apply its principles to 'protect children from abuse and (to) maximize opportunities for them to lead productive and happy lives (and to) create positive conditions for repair to take place'.” [Paragraph 49]

“Section 28 of the Constitution demands that a child should be exposed to as little stress and mental anguish as possible, particularly in the case of a child witness of whatever age who has been the victim of a sexual attack. More often than not, the child witness is testifying under compulsion and enters the witness stand under great apprehension.” [Paragraph 78]

“It is therefore difficult to fathom why the legislature should have seen fit to demand that the child victim should be exposed to ' undue ' stress and suffering before the services of an intermediary may be considered. This threshold provision places a limitation upon the best interests of the child that is neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. The child is entitled as of right to a procedure that eliminates as much as possible of the anguish that accompanies the necessity of having to relive the horror of abuse, violation, rape, assault or deprivation that the child experienced when he or she became a victim or witness. To demand an extraordinary measure of stress or anguish before the assistance of an intermediary can be called upon clearly discriminates against the child and is constitutionally untenable.” [Paragraph 79]

“It is one of the basic tenets of criminal justice that a trial should be held in public. This principle is enshrined in the Constitution in s 35(3) (c) and is of indisputable importance to ensure the public's trust in the independence and functioning of the courts - see S v Du Toit en Andere 2005 (1) SACR 47 (T).” [Paragraph 100]

“Section 158(5) is in its present form irrational and discriminatory and therefore unconstitutional.” [Paragraph 126]

“There is no justification for this additional burden of heartache and frustration that is routinely heaped upon child victims and witnesses in this fashion. The Constitution guarantees the accused a fair trial that must be concluded without unreasonable delay. However much an accused's rights may be prejudiced by the tiresome pace at which criminal trials in which serious charges are brought against them are dragged through our courts, and whatever excuse may be offered for the manner in which the fair trial rights of the accused are infringed, the paramountcy of children's rights demands that they are not forced to join the throng of those who have to wait for months or years before their case is finalised. Whenever a child is involved as a victim or witness, such child is by virtue of the clear-cut provisions of s 28(2) entitled to have his or her case given priority at every stage of the investigation and of the prosecution. Trials in

which children are involved as victims and witnesses must be concluded as soon as possible." [Paragraph 159]

ABSA BANK LTD v NTSANE AND ANOTHER 2007 (3) SA 554 (T)

The plaintiff sought to declare an immovable property (the defendants' home) executable for default judgment for the full C amount of the mortgage bond over the property (R62 042,43) even though the defendants were only in arrears in respect of the agreed periodic payments in the very small amount of R18,46. The defendants had initially acquired registered leasehold over the property, which was later converted into ownership. They had not received any State assistance to purchase the property, and had willingly put up their home as security for the debt. Since the bond D had been granted in 1998, the defendants had intermittently and repeatedly defaulted on the agreed payments.

Bertelsmann J held:

"At best for the debtor who has willingly bonded her or his property a Court could enquire whether, prima facie , enforcement of the bond might be held in abeyance while ways and means are explored by which payment of the debt might be arranged in spite of the debtor having defaulted. This enquiry would be complicated by the fact that most matters of this nature would come before the Court by way of an application for default judgment. While the Court in the Mortinson matter did not hold as a matter of law that declaring residential property executable did constitute a limitation of the rights protected in s 26(1) of the Constitution, but only accepted that this was the case, it did add that, if a small amount was in arrears that triggered the action against the debtor, the possibility of an infringement of these rights was increased and such claims therefore required careful scrutiny". [Paragraph 69]

"Adjudication between conflicting interests in a society that is governed by a democratic constitution involves the continuous weighing up of competing rights." [Paragraph 70]
"In casu , the plaintiff's right to commercial activity and the right to enforce agreements lawfully entered into must be balanced against the right to adequate housing that the defendants indubitably enjoy.." [Paragraph 71]

"In this weighing-up process the proportionality of the harm must be considered that may befall the defendants if judgment is granted. It must be weighed against the harm plaintiff may suffer if the agreement underlying the registration of the mortgage bond is rendered commercially ineffective. Not only would this deny the plaintiff the right to enforce a covenant properly and lawfully entered into, it might create uncertainty and distrust in commercial activities and investment in the economy might be

negatively affected if Courts were to be seen to interfere willy-nilly with established practices, see Saunderson , paras [2] and [3].” [Paragraph 72]

“In considering these rights, the Court is called upon to take all relevant information into account. These factors include the value of the bonded property; the past history of payments made by the debtor; the amount outstanding on the bond; any assets other than the immovable property the debtor might possess, particularly movable assets capable of easy attachment and sale in execution; any other debts that the bondholder is aware of, such as arrear rates and municipal taxes; whether the debtor is employed or not, etc.” [Paragraph 73]

“The Court is enjoined by the Constitution to ensure that fundamental human rights are not infringed. If necessary, it has to act mero motu to prevent the infringement of constitutionally safeguarded rights: Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng, en Andere 2001 (11) BCLR 1175 (CC). The present case demonstrates just how cumbersome and often ill-defined such an intervention might become. The issues that must be addressed once the Court is of the view that a constitutional right may be infringed, should be clearly formulated and defined as narrowly as possible.” [Paragraph 77]

“To allow such a result in a country where housing is at a premium and poverty and the legacy of a previous dispensation deny millions the fundamental right to a roof over their heads infringes the fundamental right to adequate housing and may also, as was argued by Mr De Villiers , be in conflict with the right to dignity.” [Paragraph 83]

“Every circumstance that does or could constitute an infringement of a fundamental right should be capable of a definition of the principle involved. In this matter this definition presents a challenge because of the many variable circumstances that might arise in individual cases. It should include the following (without any claim I to finality or comprehensiveness): whenever a bondholder calls up the bond, or seeks an order declaring the bonded property specially executable, while the amount in arrears at date of application for judgment is so small that it should readily be capable of settlement by execution against movable assets, taking all circumstances into account, the declaration of the immovable property as executable would constitute an infringement of the debtor's fundamental right to adequate housing.” [Paragraph 86]

THEMBISILE AND ANOTHER v THEMBISILE AND ANOTHER 2002 (2) SA 209 (T)

The applicants sought a declaratory order that they were entitled to bury the deceased, who had died in May 2001, at his ancestral home at the locality of their choice. The first applicant was the deceased's first wife, married to him in a properly conducted customary union in June 1979. The second applicant was the eldest male son born out of the union between the deceased and the first applicant, still a minor at the time of the application. The application was opposed by the deceased's second wife, the first respondent. She had entered into what purported to be a civil marriage with the deceased in May 1996, duly documented by a marriage certificate, followed by a customary union in October 1999.

Bertelsmann held:

"The customary union has been given constitutional recognition and protection by s 15 of the Constitution of the Republic of South Africa Act 108 of 1996, which provides specifically, apart from enshrining the right to freedom of conscience, religion, thought, belief and opinion, that: I

'15(3) *(a)* This section does not prevent legislation recognising -

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered by persons professing a particular religion.'" [Paragraph 23]

"Further constitutional protection of the customary union is provided by s 30 (enshrining language and culture) and s 31 (protecting cultural, religious and language communities and the practice of such culture and religion) of the Constitution. The core values of the Constitution, namely human dignity, non-racialism and the B equal protection afforded to individuals and communities, underscore this fact. (Compare further Ryland v Edros 1997 (2) SA 690 (C) at 707E - H and Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) 1999 (4) SA 1319 (SCA) , particularly at 1327G - 1330G.)" [Paragraph 25]

MEC FOR HEALTH, MPUMALANGA v M-NET AND ANOTHER 2002 (6) SA 714 (T)

The first respondent, an independent television station, intended to broadcast on 21 June 2002 an exposé on alleged malpractices in the treatment of women undergoing voluntary abortions at a public hospital falling under the jurisdiction of the applicant. When informed of the first respondent's intentions, the applicant launched an urgent application to interdict the broadcast less than half an hour before the program was to go on air.

Bertelsmann held:

“The media, including the respondents, have an indubitable right, and indeed the duty, to inform the public about matters which fall in the public domain and for which the applicant is accountable to the public. This right is safeguarded and the duty is imposed by the Constitution.” [Paragraph 18]

“Freedom of expression lies at the very heart of our democracy, all the more so in the public sector where in the past the government, the Executive and officialdom were protected by a web of statutory and regulatory restrictions upon the freedom of the media to report on matters which might have cast an adverse light on the establishment or State officials whose repressive activities were conducted behind the shield of 'State security'. O'Regan J in South African National Defence Union v Minister of Defence and Another 1999 (4) SA 469 (CC) para [8] at 477E underlined its importance thus:

'(F)reedom of expression is one of a ''web of mutually supporting rights'' in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial.'” [Paragraph 19]

“The ability to form an opinion, particularly an opinion about the manner and fashion in which the authorities are performing their public duties or giving content to their obligation to deliver social services as demanded by the Constitution, is, of course, dependent in a very large measure upon the media's ability to provide accurate information on the way in which politicians and functionaries are fulfilling their mandate.”[Paragraph 20]

S v MALULEKE 2008 (1) SACR 49 (T)

The accused, who was accused 1 during the trial, was convicted in the High Court of the Northern Circuit of the Transvaal Provincial Division, sitting at Lephalele, of murder. During evidence in mitigation, the defence investigated the question whether the accused had, prior to the trial, complied with the traditional custom of her community of apologising for the taking of the deceased's life by sending an elder member or members of her family to the family of the deceased.

Bertalsmann J held:

“The incorporation of the principles of traditional justice into the South African criminal-justice system must be approached with circumspection. While it is generally appreciated that African legal systems did not know prisons, it would be dangerous indeed for a judge not versed in traditional customs to make assumptions that could prove to be grievously wrong and the incorrect application of which would do more harm than good.” [Paragraph 38]

LOUW AND ANOTHER v MINISTER OF SAFETY AND SECURITY AND OTHERS 2006 (2) SACR 178 (T)

The plaintiffs, a married couple, claimed damages from the defendants on the grounds of unlawful arrest.

Bertelsmann J held**:**

“In the absence of a warrant, an arrest is lawful only if it is effected in accordance with s 40 of the Criminal Procedure Act 51 of 1977 of a person who has committed a crime listed in Schedule 1 of the Act, or of someone who is on reasonable grounds suspected of having committed such a crime. (S v Shirinda 1986 (1) SA 573 (T).)”

“An arrest is a drastic interference with the rights of the individual to freedom of movement and to dignity. In the recent past, several statements by our Courts and academic commentators have B underlined that an arrest should only be the last resort as a means of producing an accused person or a suspect in court - *Minister of Correctional Services v Tobani* 2003 (5) SA 126 (E) ([2001] 1 All SA 370) at 371 *f* (All SA):

'So fundamental is the right to personal liberty that the lawfulness or otherwise of a person's detention must be objectively C justifiable, regardless . . . even of whether or not he was aware of the wrongful nature of the detention.'”

“An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights.”

SELECTED JUDGMENTS

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

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

Ebrahim J held:

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

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

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

"In the present circumstances I find established on the probabilities, that the applicant deliberately absented herself from duty with the intention not to return and for reasons best known to herself

changed her mind thereafter. I am of the view that the applicant deserted her post and I find therefore that her dismissal was substantively fair" [Paragraph 6]

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

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

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

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

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

"The substantial issue in this appeal is whether such a duplication has occurred with regard to counts 2, 3 and 4. The rule against a duplication of convictions is a salutary one and it is the court's duty to guard against such duplication where an accused person is charged with multiple charges supported by the same facts." (paragraph 3)

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

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

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

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

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

Ebrahim J held:

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

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

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

The claim was dismissed.

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

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

"It is trite that a public authority taking administrative action must be authorized to do so. If there is no authorization for the action in some or other way the action taken will be unlawful. ... Consequently, not only must a functionary exercise powers/take administrative action which he is expressly authorized to take but he must also only take such action within the limits provided for in that source of authority. ... Unfortunately ... in authorizing the increases to operate with retrospective effect, he [Dingane] embarked

on a course falling outside the boundaries prescribed by the said regulations and his actions were clearly unlawful and invalid and fell foul of the constitutional requirement of just administrative action ..." (pages 1271 – 1272).

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

"In the present case there can be no debate about the fact that Dingane on making the salary increases retrospective in operation became functus officio. ... The issue at hand is therefore a completely different one [to the *Oudekraal* case]. It is whether the department was entitled to use a lawful measure in the form of enacted legislation to recover monies incorrectly paid as a result of the functionary's unlawful and invalid act. This legislation was enacted to deal with precisely the kind of invalid administrative action complained of. ... One can only imagine the chaos which would result in the every day discharge of duties in state departments where quite naturally errors can and do occur ... if on each occasion the error could only be rectified by a court of law in review proceedings. ... The applicants have clearly misconceived the decision in *Oudekraal* as authority for the proposition that every invalid administrative act can only be set aside in proceedings for judicial review. That is certainly not the ratio of that decision." (pages 1273-1274)

The application was dismissed.

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

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

Applicant sought judicial review of a decision to refuse to convert a prospecting permit granted under the Minerals Act, which it required to enable it to continue its prospecting operations lawfully under the

Mineral & Petroleum Resources Development Act ("MPRDA"). Applicant further sought a declaratory order that its "old order" prospecting rights remained in force for 2 years following the commencement of the MPRDA.

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

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

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

LAWSON BROWN HIGH SCHOOL V THE MEMBER OF THE EXECUTIVE COUNCIL AND OTHERS

This is the return of a Rule granted by agreement and calling upon the Respondents to show cause why an order in the following terms should not be fully granted.

Pillay J held:

"The argument by the parties centred around the issue of interpretation of section especially the fact that section of the Act speaks to a candidate and recommendation. It is important to note that both notions are referred to in the singular. Save for Laeskool Gaffie Marree Members of the Executive Council for Education, Training Arts and Calture, Northern Cape and Others 2003 (5) SA 367, there does not seem to be any decided cases reported on this specific point and/or the implication of these words being used in the singular....."

"The Import thereof is that this part would only become applicable, allowing for the appointment of a person other than the first preferred candidate only if the latter is unable to accept the offer of employment. The employer does not have any option save in the event of the first preferred candidate not being able to take up the offer of employment."

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

The issue is whether the court of first instance was correct in dismissing the appellant's special plea of prescription.

Pillay J held

"But I do not think it is necessary to decide in this case precisely when the right of action arose. I have pointed out that s 12(3) of the Act delays the running of prescription until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises.....There can be no doubt that at least by that time the prospect of receiving the purchase price was minimal, if it existed at all. Had a court been called upon to determine at that date, as a matter of probability, whether the respondent had suffered loss, it is plain what its finding would have been. I think it must follow that by no later than that date the respondent's right of action has indeed accrued, and that she had knowledge of all the facts which gave rise to that right of action." [Paragraph 18]

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

This was an appeal against the judgment of Pietermaritzburg High Court reviewing and setting aside the decision of the Department of KwaZulu-Natal to award to Tansnat Bus Service (pty) LTD the remainder of a seven-year contract relating to the operation of bus services in the Durban and surrounding areas.

Pillay AJA held:

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

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

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

OFFIT ENTERPRISES (PTY) LTD AND ANOTHER V COEGA DEVELOPMENT CORPORATION AND OTHERS 2010 (4) SA 242 (SCA)

The appellants seek, in the first instance, an order declaring that any expropriation in terms of current legislation of three properties owned by them, and falling within the Coega Industrial Development Zone (the Coega IDZ), is neither permissible nor lawful and, in the alternative, an order compelling any one of the respondents desirous of expropriating the properties to initiate expropriation proceedings within one month of the court's order

Wallis J held:

"There is no apparent reason why the identity of the party undertaking the relevant development, as opposed to the character and purpose of the development, should determine whether it is undertaken for a public purpose. Thus the expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself, using the same contractors. I do not think it can be said in our modern conditions and having regard to the Constitution that an expropriation can never be for a public purpose merely because the ultimate owner of the land after expropriation will be a private individual or company." [Paragraph 15]

"In terms of s 6(2) (g) of PAJA a decision includes a failure to take a decision. The failure to take a decision in regard to the expropriation of the appellants' properties is therefore administrative action. It proceeds that, in view of the history of the matter and the impact that the ongoing threat of expropriation has had on the value of these properties, the appellants have pro tanto been deprived of property in terms of s 25(1) of the Constitution. It follows, so the argument goes, that the failure to take the decision to expropriate has not only itself been unfair and given rise to a breach of their constitutional rights, but, in addition, to permit it to be taken at this stage, after all the inconvenience and financial detriment that the appellants have undergone, would itself be unfair. Hence any expropriation that took place now or hereafter would C constitute unfair administrative action and an interdict should issue to prevent it." [Paragraph 15]

"In my view both the constitutional argument based on s 25(1) of the Constitution and the syllogism leading to the conclusion that the failure to take a decision to expropriate the property is administrative action are incorrect" [Paragraph 36]

The findings of the Eastern Cape High Court were accordingly confirmed and the appeal dismissed.

South African Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA)

Respondent was formerly employed by the appellant as its chief internal auditor, but was dismissed in a manner he alleged was procedurally and substantively unfair. After pursuing his remedies under the Labour Relations Act 66 of 1995 (the LRA) and reaching a settlement with the appellant, in terms of which he was paid an amount equivalent to one year's salary, he instituted this action, claiming that his contract of employment was subject to 'an explicit, alternatively implied, further alternatively tacit term.
In the court a quo appellant filed several special pleas that were ultimately dismissed, along with its application for leave to appeal. The appellant's petition to the Supreme Court of Appeal for leave to appeal was set down for hearing, the parties being directed to be prepared to argue the merits of the appeal. Among the special pleas filed by the appellant was one nominally expressed as a challenge to the jurisdiction of the High Court to consider the claim. In substance it was alleged that respondent's remedies for unfair dismissal were those provided for in the LRA and that the High Courts have no jurisdiction to grant such remedies.

Wallis J held:
"When a jurisdictional challenge is raised the court must necessarily dispose of it before entering upon any further questions that arise in the case. The nominal challenge in this case was raised in terms that have become familiar and it is not necessary to set them out in detail." [Paragraph 6]

"The fundamental difference between rights arising from a contract and rights arising from statute is that the former depend upon the actual or imputed consent of the parties whilst the latter are imposed by the legislature in order to give effect to social policies underpinning the legislation…..Rights to safe working conditions are protective in nature. All of this has limited the extent to which employers and employees are free to determine the terms of their relationship….." [Paragraph 14]

"The LRA was enacted in order to give effect to the labour rights now guaranteed by s 24 of the Constitution, and in particular the right to fair labour practices. One of the most important rights flowing from that constitutional guarantee is the right not to be unfairly dismissed, embodied in s 185 of the LRA." [Paragraph 21]

"I would add to it that there is the further bar in South Africa that the legislation in question has been enacted in order to give effect to a constitutionally protected right, and therefore the courts must be astute not to allow the legislative expression of the constitutional right to be circumvented by way of the side-wind of an implied term in contracts of employment. I am also fortified in that conclusion by the

fact that it reflects an approach adopted in a number of other jurisdictions. In addition the Constitutional Court has already highlighted the fact that there is no need to imply such provisions into contracts of employment because the LRA already includes the protection that is necessary." [Paragraph 33]

"While the Constitution guarantees to everyone 'the right to fair labour practices', and also calls upon courts, when developing the common law, to 'promote the spirit, purport and objects of the Bill of Rights', it does not follow that courts are thereby enjoined to develop the common-law contract of employment by simply incorporating into it the constitutional guarantee. Where the common law, as supplemented by legislation, accords to employees the constitutional right to fair labour practices there is no constitutional imperative that calls for the common law to be developed…." [Paragraph 35]

"I share the view of Professor Halton Cheadle, whose role in the drafting of the LRA is well documented, that where, as here, the employees are protected by the LRA, s 8(3) of the Constitution does not warrant or require an importation from the realm of constitutionally protected labour rights into individual contracts of employment by way of an implied term. The LRA specifically gives effect to the constitutional right to fair labour practices and the consequent right not to be unfairly dismissed. Accordingly the constitutional basis for developing the common law of employment and thereby altering the contractual relationships is absent." [Paragraph 37]

"I am not sure that the common law required development in order to reach that conclusion, but that is by the by. What is important to bear in mind is that the effect of any extended duty of fair dealing must be worked out in individual cases in the light of the statutory provisions giving effect to the constitutional guarantee of fair labour practices. The constitutional rights that were drawn upon in that case for importing into the contract a term protecting the employee against constructive dismissal are given full effect in relation to employees falling under the LRA by the definition of 'dismissal' in s 186(1). *Murray* seems to me to be authority for no more than the proposition that an employee who is not subject to the LRA enjoys the same right as other employees not to be constructively dismissed, whatever else might have been said en passant. It is possible that there is some need to develop the common law by importing into the contract of such employees terms that give effect to their right to fair labour practices, but that is not a matter that need now concern us."

Appeal was upheld.

Mkhize v Umvoti Municipality and Others 2010 (4) SA 509 (KZP)

In Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others C 2005 (2) SA 140 (CC) (2005 (1) BCLR 78) the Constitutional Court made the order that:

'1.1 The failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in s 66(1) (a) of the Magistrates' Courts Act 32 of 1944 is declared to be unconstitutional and invalid.'

The order made by the Constitutional Court should be construed as applying D only when the immovable property in respect of which execution is sought is the debtor's home.

Wallis J held:

".....in the process of ascertaining the meaning of words in a document, the court must pay regard to the whole factual matrix or context surrounding the use of those words, and is not restricted to what E was formerly described as 'background circumstances', with reference to 'surrounding circumstances' being limited. Also, one does not start with some a priori view of the meaning, but determines the meaning of the words in question in the light of the entire context……" [Paragraph 17]

"For present purposes the important point that emerges from these cases is that reading-in, as a remedy, always takes place within the context of the separation of powers that is a fundamental part of our constitutional order. Under the Constitution responsibility for legislation lies with the legislative bodies established in terms of the Constitution. Where a court interferes with legislation it does so within the ambit of its own constitutional responsibility for determining whether legislative provisions comply with the Constitution. Whether it applies a remedy of severance or one of reading-in, or a combination of the two, its sole aim and function are to render the legislation compliant with the provisions of the Constitution. It is not vested with any general legislative capacity merely by virtue of the fact that it has found a particular statutory provision not to comply with the Constitution. Its function is to frame an appropriate order that remedies the constitutional defect. It is for this reason that stress is laid on the court's obligation to endeavour to be faithful to the legislative scheme." [Paragraph 30]

".....It is the function of the courts to ensure that the limits of public power are not transgressed; to ensure the appropriate division of powers among the various spheres of government, and to determine the legality of government and executive action measured against the Bill of Rights. That authority empowers courts to determine the constitutionality of legislative provisions. When they determine that a provision is unconstitutional, they are obliged to declare it to be unconstitutional to the extent of that unconstitutionality…….Courts have no function in determining the content of such legislation. It is not for courts to involve themselves in the development of policy, as that is the sphere of the executive. It is

only when a provision in the legislation crosses the boundaries established by the Constitution and is declared unconstitutional, and then only to the extent of such unconstitutionality, that the courts can influence its terms and those of the legislation of which it forms a part, either by striking it down, or by amending it through the processes of severance or reading-in." [Paragraph 36]

S v Kotze 2010 91) SACR 100 (SCA)

This appeal raises the interpretation and application of section 252A of the Criminal Procedure Act.

Wallis J held:

"……Whilst the section refers to the burden being discharged on a balance of probabilities, it is in my prima facie view incompatible with the constitutional presumption of innocence and the constitutional protection of the right to silence. Those rights must be seen in the light of the jurisprudence of the Constitutional Court, in which it has been held that their effect is that the guilt of an accused person must be established beyond reasonable doubt……" [Paragraph 20]

"……..It is not correct to say, as does one leading commentator, that it is an authority to use traps and undercover operations 'in certain circumstances'. There is no such qualification in the section. Absent a constitutional challenge - and there is no such challenge in the present case - there is no room for an argument that the use of a trap or the undertaking of undercover operations is unlawful in South Africa." [Paragraph 22]

"The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted." [Paragraph 23]

"The starting point is that, in each case where the evidence of a trap is tendered and its admissibility challenged, the trial court must first determine as a question of fact whether the conduct of the trap went beyond providing an opportunity to commit an offence. It does that by giving the expression its ordinary meaning and makes its decision in the light of the factors set out in ss (2)." [Paragraph 26]

Appeal was dismissed.

National Horseracing Authority of Southern Africa v Naidoo and Another 2010 (3) SA 182 (N)

A board of inquiry, convened by the appellant, convicted the first respondent, a trainer of racehorses, on charges of possession of certain drugs, and of attempting to mislead the board. The board imposed a sanction of a warning off. In response, the respondent challenged the convictions and sanction in the Local Division of the High Court, which upheld the convictions, but set aside the sanction. The appellant appealed that decision to the Provincial Division of the High Court. There, the respondent contended that the enquiry had violated the principles of natural justice, and that the sanction of warning off was not rational in the circumstances.

Wallis J held:
"It seems to me that there are two difficulties in the path of this approach. The first is that in the very same paragraph of the founding affidavit the respondent invoked the provisions of s 39(2) of the Constitution and the court's obligation to develop the common law by promoting the spirit, purport and objects of the Bill of Rights. Secondly, when dealing specifically with his challenge to the sanction of warning off the respondent contended that this sanction was 'neither justified nor rational in the circumstances'. On several occasions thereafter he complained that the sanction is 'unfair and irrational'. That is language appropriate to a review on the grounds of rationality in terms of the provisions of s 6(2)(h) of PAJA as construed by the Constitutional Court." [Paragraph 14]

"Insofar as the application of PAJA is concerned it is not and never has been a rigid rule that a litigant seeking to rely upon a statute must refer to that statute in the founding affidavit or risk being non-suited. Where a litigant relies upon a statutory provision it is not necessary to specify it, provided that it is clear from the facts alleged that the relevant A statutory provision is applicable….." [Paragraph 16]

SELECTED ARTICLES

'CIVIL LITIGATION: WHO CAN AFFORD IT?'

Wallis commenced the article by pointing out how the cost of civil litigation is at the forefront of the challenges facing the South African justice system, where civil litigation is often seen as privilege of the rich. The introduction of the Bill of rights in the Constitution raised the question of how such rights would be enforced in the absence of the means to enforce them by litigation. He went further to set out categories of groups within the society who can afford civil litigation. He argues that the first and foremost obvious group who can afford civil litigation is the judiciary. The judiciary runs the process; they control the court rolls; they decide when they will sit and for how long; they have power to refuse to hear cases; and the salaries they are paid enable them to afford litigation. The second category is the corporations and institutions. The institutions include government institutions. He singles out insurance

companies as funding so much of civil litigation. The process of litigation becomes an inevitable thread running through their business life. They use civil litigation as a tactic to limit, reduce or defeat the meritorious by using the insurer's great financial resources. He then examines the situation of what he calls the 'masses'. He argues that an essential component of community acceptability is that the legal process should be seen to be fair, a value enshrined in human rights instruments throughout the world. However, the rules under which civil litigation is conducted are designed to deal with major litigation, involving millions of Rands, multiple parties and complex questions of law. What is often overlooked is that most civil disputes involve simple issues, and yet the same complex rules are used for such disputes 'because fairness must be extended to all'. He recommended what he calls a 'tiered approach' to civil litigation rules. Most cases should proceed on simple rules involving little more than a statement of claim and defence, limited discovery and a basic pre-trial procedure. In more complex cases the option to add additional procedural layers should be there but subject to strict judicial control to be exercised informally and relatively summarily. He concluded by suggesting a change of attitude. There should be a recognition that the legal professionals exist to provide a service. There can't be a talk of scarce judicial service when the way court hours are structured and courts makes those resources unavailable for most of the time. There can't be worries about costs of trials, when trials which could finish in eight hours take two days. The problems of who can afford civil litigation will not go away until "we recognise that the fault is not in our stars but in ourselves".

THE NEW LRA - HOW DECISIVE IS THE BREAK FROM THE PAST? (1997) 18 ILJ 902

In this article Wallis reflected on the new Labour Relations Act 66 of 1995 and the extent to which it involves a break with the past. He argued that the point of departure is that the new Labour Relations Act makes sweeping changes to the familiar terrain of labour law and industrial relations practice in South Africa. With three new labour law regimes in South Africa in ten years South Africa has obviously acquired a taste for novelty!

In a world of constant change being new is important. But in the context of the law - and particularly in the context of labour law one finds himself constrained to pose two questions. Firstly, is complete novelty achievable and desirable? Secondly, to what extent has something new been achieved in the Labour Relations Act?

Law builds the future on reflections on the past. South Africa's legal system is a civil law system. The procedures in South African courts and the processes of interpretation and legal reasoning employed

have been moulded not only by the civilian legal systems but more significantly by the common law whose influence has spread from England throughout the world.

He contended that his purpose in the paper rather is to note as a fact that these were the background influences on those responsible for the drafting of the Labour Relations Act. With the best will in the world it was impossible for the drafting team to operate entirely outside and unaffected by the legal system and legal structures with which they were most familiar.

To approach the Act therefore on the basis that it was drafted on a tabula rasa - by suggesting that it is something wholly new unaffected by what has gone before-is, he suggested, erroneous. Any process of interpretation of a statute requires a conceptual framework and an approach to the Labour Relations Act which treats it as consisting entirely of new wineskins into which its interpreters can pour the wine of whatever new meaning seems to fit the present moment suggests the absence of such a framework.
He then made reference to two provisions of the Act the first is s 64(4) which is the status quo provision in regard to unilateral changes in terms and conditions of employment. Such a provision is not new. The expression 'unilateral changes in terms and conditions of employment' is not new. Its meaning can be taken as reasonably established and it has consistently been held that the terms and conditions of employment to which it refers are the contractual incidents of the employment relationship.

He then looked at s 145 which deals with the review of arbitration awards rendered under the auspices of the CCMA. He suggested that it is of vital importance because of the central role which such arbitrations play in the Act's dispute resolution procedures. Much of their effectiveness in providing the intended swift and relatively summary resolution of many types of dispute - particularly those concerning dismissal which clogged the workings of the old Industrial Court - will depend on the ease with which such awards can be challenged. It will assume that there was a purpose in adopting them in this context and recognize that the purpose was that of upholding the integrity of the process of arbitration. Section 145 will then be given the same meaning as its equivalent under the Arbitration Act.

He further suggested that one thing the new Labour Relations Act does is to provide a more stable foundation upon which to build a labour law jurisprudence for the future. While the past saw significant progress it sacrificed even the remotest degree of certainty in its pursuit of flexibility.
He concluded by suggesting that very often the old system is the sturdy foundation upon which the new, such as entrenched organizational rights, bargaining councils, the CCMA and the Labour Court have been constructed. New solutions will be seen to flow from the problems of the old system and where old concepts are again encountered they are there because their worth has been established.

SELECTED JUDGMENTS

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

Judgment delivered 5 December 2005

Applicant, the Director of Public Prosecutions in the Western Cape, sought an order interdicting and restraining Respondent, a company conducting the business of a television broadcaster, from broadcasting a programme dealing with a case where a baby had been murdered, until such time as Respondent had furnished Applicant with a copy of the programme, and Respondent had afforded Applicant 24 hours to view the programme and to institute such proceedings for an appropriate order as it may deem fit. Applicant, who had not been shown a preview of the programme, was concerned that the broadcasting of the programme might prejudice the intended criminal prosecution of a number of suspects who had been arrested and charged with the murder of one "Baby Jordan". The murder of this infant in somewhat unusual and sensational circumstances had evoked public outrage and had received much publicity. Two persons who had been interviewed by Respondent had given statements to the police for the purpose of the trial. A danger existed that there might be discrepancies between the police statements and their statements made to Respondent's interviewers. That might unfairly be held against the witnesses. Should this occur it would have an adverse effect on the State's case at the trial. Respondent opposed the relief sought, relying inter alia on section 16 of the Constitution which guarantees the right to freedom of expression including the freedom of the press and other media. Respondent contended that Applicant had failed to demonstrate that it had both a clear right and a reasonable apprehension of interference with this right. The programme presented nothing materially new, but instead dealt with facts already in the public domain due to extensive media coverage of the murder of Baby Jordan. It had given Applicant an undertaking to that effect before the application was launched. What Applicant sought amounted to pre-censorship or a prior restraint on publication. Both forms of censorship, it was argued, violated the right to freedom of expression contained in section 16 of the Constitution. The Court, in weighing the two conflicting interests, concluded that in casu the right to freedom of expression had to yield to the right to a fair trial. It was in the interest of the public that Applicant should effectively prosecute cases so that its safety and security was ensured. It would not be for the public good that information upon which Applicant would rely in prosecuting a case was used in a manner which undermined its obligation to fight crime. Applicant was not seeking to arbitrarily interfere with Respondent's editorial independence. All that Applicant sought was to have access to the broadcast material in order to satisfy itself that its right to a fair trial was indeed protected. The limitation to Respondent's right to freedom of expression was in the circumstances reasonable. It was reasonable in

relation to the interest that was sought to be protected and did not go beyond that interest. The restriction was not only rationally connected to a legitimate objective, but was also not overbroad. It was subject to judicial intervention. Should applicant, upon receipt of the requested copy of the broadcast, be of the view that the broadcast would interfere with the trial, it would approach the Court to determine whether this was indeed so. There were therefore compelling reasons justifying the grant of the order sought. The Court granted an order in the terms prayed.

In this case Zondi J referred to Constitutional Court, Supreme Court of Appeal and various local division decisions. He also referred to Canadian, English and American case law.

Zondi AJ (as he was then) held:

"I now turn to consider the question whether the order sought by the applicant limits the right to freedom of expression contained in section 16 of the Constitution and whether the applicant has made out a proper case for the order it seeks. The order sought by the applicant is interdictory in nature and there is no doubt that such an order limits the free flow of information and thus interferes with a right to the freedom of information. The freedom of expression however, does not enjoy superior status in our law (S v Mamabolo (supra) at 470C) and needs to be construed in the context of the values of human dignity, freedom and equality enshrined in our Constitution (Khumalo and Others v Holomisa (supra) paragraph 25). However, this limitation may be permissible if the applicant is able to demonstrate that it is reasonable and justifiable." [Paragraph 33]

"It is trite that in order to succeed in an application for final interdict, the applicant must establish a clear right, an injury actually committed or reasonably apprehended and that there is no other satisfactory remedy available to it. (Setlogelo v Setlogelo 1914 AD 221). On the papers I am satisfied that the applicant has met these requirements. As a prosecuting authority it has to institute criminal proceedings in the most efficient and effective manner (S v Basson6 2005 (1) SA 171 (CC). If the respondent is allowed to proceed with a broadcast without the applicant viewing it, it will be unable to determine whether the broadcast would offend against ts right to a fair trial or the effective prosecution of the criminal case. The applicant will have no other satisfactory remedy available to it should its right to a fair trial be violated as a result of the broadcast of the 3rd Degree programme dealing with the murder of Baby Jordan. The suggestion by the respondent that the applicant will have an alternative remedy should the respondent act in a manner contrary to the Broadcaster's Code of Conduct is to provide cold comfort to the applicant and may be a matter of too little too late." [Paragraph 34]

"The second question is whether the applicant has discharged the onus of demonstrating that the limitation is reasonable and justifiable… I have already found that the order sought by the applicant does indeed limit the freedom of expression as it limits the free flow of information. I have also stated that the

right to freedom of expression does not enjoy a superior status in our law and must be construed in the context of other values enshrined in the Constitution such as human dignity, equality and freedom. The question is whether the limitation is constitutionally justified. It is to this question that I now turn. The fact that a conduct is found to violate the rights protected by the Constitution does not mean that that conduct is unconstitutional. The conduct may nevertheless still be found to be constitutional if it "is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . ." One needs to do a justifying analysis." [Paragraph 35-36]

"It is against this background that the contentions of the parties should be considered. The applicant relies on its duty to prosecute crime and the right to a fair trial to justify the limitation of the respondent's right to freedom of expression. It is correct that the applicant has a constitutional obligation to prosecute offenders in order to protect the rights of citizens and that it has a right to a fair trial (S v Basson (supra)). The question is whether the broadcast of the programme will prevent the applicant from complying with its constitutional obligations and violates its right to a fair trial. It is argued by the applicant that a broadcast involving the identification of the accused or an indication of the ability to identify the accused could materially prejudice its case. The applicant further avers that the police have already obtained statements from the witnesses interviewed by the respondent. It accordingly argues that possible discrepancies between statements made to the police and statements made during the interview may be held against the witnesses and may thus prejudice their evidence and the State's case." [Paragraph 37]

"t is correct that the applicant has a right to a fair trial and an obligation to prosecute effectively cases on behalf of the State. In a murder case the interest of the applicant is to protect the right to life. This duty was recognised and explained by the Constitutional Court in S v Basson (supra)… At the same time the respondent as a broadcaster has a right to receive and impart information. It is entitled to expect that its editorial independence would not be arbitrarily interfered with. There is no doubt that the respondent's editorial independence is interfered with when a third party seeks to introduce either through the court order or by legislation, a measure which has the effect of postponing or delaying publication. It is also correct that the public has a constitutional right to receive information particularly information on matters of such great public and national interest. These are conflicting claims to rights between the parties and these rights are not absolute. They may be limited in terms of section 36(1) of the Constitution. Indeed in terms of paragraph 7 of the Broadcasters' Code of Conduct which came into effect on 4 February 2003 and published by the Independent Communication Authority of South Africa, the right to freedom of expression should be weighed up against many other rights, such as the right to a fair trial. I have to weigh up these conflicting claims to rights against each other and decide on the one that will prevail or should be limited and why it should be so. In undertaking the balancing exercise I have

to consider the standard of justification under section 36(1) of the Constitution namely the nature of the right that is limited, importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there are any less restrictive means to achieve the purpose. The importance of the right should be considered within the context of the foundational values of democracy, dignity, equality and freedom. This is important because the right may have a different value depending on the context in which is claimed. In some cases the context in which the right is claimed will assist to give meaning and content to its value." [Paragraph 39-42]

"It is correct that there has been substantial public interest in the murder of Baby Jordan and the subsequent arrests relating to the murder and that these matters have been dealt with extensively in the media including television. These matters are in the public domain and it will be unfair to limit the respondent's right to report on such matters or to prevent the public to receive information on such matters. What is however not in the public domain are the events surrounding the murder. There is therefore a real danger that the nature and scope of the interviews held for the purpose of the 3rd Degree programme may focus on the events surrounding the murder. If this occurs the applicant's right to a fair trial may be compromised. To hold a fair trial, in my view, it is important that the witnesses' statements about the events surrounding the commission of a crime, such as their ability to identify the suspects, should not be allowed to be in the public domain while the matter is still under investigation. Such conduct may endanger the lives of the state witnesses and it is definitely not in the interest of administration of justice." [Paragraph 43]

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

MARKOM V MENQA AND OTHERS (2008) JOL 22400 (C)

This case deals with the sale and execution of applicant's house pursuant to a default judgment given by the Magistrates Court. This application sought to declare the sale in execution null and void and interdicting the transfer of the property to the respondent.

Zondi J held:

"The Constitutional Court in *Jaftha* ordered that section 66(1)(a) of the Act has to be read as though the phrase "a court, after consideration of all relevant circumstances, may order execution" appears before the phrase "against the immovable property of the party". At 164F–G the court explained the effect of this reading in as follows:

> "However, once the Sheriff has issued a *nulla bona* return indicating that insufficient movables exist to discharge the debt, the creditor will need to approach a court to seek an order permitting execution against the immovable property of the judgment debtor. The court will decide whether or not to order such execution having considered all relevant circumstances."

In the *Reshat Schloss* judgment, *supra*, it was held that the declaration of invalidity in *Jaftha*'s case applied retrospectively and accordingly a sale in execution which had taken place pursuant to writ which was not obtained in accordance with the requirements of section 66(1)(a) was invalid" [Paragraph 16-17]

"It is clear that a warrant of execution was issued against the applicant's movables before the warrant of execution against the immovable property was authorised. In a return of non-service dated 23 March 2000 the Sheriff reported:". . . despite numerous attempts, the debtor could not be found . . . The premises were searched in the presence of Gail, where no attachable assets could be found." In my view, the present case falls within the four corners of the mischief which the Constitutional Court in Jaftha was seeking to address, namely, the procedure whereby a clerk of the court, without any judicial oversight, rubber stamped the granting of a writ of execution against immovables once the debtor had insufficient movables to satisfy the debt. It is clear in this matter that the writ of execution was issued by the clerk of the court and without judicial supervision and was therefore in violation of the law as laid down in Jaftha. The writ was in the circumstances invalid." [Paragraph 20]

"Mr Sievers, relying on the authority of Gibson NO, supra, submitted that the fact that delivery had taken place and that the first respondent had acted in good faith did not entitle the court to impeach the sale in execution. He accordingly submitted that in the absence of proof of bad faith or knowledge of any defect on the part of the first respondent, the sale in execution should not be impeached. In my view, Gibson's

case does not apply in a situation where an alleged sale in execution takes place pursuant to an invalid warrant of execution. In the present case the sale in execution took place in terms of and on the basis of an invalid writ which, in my view, is the heart of the sale. Therefore, the fact that the first respondent acted in good faith when he purchased the property is irrelevant. In my view, the provision of section 70 of the Act does not apply in the circumstances where a sale in execution took place pursuant to an invalid warrant of execution. To apply the provisions of section 70 in these circumstances would defeat the whole purpose of the Constitutional Court ruling in Jaftha's case." [Paragraph 22]

This matter was taken on appeal. The appeal related to two issues: 1) That the applicant had failed to in his papers to establish that the warrant of execution has indeed been issued without the requisite judicial oversight; 2) that section 70 of the Act protects their title. Insofar as the first issue was concerned, the SCA dismissed that argument in that the very fact that the warrant had been issued by the clerk of the court indicates a lack of judicial oversight. Insofar as the second issue was concerned, the court upheld the appeal.

This case refers to Constitutional Court, Appellate Division and local division decisions.

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

Judgment delivered 16 March 2009

In a request to the second respondent in terms of the Promotion of Access to Information Act 2 of 2002 ("the Act"), the applicant sought access to certain information relating to a tender for the design, development and implementation of a grant administration system. The request was refused and an appeal to the first respondent dismissed. The present application was for an order setting aside the first respondent's decision and condoning applicant's non-compliance with the provisions of the Act relating to time period within which to bring the application. The applicant was an investigative journalist.

Zondi J held:

"The first and second respondents oppose the application and the relief sought by the applicant on the basis that the application is late and that the applicant is not entitled to the requested information. In the alternative the applicant seeks an order declaring section 78 of the Act to be inconsistent with the provisions of the Constitution of the Republic of South Africa, 1996 and unconstitutional to the extent that it infringes his right of access to court by imposing an unreasonable time limit on the period within which he may institute legal proceedings. The third respondent opposes the alternative relief sought by the applicant" [Paragraph 2-3]

"Section 32(1) of the Constitution confers upon every person the right of access to any information held by the State and this right is entrenched in the Bill of Rights. The Promotion of Access to Information Act was enacted to give effect to the provisions of section 32(2) of the Constitution. As its preamble declares its object is to give effect to the right in section 32 of the Constitution and subject to the provisions of section 36 to foster a culture of transparency and accountability, inter alia, in public bodies" [Paragraph 13]

"Section 78(2) of the Act provides that a requester that has been unsuccessful in an internal appeal may, within 30 days, apply to Court for appropriate relief in terms of section 82. I must point out at the outset that section 78(2) of the Act does not provide for condonation nor does it state that non-compliance with the time period cannot be condoned. I will assume that the court has a discretion to condone non-compliance with any of the time limit provisions and that the section has not taken away the court's discretion. Section 78(2) must be construed in the context of section 32(1)(a) read with sections 34, 36 and 39(2) of the Constitution. Section 34 of the Constitution guarantees everyone a right of access to courts and which right may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. Section 78(2) of the Act must therefore be interpreted in such a way that it does not take away or interfere with an individual's right to approach courts. A court is obliged in terms of section 39(2) of the Constitution to promote "the spirit, purport and objects of the Bill of Rights" when interpreting any legislation. There is no indication in the Act either expressly or implicitly to suggest that non-compliance with any of its provisions may not be condoned. I, therefore, find that non-compliance with the time period provided for in section 78(2) of the Act may be condoned on good cause shown." [Paragraph 22-23]

"The provisions of section 77(4) and (5)(c) of the Act, however, provide for two different periods within which an appeal may be lodged against the decision of the Minister. There appears to be a conflict between the provisions of section 77(5)(c)(i) and section 78(2). Section 77(5)(c)(i) requires the notice informing the appellant or requester of the decision on internal appeal to state that the appellant or requester may lodge an application with a court against the decision on internal appeal within 60 days or, if notice to a third party was required, within 30 days, after notice is given. On the other hand section 78(2) requires a person aggrieved by the decision on internal appeal to approach Court within 30 days for appropriate relief under section 82 of the Act. In my view section 78 is a self-contained provision which exhaustively governs applications for relief in terms of section 82. A requester who approaches a court in terms of section 78(2) for a relief under section 82 of the Act must do so within 30 days after receiving the notice regarding the outcome of the internal appeal. But a requester who is aggrieved by the Minister's (relevant authority's) decision and who wishes to approach a court for relief falling outside the ambit of section 82 may do so within 60 days after receipt of the Minister's decision. My view is based on

the fact that there is no reference to section 82 in section 77(5)(c). In the present matter the appellant should have come to court within 30 days after 2 February 2007 for relief under section 82 of the Act" [Paragraph 26-27]

"When the applicant brought the matter to their attention and for advice his appeal to this Court was in no way threatened by the 30-day limit. At that stage urgency was not an issue. It is the subsequent inexplicable delay which led to urgency. In my view that urgency was self-created. Even when the applicant realised that the matter had become urgent, he did not treat it with sufficient degree of urgency it deserved. He waited for counsel, who was not immediately available, to prepare the papers. Applications for condonation should in general be brought as soon after the default as possible. The applicant must produce acceptable reasons for the court to nullify any culpability on his part which attaches to the delay. In my view the applicant's condonation application is utterly lacking in this regard" [Paragraph 31]

"In my view when access to information is denied on the grounds of factors set out in section 39(1)(b)(iii)(ee) a public body refusing access must show the existence of reasonable grounds to expect that prejudice or fairness of a trial or the impartiality of an adjudication will result if access to information was allowed. There must be a foundation for a finding that there is an expectation of an adverse consequence." [Paragraph 41]

"There is no doubt that the right of access to information is crucial to exercise or protection of the rights guaranteed in the Constitution. The issue on which the applicant intends to report will no doubt highlight the importance of promoting good governance and transparency. Members of the Cabinet are accountable to Parliament for the exercise of their powers and the performance of their functions. They may not act in a way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests. At the same time the fairness of a trial or the impartiality of adjudication is part of the judicial process. There is no doubt in my mind that the integrity of the judicial process is an essential component of the rule of law and the integrity of the judicial process may be severely compromised if a record, which a party to litigation intends to use to prove his claim or disprove the other party's claim, was made available to a third party before the trial is finalised. A disclosure might create a huge risk of prejudice to the administration of justice." [Paragraph 45-46]

"In my view a public body will be entitled to refuse access to a record in circumstances where it is able to show the existence of reasonable grounds to expect that prejudice or fairness of a trial or the impartiality of an adjudication will result if access to information was allowed. It does not have to prove that the results which are expected will as a matter of fact certainty occur. Proof of probability is sufficient and in

my view the first respondent has met the required standard. In the light of this approach I am therefore not satisfied that the applicant has shown that he has reasonable prospects of success on the main application. In the circumstances the applicant's application for condonation must fail." [Paragraph 47-48]

"In paragraph 6 of the amended notice of motion, the applicant seeks an order declaring unconstitutional and invalid the provisions of section 78(2) which limit the time period within which to approach a court. Such a declaration becomes relevant only in the event that "this Court finds that it does not have jurisdiction to grant condonation of the applicant's non-compliance with the time periods prescribed in section 78. . ." In other words in terms of the relief sought by the applicant in his amended notice of motion the constitutional issue would not arise if I found that the court has a discretion to condone non-compliance and the matter would be determined on the basis of whether or not the applicant had made out a case for condonation. This was the position adopted by the applicant before the hearing of this application" [Paragraph 50]

"In my view a challenge to section 78(2) of the Act must be approached by reference to sections 32, 34 and 36 of the Constitution. In other words the question is whether section 78(2) of the Act infringes sections 32 and 34 of the Constitution and if so: whether such infringement is reasonable and justifiable in terms of section 36 of the Constitution. In terms of section 32 of the Constitution everyone has the right of access to any information held by the State. The Act is the legislation demanded by section 32(2) of the Constitution. In terms of section 34 of the Constitution everyone has a right of access to courts in order to have his or her justiciable claim decided." [Paragraph 58-59]

"A litigant wishing to challenge the first respondent's decision may have to overcome financial and/or geographical hurdles before being able to approach a court for a relief under section 82 of the Act. He may be without funds to finance litigation or may be residing in an area which is remotely located from the seat of a court. It may thus become necessary for him to approach his family members or for that matter, Legal Aid Board for necessary assistance. If these attempts fail it may become necessary for him to realise some of his assets in order to raise funds for litigation. These are the hurdles which an ordinary litigant may have to meet before being able to approach a court for an appropriate relief. The 30 day period provided for in section 78(2) of the Act is, in my view, grossly inadequate to enable an ordinary applicant to overcome the hurdles and challenges I have referred to. he fact that an applicant may apply for condonation in the event of his failure to bring the application within 30 days does not lessen the deleterious effect which 30-day time limit has on his ability to approach the court for an appropriate relief under section 82 of the Act. What is important is the adequacy of the opportunity and not what he may do in order to retrieve the lost opportunity. In my view the third respondent has failed to show that section 78(2) is reasonable and justifiable in an open and democratic society based on human dignity,

equality and freedom. In the circumstances I find that section 78(2) of the Act, in so far as it requires a litigant to bring an application to court within 30 days, is inconsistent with the Constitution and is unconstitutional." [Paragraph 69-71]

This case refers to Constitutional and Supreme Court of Appeal decisions.

TREATMENT ACTION CAMPAIGN AND ANOTHER V RATH AND OTHERS (2008) 4 ALL SA 360 (C)

Judgment delivered 13 June 2008

The present application was launched on the basis that the first seven respondents were contravening various provisions of the Medicines and Related Substances Act 101 of 1965 ("the Act"). Various forms of relief were accordingly sought. The applicants' complaint against the first seven respondents was that they carried out activities which the applicants believed were unlawful and placed at risk the health and lives of people with AIDS. The applicants allege that the said respondents sold and distributed medicines which were not registered, sold products containing scheduled substances; made false and unauthorised statements about efficacy of their medicines in treating or preventing AIDS; conducted unauthorised and unethical clinical trials on people with AIDS; and made false statements that anti-retroviral drugs ("ARVs") are ineffective in treating AIDS. The issues for determination were whether the relevant respondents were are distributing medicines in contravention of the Act; whether the said respondents were conducting unauthorised clinical trials in contravention of the Act; whether the respondents were publishing unauthorised, false and misleading advertisements concerning vitamins, multivitamins, and certain products produced by the first respondent and the entities associated with him; and whether the Government had taken reasonable measures to investigate and put an end to such activities. The Court began its consideration of the first question with an examination of the definition of "medicines". It found that the treatment linked to the first two respondents was indeed a medicine as contemplated in the Act. That led to the question of whether the first two respondents were selling the medicine. The Act defines the word "sell" very widely, and the Court found that the first two respondents were selling the medicine in question. Having arrived at the above conclusions, the Court next had to decide whether the medicine was subject to registration as a medicine. As the medicinal value of the substance being distributed by the first respondent had not yet been established, the Court found that it was not subject to registration. However, the relevant respondents were urged to cease making claims about efficacy of the substance until it had been submitted to the Medicines Control Council to review claims about its safety, quality and efficacy. Turning to the further complaints against the respondents, the Court agreed with the applicants that the relevant respondents were guilty of unlawfully conducting clinical trials, but due to a dispute of fact which could not be resolved on the papers, could not find that the respondents were guilty of publishing false or misleading statements. Linked to the question of the unlawful clinical

trials, the Court examined whether the eighth and ninth respondents, as members of government, had a duty to take steps to prevent such conduct. Having regard to the provisions of the National Health Act 61 of 2003, the Court found that they did.

Zondi J held:

"The question to be determined is the meaning of the word "medicine" as used in the Medicines Act. The matter is essentially one of interpretation. The intention of the Legislature should be ascertained from a study of the provisions of the Medicines Act and that the language of the Legislature should be read in its ordinary sense. If the meaning of the words using this approach is clear then such meaning represented the intention of Parliament, the object of statutory interpretation always being to stamp a particular meaning with the Legislature's imprimatur by means of the fiction of Parliament intent. (Judicis est ius dicere sed non dare.)" [Paragraph 35-36]

"It is clear to me that the dictionary meaning of "medicine" is limited to the drug for treatment or prevention of diseases. It only includes two functions of the drug, namely treatment and prevention and does not include other functions as set out in section 1 of the Medicines Act, such, as the "diagnosis, mitigation, or modification of disease" (section 1(a)) or "restoring, correcting or modifying any somatic or psychic or organic function in man…" (section 1(b)). In the present matter the dictionary meaning of "medicine" seems to have some limitations and therefore may not be used as a tool to ascertain the intention of the Legislature. It is therefore clear that the Legislature intended the word "medicine" to have a wider than a dictionary meaning in order to achieve the object of Medicines Act namely to control and regulate dissemination of medicines either inherently harmful or potentially so when misused. The definition of "medicine" in the Act places more emphasis on the "use" of substance or mixture of substances. A substance or a mixture of substances must be "used or purporting to be suitable for use or manufactured or sold for "use" in performing various functions set out in the Act." [Paragraph 40]

"I have already held that in determining whether or not a particular substance is "medicine" for the purpose of the Medicines Act one must have regard to the use of a substance. Is it used for medicinal purpose? In this case it is alleged by the applicants that the first respondent made claims in various media that the substances he distributes cure or reverse the course of AIDS. The substances are medicines in that the first and second respondents distribute them for use for medicinal purposes. It is therefore necessary to bring them under the ambit of the definition of "medicines" in order to control and regulate their use. Members of the public, because of statements about their medicinal efficacy, will start using the substances on the basis that, when taken, they will cure or reverse the course of AIDS. The control and regulation of these substances is necessary in order to prevent confusing messages being

sent out to the public about the treatment of AIDS. In the circumstances I find that VitaCell is a medicine within the meaning of the Medicines A" [Paragraph 45]

"It is clear that the MCC performs an administrative function when it considers applications for registration of medicines. Its decision must comply with the provisions of section 33 of the Constitution of the Republic of South Africa, 1996 which provides that everyone has the right to administrative action that is reasonable and procedurally fair. The decision of the MCC must be reasonable within the meaning of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). What that means is that during the registration process the manufacturers, distributors or wholesalers must have a hearing." [Paragraph 54]

"The question for determination is whether VitaCell is subject to registration as a medicine. The answer to this question will turn on the interpretation of the 2002 call up notice. I agree with Mr Budlender's submission that it is not for the MCC to decide whether the substance is a medicine. It is for the courts to decide that question. But it is correct that it is for the MCC to resolve that any particular substance requires to be registered. The term "medicine" is defined in the Medicines Act and if there is a dispute about the nature of a substance it is for the courts to make a determination whether or not a particular substance is a medicine as defined in the Medicines Act." [Paragraph 62]

"There is no doubt in my mind that the activity of the Rath respondents, though they prefer to characterise it as a clinical pilot study, was an investigation in respect of micronutrients for use in human beings with AIDS and was intended to discover or verify the clinical effects of the micronutrients. It seems to me they were carrying out a clinical trial. Although they deny that they conducted clinical trials, that denial, in my view, is, however, entirely inconsistent with their own repeated statements none of which they denied having made. It appears to be an attempt to escape liability for their widely proclaimed conduct now that its legality is being challenged. In my view, the Rath respondents' activity, (conducting a clinical pilot study) viewed subjectively constituted a clinical trial as defined in the Regulation. Their conduct was unlawful in that they did not have a permission to run clinical trials" [Paragraph 75]

"The question is whether the applicants have established the contravention of the provisions of section 20 of the Medicines Act by the first and second respondents. It is clear that the provisions of section 20(1)(b) do not apply to the present case because the MCC has not made any claims about the therapeutic effect of VitaCell or what it can be used for. Section 20(1)(a) therefore applies. It is common cause that the first respondent caused to be published in various newspapers and pamphlets statements about micronutrients and other products of the second respondent. The next question is whether those statements constitute "advertisement" as defined in the Medicines Act. In other words the statements must have been intended to promote the sale of Rath's products. In relation to medicines or scheduled substance an advertisement will be false or misleading if it can be shown that the person who made it

was aware that it was incorrect. This finding cannot be made in the present case because there is no consensus amongst the experts upon whom the parties rely for their view on what the micronutrients can and cannot do to persons with AIDS. The dispute cannot be resolved on papers. However, in view of the provisions of the 2002 call up notice the first and second respondents must stop making claims about the medicinal effect of their products until their products in respect of which medicinal claims are made have been submitted to the MCC to review the efficacy, quality and safety of those claims.82" [Paragraph 82]

"I have found that the first, second, fourth and fifth respondents' clinical pilot study constitutes clinical trials within the meaning of the Medicines Act and that such clinical trials are unlawful in that they are not conducted in accordance with the provisions of the Act. I accordingly declared the respondents' clinical trials unlawful and to that end I have concluded that the first, second, third, fourth and fifth respondents' should be interdicted from conducting unauthorised clinical trials in South Africa. I have also found that the first to seventh respondents' conduct, in publishing advertisements concerning the efficacy of VitaCell on persons with AIDS, is unlawful in that the first to seventh respondents have not submitted VitaCell to the MCC to review its medicinal claims. I accordingly concluded that the first to seventh respondents should be interdicted from publishing advertisements concerning the medicinal effects of VitaCell on persons with AIDS pending the submission by the first to seventh respondents of VitaCell to the MCC to review its medicinal claims." [Paragraph 83]

"It is clear from the provisions of the National Health Act that the eighth respondent primarily is under a duty to take reasonable measures to ensure that the provisions of the Medicines Act, which she administers, are enforced in order to protect, promote, improve and maintain the health of the population of the country. The ninth respondent assists the eighth respondent in carrying out her primary responsibilities under the National Health Act by ensuring that the provisions of the Medicines Act are enforced. I therefore find that the eighth and the ninth respondents are under a duty to take reasonable measures to prevent the first to fifth respondents from conducting unauthorised clinical trials and to prevent the first to seventh respondents from publishing advertisements concerning medicinal effects of VitaCell on people with AIDS pending the submission of VitaCell to the MCC to review its medicinal claims." [Paragraph 88]

WOODWAYS CC V VALLIE (2009) JOL 24500 (WCC)

Judgment delivered 31 August 2009

The present appeal was against the judgment and order handed down by the equality court, in which the appellant was found to have unfairly discriminated against the respondent within the meaning of the

Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.The appellant was a close corporation owned by a Christian couple. An employee who shared that faith had requested the respondent, a customer, to remove his fez (worn by men of the Muslim faith) as it was an expression of a faith which was diametrically opposed to hers. The grounds of appeal were that the court had erred in imposing legal liability upon the appellant on the basis of a legal theory that was advanced neither in the papers, nor at the hearing and secondly, in finding that the relevant person had committed discrimination as envisaged in the Act. Held that the issue before the Equality Court was whether the appellant's employee's request to the respondent to remove his fez, which according to the respondent, was an expression of Muslim religion, constituted an act of unfair discrimination within the meaning of the Act.The present court found that the respondent was discriminated against on the ground of religion when he was asked to remove his fez by the appellant's employee. In terms of section 13 of the Act the onus was on the appellant to prove that the discrimination was not unfair. It was found that the appellant was unable to justify the discrimination. The appeal was dismissed.

Zondi J held:

“The promise of equality and easy access to justice, which the Act seeks to fulfill, would never be realised if litigants in unfair discrimination cases were expected to be meticulous in the manner in which they plead their causes of action. It is for this reason that in terms of section 16(2) read with section 31(4)(a) of the Act only a judge or magistrate who has completed social context training may be designated to hear unfair discrimination matters under the Act.” [Paragraph 38]

“It is clear therefore to me, upon a careful analysis of the record, that the respondent made a case for unfair discrimination based on two legs. Firstly, he made a case for unfair discrimination based on the fact that the appellant's request to remove his fez was stated as a precondition to service which is the version which was rejected by the court a quo. The second or alternative leg of his unfair discrimination claim was that even if the appellant had not stated the request for him to remove his fez as a precondition to service, the mere request for him to remove his fez constituted discrimination.[49] I am of the view that the court a quo was entitled to make a finding of discrimination based on the alternative claim relied upon by the respondent. The appellant was not prejudiced in that the discrimination based on the alternative claim was fully investigated and there is no reasonable ground for thinking that further examination of the facts might have led to a different conclusion.” [Paragraph 48-49]

“The interpretation of "discrimination" contended for by the appellant tends to restrict its meaning and which, as Mr Osborne pointed out, flies in the face of the broad interpretation injunctions that appear in the Act. The respondent brought his claim under the Act and not in terms of the common law. His claim must therefore be determined in accordance with the provisions of the Act and the Constitution which

specifically establish the rights which the respondent seeks to assert. Section 3 of the Act enjoins any person applying the Act to interpret its provisions to give effect to, inter alia, the provisions of the Constitution relating to the promotion of equality through legislative and other measures designed to protect or advance persons disadvantaged by the past and present unfair discrimination and to take into account the context of the dispute and the purpose of the Act. The preamble, which must also be taken into account in applying the Act, defines the purpose of the Act as eradicating both social and economic inequality and seeks further to combat discriminatory practices and attitudes." [Paragraph 53-56]

"I also reject the suggestion by the appellant that the only conceivable burden or disadvantage that Vallie could have suffered by reason of Bailey's mere request to him to remove his headgear, is that he was insulted or humiliated by the request, in that the request injured his religious feelings. The fact of the matter is not about injury to Vallie's religious feelings. It is about the extent to which a request impaired his dignity and identity. The wearing of a fez to Vallie is an expression of his religious belief which is central to his identity and dignity. It is his identity and dignity which are implicated in this matter. In my view, Bailey's request left Vallie with a Hobson's choice. He had to choose between complying with Bailey's request and observing his religious faith. Thus the request imposed a disadvantage on him. In the circumstances I find that Vallie was discriminated against on the ground of religion when he was asked to remove his fez by Bailey. Having found that Bailey's request to Vallie to remove his fez constituted discrimination, the next question is whether the discrimination was unfair." [Paragraph 61-64]

"It is correct, as the Constitutional Court held in South African National Defence Union v Minister of Defence & another 1999 (4) SA 469 (CC) [also reported at [1999] JOL 4919 (CC) – Ed] at paragraph [8], that freedom of expression is closely related to freedom of religion, belief and "the corollary of the freedom of expression and its related rights is tolerance by society of different views". The appellant contends that when Bailey requested Vallie to remove his fez she was exercising her rights of religion and freedom of speech under the Constitution and that it is inevitable that in the exercise of her religious right a party who holds different religious belief will be offended. I find this argument untenable given the context in which the communication between Vallie and Bailey occurred. It took place in the commercial context in which, in my view, expression of religious beliefs was irrelevant and inappropriate. Vallie had come to buy a product. When he stepped into the appellant's premises he had no Page 25 of [2009] JOL 24500 (WCC)idea that religious beliefs would come up for discussion. Bailey may not exercise her freedom of expression and religious rights in a manner inconsistent with the provisions of the Constitution or which is violative of other person's rights. It is also correct that in terms of sections 14(3)(c) of the Act and under Constitutional equality jurisprudence (Harksen v Lane NO & others 1998 (1) SA 300 (CC) [also reported at 1997 (11) BCLR 1489 (CC) – Ed] at paragraph [51]), a factor that must be

taken into account in adjudicating claims regarding unfair discrimination is whether the plaintiff is of a group that has suffered from patterns of disadvantage." [Paragraph 67-70]

"In determining whether the appellant has discharged the onus to prove that the discrimination was not unfair I will take into account the fact that Vallie is not only a member of a historically disadvantaged group but also belongs to a religion which has suffered marginalisation in the past. It is within the context of and in light of these considerations that Bailey's request must be considered in order to understand the effect which it had on Vallie's dignity and identity. The discrimination is not limited to the respondent only. It extends to all members of the community of Muslim faith. It is clear from the record that the appellant readily accepts and welcomes other customers. The practice of requesting customers of Muslim faith to remove their headgear while on the appellant's premises humiliates and dehumanises them. In my view, the appellant has failed to justify the fairness of the discrimination. It may not justify Bailey's statement on the basis that when she made it she was exercising her right to freedom of expression or freedom of religion. She may not exercise her rights under the Constitution or for that matter under the Act in a manner which is in violation of or undermines the other person's rights under the Act or the Constitution. In conclusion I find that Bailey's statement requesting Vallie to remove his fez constituted discrimination based on religion and that the appellant has failed to justify its fairness. There is no reason to interfere with the consequential relief ordered by the court a quo and its order should stand." [Paragraph 72-75]

Erasmus J concurred with Zondi J.

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

S V ZINCAMILE MANDLA NONGINGI, CASE NUMBER: 55/2008

Judgment delivered 11 May 2008

The accused in this matter was convicted in the Regional Court, Lusikisiki, on one count of rape. The case was referred to the High Court for sentencing

"The country is currently engulfed in a sea of crimes affecting the abuse of vulnerable sections of our society, women and children. The rights of children are enshrined in the Bill of Rights." (Paragraph 32)

"The perverted sexual acts involving little children are seemingly escalating at an alarming rate. The prosecution confirmed that they are inundated with more cases of this nature. The prevalence of offences involving young girls and the deterrent factor in sentencing, leads me to believe that the harshest penalties in dealing with those, like the accused, who continue to believe that they can molest and abuse little girls, must be imposed" [Paragraph]

"The devastating effect of rape to young victims is that they become psychologically handicapped to the extent that they perceives themselves as subhuman / second class citizens who have lost self-esteem, respect and integrity. In my view, Courts now need to do everything justifiably possible in their power to stem the tide." (Paragraph 37)

THRONE YEBE V IVAN COHEN, CASE NUMBER: 1658/04

Case heard18 October 2004, Judgment delivered 8 November 2004

The complainant lodged a complaint with the Rental Housing Tribunal (KZN) for the refund of a deposit. The parties went for mediation which was unsuccessful and the matter was then lodged with the High Court.

Mthembu AJ delivering the minority judgement:

"The majority in its judgment, with respect, failed to honour its constitutional obligation to 'balance the rights of landlord and tenant' and, at worst, the judgement/ruling does not seem, 'to protect both the landlord and the tenant against unfair practice and exploitation' as the legislature sought the Rental Housing Tribunal to do.

… Clearly leasing someone a dwelling which does not constitute a dwelling within the meaning of the Act as defined in the preceding paragraph is prejudicial to the tenant and consequently constitutes unfair practice.

The conduct of the landlord in leasing such a structure with such substantial defects, in respect of which the majority ordered a tenant to forfeit a deposit sum of R2,900.00 is, to my mind, without doubt, so prejudicial to the tenant that it should itself amount to unfair practice.

According to section 26 of the Constitution 'everyone has the right to have access to adequate housing.' The State in fulfilling its obligation to the nation [South Africans] of affording everyone the right of access to 'adequate housing' promulgated the Rental Housing Act 50 of 1999.

Providing someone with a structure containing the kind of defects as shown in this matter would **NOT**, in my view, constitute accessing for a person 'adequate housing' within the meaning of section 26 of the Constitution." (paragraph 13)

S V SIYABONGA NTONGANDLELA NOMKHATSHULA, CASE NUMBER: 72A/2008

Judgment delivered 23 May 2008

This is a review of the trial proceedings. The accused was arraigned for trial before the magistrate court on a charge of common assault. The accused pleaded not guilty to the charge. The magistrate fined him R20,000. Such fine was made after the accused had testified in court that he is unemployed and when it was clear that he had inflicted no bodily harm on the complainant.

Mthembu A J held:

"In determining the appropriate sentence to be imposed upon an accused person in any particular case, it is the duty of the Court to have regard not only to the nature of the crime committed and the interests of society but also to the personality, age and circumstances of the offender." (Paragraph 10).

SELECTED JUDGMENTS

GURUNATHAN PILLAY & ELIZABETH PILLAY V MUTHUKRISHNA PILLAY & PRABAVATHI PILLAY, CASE NUMBER: 184/2005

This matter was brought by way of an appeal against the lower court's decision in favour of the respondents. The respondents based their claim on the partly oral partly written lease agreement. Appellants' defence was that the agreement was made under duress or undue influence; they denied the existence of an oral agreement and challenged the validity of the written agreement on the basis that it was of no force as it was never signed by the Respondents.'

Mbatha AJ Held:

"The fact that the Respondents failed to sign the agreement clearly shows that the offer made by the appellants was not accepted. The lease agreement remained unsigned not only on that day or for months but for a number of years. I therefore find that there was no acceptance on the part of the Respondents. The Respondents can therefore not rely on an agreement which they refused to sign. the court *a quoa* with respect, was wrong in finding that this was a valid and enforceable agreement." (Page 8, Paragraph 2).

BONGANI ERNEST LINDA V S, CASE NUMBER AR548/09

Judgment delivered 16 November 2010

The matter came before the court on appeal against a sentence of 20 years for conviction of murder.

Mbatha A J held:

"I am of the view that the sentence of twenty (20) years imposed by the magistrate is unduly harsh and induces a sense of shock as submitted by Counsel for the appellant. … In my view the magistrate misdirected himself by his failing to have adequate regard to the absence of premeditation on the part of the appellant and the fact that there was an element of provocation on the part of the deceased. There were no aggravating circumstances to warrant a sentence of imprisonment above the prescribed minimum sentence of fifteen (15) years."(Paragraph 18)

MSIZI ANDERSON MYA V S, CASE NUMBER: AR247/2010

Judgment delivered 2November 2010

This is an appeal from the regional court where the appellant was convicted of a crime of rape. The appellant had unlawfully and intentionally raped a girl child who was eleven (11) years old at the time. The appellant was convicted and sentenced to eighteen years imprisonment.

Mbatha AJ held:

"This Court must find if the trial court or the magistrate misdirected herself in this matter. The main issue being whether the complainant had been raped and if indeed the appellant was the perpetrator. The trial court at all times was aware that it was dealing with the evidence of a single witness and that caution had to be applied in her evidence." (Page 5, Line 15)

"We must always bear in mind that the main issue in criminal cases is that the State must prove its case beyond a reasonable doubt. Inferences can be drawn by the learned magistrate in coming to this conclusion."(Page 5, line 21)

"Indeed it appears so from the record that the learned magistrate had failed to establish whether the appellant had been informed of the minimum sentence legislation. The appellant, in the trial court, was represented but that does not take away the duty from her to establish if indeed this was explained to the appellant in the trial court before she could proceed with the case."(Page 9, line 1)

SELECTED JUDGMENTS

GROUP FIVE CONSTRUCTION (PTY) LTD V ROYAL PALM PROPERTY HOLDINGS LTD, CASE NUMBER: 1601/2010

Case heard 2 March 2010. Judgment delivered 26 March 2010.

The applicant states that as a result of certain events and its belief that it was owed an amount of approximately r21 679 353.95 by the respondent, it decided to exercise its 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 said units were occupied by the respondent or its representatives, without the knowledge or consent of the applicant. The applicant launched these proceedings to restore to the applicants' possession of those 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 favor." (Paragraph 20)

ANDRIAS LEBELONYANE, GLADWELL NKOSI, BONGANI BEMBE & MFANAFUTHI KHUMALO V S, CASE NUMBER: AR209/07

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 (15) 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).

SINGH & ANOTHER V RAAM HARICHUNDER JAIRAM T/A SHIP & ANCHOR LIQUOR STORE & OTHERS, CASE NUMBER: 2345/2007

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 present application. 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.

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." (Paragraph 10)

SELECTED JUDGMENTS

LEBUSA AND OTHERS V KLOOF GOLD MINE, CASE NUMBER: J1497/98

Case heard 18 August 1999. Judgment delivered 18 August 1999.

In an application for an order declaring the applicants' retrenchment by the respondent unfair, the main issue facing the Court was whether it had jurisdiction to hear the matter. Held, that it was unclear as to exactly how many applicants were before the Court, and what the nature of their representation was. This was because the application purported to be one in which the first applicant was properly cited, and the rest purported to be represented by the first applicant. In addition, it came to the Court's attention that some of the applicants were before the Court without having attempted conciliation first. It was emphasised that the first applicant was not a co-employee of the other applicants, nor was he able to be their representative in any other capacity as permitted in the Labour Relations Act 66 of 1995. He was therefore excluded from acting on their behalf. Those applicants who had not properly referred their matter for conciliation first were held to be not properly before the Court. As a result the Court decided that it was unable to exercise a discretion, as it had no jurisdiction. Only the first applicant was properly before the Court, and only his application would be decided on the merits.

NGWENYA AJ held:

“In all these definitions it is evident to me that the first applicant at this stage is not an employee, whether one looks at the amended version of section 161 or the unamended version of 161. He is currently a dismissed person on his own version and for that reason it is my view that even if further applicants were to take oath and say they have given him authority to act on their behalf he is excluded from acting on their behalf because he is not a co-employee, even in the unamended version of the Act. But it goes further than that. It is evident that first applicant himself has engaged the services of counsel who appears on his behalf here today. If that be the case, what kind of representation will I be dealing with here where you got a person who has been given authority to act on behalf of a group of other people and he in turn engages the services of counsel. This may sound slightly narrow and rigid but I cannot find any other interpretation that I can ascribe to the scenario given to me. So at this stage then we are then dealing with the question of whether the first applicant can represent further applicants, forgetting for a moment what their number is or not. I have already indicated that in my view he is not one of the persons referred to there. I am saying even if one were to give such broad interpretation in the unamended version but the way the Act is couched it would appear that that right would in any event have been limited to the proceedings prior to today. Otherwise what could happen would be that simply because a dispute arose before the amendment of the Act, and therefore a co-employee had authority to

act, that that authority continues in spite of the amended portion of the Act." (Page 13 of [1999] JOL 5679 (LC))

"I must also stress that the fact that parties are said not to be properly before this Court does not mean that they do not have a relief. They may have a relief provided they address the shortcoming to their *locus standi* at this stage." (Page 17 of [1999] JOL 5679 (LC))

"So as far as the evidence before me goes, the indication is that each of the applicants was on his own save that some of them must have approached CCMA as a collective group but not as members of the union. The union might have been assisting them but nothing more than that. It did not take the risk of putting itself on record and…" (Page 19 of [1999] JOL 5679 (LC))

"…therefore it is my ruling that even if those applicants have signed the confirmatory affidavits, that would not have constituted a referral to this Court. It is even worse when this Court is approached late and therefore to the extent that there was an application for the filing of confirmatory affidavits at this late stage, firstly there is no good cause shown from the indication that I have from the affidavit that were signed in 1998 (*sic*). A year has elapsed, no good cause has been shown and all the same I am saying even if good cause was shown, it would still have not served any purpose for the essence of the affidavits would have only been to confer authority to a person that cannot represent a person." (Page 20 of [1999] JOL 5679 (LC))

"I am just raising this because it is quite evident that this file, not only did UPUSA fail its members in not approaching this matter properly. It also failed this Court. From the reading of the judgment that I made today it is quite evident that I had to deal with a fair amount of issues that could have been dealt with by attorneys of record. And further, it is deplorable that a firm of attorneys will instruct counsel without proper instructions as to how many people he is really representing. This was one of the basic issues that could have been easily resolved to understand exactly because notwithstanding the calculation by the respondent as there are 318 people affected, the records reflect a number of people whose status remain unclear." (Page 23 of [1999] JOL 5679 (LC))

BHE AND OTHERS V MAGISTRATE, KHAYELITSHA AND OTHERS, CASE NUMBER: 9489/02

Judgment delivered 25 September 2003.

Second Respondent claimed to be the intestate heir of a deceased man ("the deceased") by virtue of the African Customary Law and contended that he was therefore entitled to inherit an immovable property of the deceased in which the Applicants were residing. Third Applicant and deceased had lived together as husband and wife for a period of twelve years. First and Second Applicants were minor children born

of that relationship. The Applicants were Black persons of Xhosa extraction. The deceased had died intestate. He was survived by two descendants, namely First and Second Applicants. The latter were unable to invoke the provisions of the Intestate Succession Act because in terms of section 1(4)(b) "intestate estate" was defined to include "any part of any estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act 38 of 1927 does not apply". An application of African Customary Law together with the other statutory provisions had the effect that the first two Applicants were precluded from inheriting from their father's estate merely because they were Black and they were females. This amounted *per se* to discrimination on grounds of race and gender. It was *prima facie* unfair and offended against the provisions of section 9(1) and (3) of the Constitution. Intestate succession under African Customary Law was based on the principle of primogeniture. The general rule was that only a male who was related to the deceased through a male line could qualify as intestate heir.

NGWENYA A J held:

"I associate myself with these views. The basic premise in our current constitutional regime is to test any law, be it common law, statute or African Customary Law against the values enshrined in the Constitution. At issue here is a rule which is originally derived from unwritten rule of African Customary law. The principle of primogeniture; the principle has received legislative recognition in the Black Administration Act and the Regulations promulgated thereunder. Section 23(10) of the Act gives the President powers to make regulations not inconsistent with the Act. The Act predates the Constitution. Pursuant thereto, the President made such regulations in 1987. They appeared in the *Government Gazette* No 10601 dated 6 July 1987." (Page 34 of 2004 (1) BCLR 27 (C))

"in terms of the Intestate Succession Act 81 of 1987 (The Intestate Succession Act), (which applies to all races in South Africa) if any person dies intestate, either wholly or in part and is survived by a descendant, but not by his spouse, such descendant shall inherit the intestate estate. (See section 1(b).) "Descendant" means any descendant of the deceased person irrespective of race, gender or status.
In this case we have the deceased, who died intestate and left two descendants, namely the first and second applicants. Can they invoke the provisions of the Intestate Succession Act? The answer is no. The reason why the first two applicants cannot invoke the provisions of the Act is because in terms of section 1(4)(b) intestate includes any part of any estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act 1927 (Act 38 of 1927) does not apply. Differently put, the only reason why the first two applicants cannot inherit from their father's estate is because, as Mr *Trengove* correctly submitted, they are Black and they are females. This, in my judgment, is *per se*

discrimination on grounds of race and gender. It is *prima facie* unfair and therefore offends against the provisions of sections 9(1) and (3) of the Constitution. This court is thus bound to declare such law unconstitutional and invalid. I may add further that, on the facts before us, the second respondent's attitude leaves too much to be desired. It lacks basic humanity, which is the hallmark of ubuntu. We have been urged to develop African Customary Law.

This constitutional imperative cannot be realised on the face of some provisions contained in the Black Administration Act (if not the Act *in toto*). In the first instance the provisions of section 23 substantially require a revision. In particular the provisions of section 23(10) instruct the President to make regulations consistent with the Black Administration Act. The underlying imperative of the Black Administration Act is that of male preference as against equality of genders and that of African subordination against other races. This is not the occasion, however, where we are called upon to revise the entire Black Administration Act. Suffice it to state that in *Moseneke and Others v The Master and Another* (*supra*) the Constitutional Court has already expressed its concern with the fact that this" (Page 36 of 2004 (1) BCLR 27 (C))

"For now the following would suffice. We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents' intestate estate like any male person. This does not mean that there may not be instances where differentiation on gender line may not be justified for purposes of certain rituals. As long as this does not amount to disinheritance or prejudice to any female descendant. On the facts before us, therefore, the first two applicants are declared to be the sole heirs to the deceased's estate and they are entitled to inherit equally.

The order I would make here should reflect the constitutional order of the day. Consequently I shall declare those offending provisions of both the Black Administration Act as well as the regulations promulgated thereunder invalid and unconstitutional. Likewise, with the Intestate Succession Act." (Page 37 of 2004 (1) BCLR 27 (C))

BADENHORST V BADENHOSRT, CASE NUMBER: 9489/02

Case heard 13 May 2004. Judgment delivered 15 June 2004.

In divorce proceedings between the parties, the only issue for determination by the court was that of personal maintenance for the defendant and a claim in terms of section 7(3) of the Divorce Act 70 of

1979. It was defendant's contention that the trust assets of two trusts held by the plaintiff's parents, were essentially hers and the plaintiff's. She therefore wished for a share in the trust assets.

NGWENYA AJ held:

“It is in this context that I must decide whether it is just and equitable to put the provisions of section 7(3) (Act 70 of 1979) into play. In making such consideration I will not lose sight of the fact that the defendant shall have custody of the two minor children solely, as well as shared custody in respect of the elder children. It seems to me that what underlies the clean-slate principle is that the matrimonial estate under consideration, being what it is along the lines I have alluded to above, should not be so skewed at the time of divorce that the claimant should cry fowl. Each case will be judged on its own merits for circumstances differ from one case to the next. The scale, on the facts before me, is heavily tilted in favour of the plaintiff. That would indicate that the plaintiff has benefited more from their joint labour as opposed to the defendant. This conclusion I arrive at in the absence of any other explanation. The defendant's estate's net value is half of that of the plaintiff. Surely this should lead me to the conclusion that it is not just and equitable to leave her with the burden of being a mother, live with the children and be on full-time employment and yet start from a heavily skewed asset base. On the facts before me, I must try and balance the scale as far as possible so that the parties are almost on equal par. I conclude on the basis thus adumbrated that it would be just and equitable if I put the provisions of section 7(3) of the Divorce Act (70 of 1979) into operation here. In so doing I think the parties will almost be on equal par if the plaintiff were ordered to pay an amount of R400 000 to the defendant and also that he pays the costs of the suit.” (Paragraph 35)

“Furthermore, I should order the defendant to pay the costs of the amendment, as well as those of the joinder of the trustees of the two trusts I hasten to add here that I am not persuaded that in making an order sought herein, I should have regard to the provisions of the Capital Gains Tax Act 19 of 2001 ("the CGT"). Apart from the fact that no argument was advanced by either counsel in this regard, I am of the view that a redistribution order in terms of section 7(3) of the Divorce Act (70 of 1979) does not constitute a disposal of an asset in the hands of one spouse and a gain in the hands of the other as contemplated in paragraphs 11 and 12 of the Eighth Schedule to the Income Tax Act 58 of 1962.” (Paragraph 36)

RICKETTS V BYRNE AND ANOTHER, CASE NUMBER: 6020/00

Case heard 26 August 2003. Judgment delivered 15 June 2004.

The applicant sought an order directing the Master of the High Court to accept a certain document as the last will and testament of the deceased in this matter. The application was opposed by the first respondent, as daughter of the deceased. She disputed the validity of the will, and the testamentary capacity of the deceased, particularly as he had bequeathed most of his estate to his girlfriend.

NGWENYA AJ held:

“On the merits of the matter, the applicant bears the onus of proof in this matter. The key aspect is the intention of the testator. On careful reading of the document the applicant has failed to discharge the onus of proving with a great degree of certainty that the testator's intention was that the document was to be his last will and testament.” (Paragraph 17)

“Although three documents were signed by the deceased and two witnesses on the same day, ie 14 January 2002, I did not understand counsel for both the applicant and the respondent to suggest that the two documents which are not the subject of this application were not validly executed wills. The argument, at least by Mr *Goodman*, proceeds from the premise that either annexure "X" or annexures "CB2" and "CB3" jointly represent the last will and testament of the deceased testator. I need to state here from the outset that the proposition that I should deal in some detail with annexures "CB2" and "CB3" misses the point. These two documents are not the subject of dispute before me. They have only been disclosed as background material just as I have been told in passing that already there is a will which second respondent has accepted as a valid will of the deceased here.” (Paragraph 29)

“In order to answer this question, I deem it apposite here to refer to the *Leprosy Mission* case (*supra*); *Meyer and another v The Master* (*supra*) as well as *Meyer*'s case (14 CTR 617). The thrust of these cases is what test does one apply in order to determine whether a single page in a document purporting to be a valid will and testament does constitute a will. These decisions are *ad idem* that the court must examine whether the whole of the testator's property is disposed of in that document. Furthermore, whether it is the testator's intention that such document should be his last will and testament. If the court is satisfied on these two requirements, then the document should be upheld as the last will and testament of the testator. As regards the first requirement in *Meyer and another* (*supra*), the court had regard to "the whole of the disposition". By "the whole of the disposition" of the testator's property, I understand the court to refer to that property which the testator intended to dispose of in the will. In short, the "whole" qualifies "disposition" rather than "property". The converse of this is that the testator must necessarily dispose of his/her entire property before the document can be valid. This interpretation could have untenable consequences. It would imply that the testator must dispose of his whole assets through the will. This will necessary interfere with the testator's freedom of testation. In terms thereof, the testator is free to dispose of his property as he/she chooses subject to a few limitations (see *Lawsa* First Reissue Vol

31 at 183 paragraph 128; Beinart 1958 *Acta Juridica*; 1966 *Acta Juridica* 335). I am fortified in this conclusion by the judgment in *Ex parte Ackermann* 1950 (3) SA 424 (C) where the court said for each page to be valid it must stand as "a complete disposition in regard to the matters with which it deals" (see also *Leprosy Mission* (*supra*) at 184G).” (Paragraph 32)

S V BHENGU, CASE NUMBER: DR596/10

Judgment delivered 1 October 2010.

On automatic review, the court raised the issue of the fairness of the trial, in light of the fact that the accused did not have legal representation.

NGWENYA AJ held:

“What a fair trial is remains the subject of ongoing debate. Until such time that hard-and-fast rules are set, especially on procedural matters, the fairness of the trial will always be judged after the event. In my view, it should be possible to insist that cases where the accused if convicted is likely to be sentenced to an imprisonment term without the option of a fine or other form of punishment, the accused should be legally represented. If this were to happen, it would to a greater extent obviate this *ex post facto* determination of the fairness or otherwise of the trial.” (Paragraph 2)

“There are instances, in criminal trials where an unrepresented accused is no different to a sick patient who decides to operate on himself instead of a surgeon. No doubt a patient who does this cannot be said to be operating on himself but instead hurting himself. An accused who appears in court unrepresented irrespective of the merits of the case starts from a position of disadvantage and prejudice. The more complex the case the greater the disadvantage and prejudice. This cannot be cured by any assistance the court provides. Because in principle my judgment is premised on a point of law, I did not consider it necessary to raise the query with the magistrate first. In any event the magistrate had given a full *ex tempore* judgment.” (Paragraph 3)

“To me it is a matter of grave concern that our Constitution which heralded a new order and removed any doubt about the correctness or otherwise of *Khanyile* above and *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T), our jurispendence on this score has not moved far enough to settle the matter in particular under which circumstances should an accused person be represented at the expense of the State. The matter apart from the routine advice to the accused that he or she has the right to legal representation

has largely been left to the officials of the Legal Aid Board. How they exercise their discretion is not relevant to court and there is no duty to do so. In any view this cannot remain so forever." (Paragraph 5)
"In my respectful view, our courts are once again called upon to pronounce decisively what a fair trial is in so far as the right to legal representation is concerned. Like I said, this will differ from case to case. In the present case the absence of a legal representative for the accused exposed how alienating the courtroom environment is to an uninitiated person. The trial as a whole objectively adjudged was unfair. This is so because the accused cannot be said to have comprehended what was going on. I do not think one would quarrel with the sentiments of Didcott J, exposed above. If one endorses them, one must naturally agree that the accused in this matter was out of his depth. This, not out of his choice but ignorance. It cannot, therefore be said it was up to him to decide as he was given a choice to do so. This is no reflection to the judicial officer. He did his best in the circumstances. Only in one instance could he have taken the matter further. The explanation to the accused and perhaps a stronger indication that a legal representative would be best suited to help the accused achieve the objectives of a fair trial." (Paragraph 7)

"In my respectful view, the right to a fair trial remains a pipe dream as long as the right to legal representation remains the discretion of the accused person. Our courts have long recognised the right to legal representation. This seems to be the only aspect which is rigorously conveyed to the accused person in most trials. No doubt those who can financially afford to appoint counsel at their costs, will naturally do so irrespective. Those who cannot afford are the people in whose interest these instruments must be read and interpreted. By this I do not mean people who can financially afford are excluded. All I say is that they exclude themselves. I have already said earlier in this judgment not everybody will necessarily be entitled if he or she cannot afford legal representation to be accorded legal representation at the expense of the State. There must be a threshold." (Paragraph 13)

"Coming back to the merits of this case. Why do I consider that the accused did not have a fair trial? This is so because, judging by the evidence presented and how the accused dealt with his own defence, it is manifestly clear that this is one matter where a legal representative was needed to represent the accused. The whole process no matter how the accused tried was beyond him. He could not challenge evidence against him even if he wanted to. His cross-examination was no more than a superficial enquiry. As a result of not being legally represented there was a failure of justice." (Paragraph 16)

No Judgements or articles which fell within the parameters of this report could be found in respect of Advocate Ploos Van Amstel SC

SELECTED JUDGMENTS

AFRICAN BANK LIMITED V ADDITIONAL MAGISTRATE MYAMBO NO AND OTHERS, CASE NUMBER: 34793/2008

Case heard 10 December 2009. Judgment delivered 9 July 2010.

The applicant in this case applied to the clerk of the Pretoria Magistrates' Court for judgment by consent against the second respondent. The clerk of the court referred the matter to the first respondent, a magistrate. The first respondent refused to grant judgment. The applicant now seeks an order reviewing and setting aside the first respondent's decision to refuse judgment. In terms of its notice of motion, the applicant also sought a number of declaratory orders but, events have overtaken the applicant's proposed declaratory relief.

Delivering the Minority Judgment, POSWA:
"It is in my view not without some justification that the learned magistrate concluded that the section 58 procedure (of the Magistrate's Courts Act) is contrary to the purposes of the NCA. This procedure permits the creditor to come before the clerk of the court, with a consent documents prepared between the creditor and the debtor, which debtor is not present before the clerk of the court. The clerk of the court has to assume that all went well before the consent document was arrived at. Without the set of orders made in the majority judgment, the consumer was, in my view, unprotected from potential abuse of section 58 procedure. It should be borne in mind that the interests of the creditors on the one hand and those of the consumers/debtors on the other hand, are potentially in conflict. Due to, in particular, the creditors' financial power and their capacity to come together and discuss a general approach with regard to their interests and status, they are in a position to ensure that they, to the exclusion of the consumers, are the beneficiaries of the section 58 procedures. Consequently procedures such as the letter to be written in terms of the provisions of sections 129 and 130 of the Act, should be strictly monitored to ensure that they do not become subversive of two of the purposes of the NCA, the ones I categorized as (b) and (c) respectively." (Paragraph 4)

ALBERTS V ALBERTS, CASE NUMBER:38371/05

Case heard 15 May 2007. Judgment delivered 28 July 2008.

Upon the divorce of the parties in 2004, the respondent was awarded custody of the minor child born of the marriage. The issue between the parties was whether or not the child should have sleep-overs with the applicant. **Held** that the court found it necessary to make use of expert opinion in addressing the

issue. Upon a proper consideration of the expert's reports, the court found that the respondent had been manipulating the child's relationship with the applicant so as to deprive him of proper access to her. She had also been guilty of attempting to replace the applicant's role as the child's father with her new lover. The court found that it was important for the child to maintain a sound relationship with her father, and therefore made an order which catered for the access rights of the applicant, which was to include sleep-overs by the child.

POSWA J held:
"That draft settlement agreement is, in essence, the framework for the ultimate settlement agreement signed between the parties and made an order of court by Patel J. It already contained a clause, 5.1, with regard to Ila's custody, which would be awarded to the respondent, with the applicant being granted reasonable access rights." (Paragraph 7)

"It would, in my view, be utter injustice to both Ila's rights to relate with her father, the applicant, to the necessary bondage between the two of them and to the applicant's rights, as a father, to have access to his daughter, to ensure a continuous relationship between the two of them. That relationship is as essential as that between the respondent and Ila, as mother and daughter. The Family Advocate has dealt with the respondent's criticism of the manner in which the previous report was finalised and how the decision on extending the applicant's rights was arrived at. She has denied the respondent's allegations of a rushed job. Nothing in the initial report as the supplementary report by the Family Advocate suggests that the identical recommendations were lightly arrived at. It is, in my view, essential to speedily correct the relationship, between the applicant and Ila, painted in Dr Hartzenberg's report, which includes an apparent displacement of the applicant, as Ila's father, by the respondent's lover. That, in my view, is totally unacceptable and cannot be in Ila's best interest." (Paragraph 58)

M&G MEDIA LTD AND OTHERS V PUBLIC PROTECTOR, CASE NUMBER:2263/06

Judgment delivered 30 September 2009.

Between April 2002 and July 2005 First Applicant published nine articles in its newspaper exposing the scandal which came to be referred to as *Oilgate* and which involved improprieties surrounding certain South African-Iraqi oil deals. The issue of South African-Iraqi oil deals also received mention in two reports, dated 7 September 2005 and 27 October 2005 respectively, by an Independent Inquiry Committee of the United Nations dealing with the management and the manipulation of the United Nations Oil-for-Food program ("the OFF program"). Following the invasion of Kuwait by Iraq in 1990, the

United Nations Security Council imposed comprehensive sanctions on Iraq. Its resolution restricted relations between UN member-states and the Government of Iraq to affairs that were "exclusively for strictly medical or humanitarian purposes and, in humanitarian instances, foodstuffs". This precluded the purchase of oil from Iraq. In 1995, to alleviate civilian hardship caused by the sanctions, the United Nations relaxed its embargo on Iraq by adopting the OFF program in terms of which Iraq was permitted to sell oil but the proceeds were to be held in trust by the United Nations and released only for approved humanitarian imports. Iraq was entitled to select companies and/or persons to whom it would make allocations of crude oil, subject to UN oversight. Allegations surfaced that Imvume and another South African company, Montega Trading (Pty) Ltd ("Montega"), were so involved. Both companies were implicated by the Independent Inquiry Committee's reports. They were accused, *inter alia*, of using their relationships with South African political leaders to obtain oil allocations under the OFF program. Alerted to the allegations of improper conduct and maladministration, two members of Parliament including the Leader of the Official Opposition lodged written complaints with Respondent requesting that there be an investigation into the affair. Subsequently Respondent purported to conduct an investigation into the affair and prepared a report entitled "Report on an Investigation into an Allegation of Misappropriation of Public Funds by the Petroleum Oil and Gas Corporation of South Africa, trading as PetroSA, and matters allegedly related thereto". It was finalized in July 2005 and presented to Parliament. The Parliamentary Portfolio Committee on Minerals and Energy and the National Assembly accepted the report. On 3 August 2005 the Cabinet resolved to accept it. Applicants brought an application in the High Court seeking the review and setting aside of Respondent's report, and an order that Respondent "redo his investigation of and report on the matters that gave rise to the Report".

Applicants contended that Respondent had interpreted his mandate narrowly so as to exclude most of the subject matter of the complaints before him from his own jurisdiction. Respondent had misdirected himself by unduly limiting his own powers of investigation. This vitiated the report. Respondent had adopted the stance that he was not empowered to investigate allegations such as those of the payment to the ANC, the payment to the contractor who had worked on the Minister's private residence, the relationship between Imvume and the ANC, and the involvement of the ANC in Majali's business negotiations with the Government of Iraq. Respondent had contended that his constitutional responsibility was to investigate conduct in the affairs of the State or public administration which was alleged or suspected to be improper or to bring about impropriety or prejudice, to report on that conduct, and where necessary to take remedial action. This was what the Public Protector Act provided for. As a statutory functionary, he could lawfully and properly exercise only those powers conferred, and discharge only those functions and duties imposed upon him in terms of that Act and the Constitution. Imvume was a private company and not a public entity. The ANC was a political party and so should be regarded as private and not a public body. The fact that the ANC held the majority of seats in the

governments at various levels did not alter that position. Accordingly, the Public Protector lacked jurisdiction in respect of the conduct and affairs of political parties because they were private entities. As neither the ANC nor Imvume was a public entity, the alleged payment complained of was a payment made by one private entity to another which could not have any bearing on "State affairs". It also had no relation to an act or omission in the public administration or in respect of a public entity. Respondent had found that the payment allegedly made by Imvume to the ANC did not involve public money. Accordingly, Respondent had reasoned, the Public Protector had no jurisdiction to investigate the alleged payment by Imvume to the ANC.

The Court found it unnecessary to decide the questions whether or not Respondent's conduct was an administrative action, the applicability or otherwise of the provisions of PAJA, and whether Respondent was under an obligation to treat Applicants fairly. It was unnecessary to do so because Respondent had conceded that an application of the principle of legality would be decisive. If it were to be found that he had misunderstood the nature of the mandate given him, then the principle of legality would require that his act be set aside. If he misconstrued his powers and as a result constrained himself unduly by not investigating where he should have investigated and by "under-investigating" what he did investigate, then the application would have to succeed.

Prior to the enactment of the Interim Constitution, where a matter was left to the discretion or the determination of a public officer, and where his discretion had been *bona fide* exercised or his judgment *bona fide* expressed, Courts would not interfere with the result. If the public officer had duly and honestly applied himself to the question which had been left to his discretion, it was not possible for a court either to make him change his mind or to substitute its conclusion for his. The Constitution, however, required more than that a public officer should exercise his powers in good faith. It placed further constraints upon the exercise of public power through the Bill of Rights and the founding principle of the rule of law. An exercise of public power by the Executive or by other functionaries had to be rationally related to the purpose for which the power was given.

On an application of this test, the Court had to conclude that Respondent acted irrationally in respect of (a) complaints that he did not investigate because he considered them to be beyond his jurisdiction and (b) complaints which he investigated with the aid of inadequate evidence, that is, without obtaining relevant evidence that was obviously necessary. It was not necessary to make a finding as to whether the inadequacy of the investigation resulted from a desire deliberately to shield the ANC. The Court emphasised that it had reached its decision solely on the basis that Respondent's conduct did not pass the test of the constitutional principle of legality.

POSWA J held

"… I pause here to comment that the Public Protector, being an advocate of the High Court of South Africa and occupying a senior position provided by the Constitution, should ensure that he refers appropriately to authorities, just as a judge or magistrate would do." (Paragraph 30)

""Section 182 of the Constitution is the enabling section from which the Public Protector draws his/her powers of investigation and receives duties in that regard. In subsection (2), the Constitution provides that the Public Protector "has the additional powers and functions prescribed by national legislation", in this case the PPA that was subsequently enacted. Nothing in section 182 of the Constitution has a bearing on the dictum by Moseneke DCJ in *Masethla v President of the RSA and Another* 2008 (1) BCLR 1 (CC), in my view." (Paragraph 93)

"My decision not to discuss the question of the application of PAJA and all that go with it, in this judgment, is based, primarily, on the concession made by and on behalf of the respondent, in the manner demonstrated, with regard to the principle of legality – a concern well made, in my view. Both parties rely on *Masethla* (*supra*) with Mr *Maleka*, probably before he applied his mind to the need to concede, submitting that it is not authority in support of the principle of legality on the facts of this case. Although he did not say so in so many words, it is evident that Mr *Maleka* now concedes that *Masethla* supports the applicants' submission with regard to the principle of legality. As the respondent himself has conceded, all that the applicants require this Court to do is to find that the respondent misconstrued his powers and duties and that, consequently, he constrained himself unduly and did not investigate where he should have done so or under-investigated what he did investigate." (Paragraph 99)

"The next question is with regard to the appropriate order to make. I am aware that there is authority to the effect that a court may, in appropriate circumstances, not refer a matter back to the person or institution or body which had made the order which has been set aside, where the court is of the view that the individual or body in question is unlikely to change his/her or its mind. I am of the view that there is no evidence, direct or indirect, to suggest that the respondent or his successor-in-office will not do a proper investigation if the matter is remitted to his office for an appropriate investigation, taking into Mushwana would still be in office when this matter is returned to him. I do not, however, think that it makes a difference who the Public Protector is that reconsiders the complaints" (Paragraph 116)

OELOFSEN NO V GWEBU & OTHERS, CASE NUMBER:10499/04

Case heard 3 December 2007. Judgment delivered 22 April 2010.

As the trustee of the insolvent estate of the first respondent, who was married by customary law to the second respondent, the applicant sought to evict the respondents and all parties occupying through them from property which formed part of the insolvent estate. The respondents argued that the property was still registered in the name of the first respondent and that, accordingly, the respondents were entitled to continue in occupation thereof. The application was based on the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the Act"). **Held** that the application had to be dealt with on the basis that the respondents were illegal occupiers of the property. The court raised with the parties the question of whether the applicant should not have cited the local municipality, apart from serving the section 4(2) notice on it. The court's request for such submissions was based on the provisions of section 7 of the Act. The court concluded that the fact that the municipality would incur certain obligations in the case, it should be cited. The application could not proceed until then.

POSWA J held:

“I think it will do no harm for me to round up my view of the implications of section 7 of PIE. Section 7(2) deals with the scenario in which the local municipality is the owner of the land in respect whereof the eviction proceedings are brought. Nothing is demanded of the municipality in such circumstances. The task to determine whether there is a dispute that calls for an attempt to settle it, falls on a Member of the Executive Committee ("MEC") designated by the Premier of the Province concerned. For the same reasons for which the local municipality must be joined where it is not the owner (section 7(1)), the Premier must, in my view, be joined where the local municipality is the owner of the land (section 7(2)).” (Paragraph 29)

“As must, by now, be obvious, I have arrived at the conclusion that this application cannot proceed without the local municipality being joined. In the circumstances, it is not necessary, in my view, to deal with many other submissions made by the parties' legal representatives. Such submissions will be relevant only after the local municipality has been joined. I am in agreement with Mr *Leathern* that the proper course is not to dismiss the application.” (Paragraph 30)

SELECTED JUDGMENTS

SHUNMUGAM & OTHERS V NEWCASTLE LOCAL MUNICIPALITY & OTHERS; NATIONAL DEMOCRATIC CONVENTION V SHUNMUGAM & OTHERS, CASE NUMBER: 6883/07; 7680/07

Case heard 22 October 2007. Judgment delivered 4 December 2007.

Two applications dealing with floor-crossing legislation were dealt with by the court. 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 sought the review of their expulsion from NADECO. In the second application, NADECO sought to enforce the councillors' expulsion. **Held** that the facts established that the councillors ceased to be members of NADECO at midnight on the commencement date of the floor-crossing period. Their joining of other parties indicated their intention no longer to be part of NADECO. The seats held by them were therefore vacant.

RALL AJ held:

"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 at 121H–J 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)

“As far as the first application is concerned, the only reason given for a departure from the normal rule is that the IFP applicants were not really parties to that application. Whilst I have sympathy for these applicants because it can hardly be said that their case was well presented in the founding affidavits, the fact remains that they signed powers of attorney authorising the attorneys in question to represent them and put up confirmatory affidavits. Furthermore, the attempt to distance themselves from the first application came rather late in the day. They purportedly abandoned the relief in the first application in the affidavits they delivered in the second application on 10 October 2007. By that stage the matter had been set down for argument on 22 October 2007 and so in order to abandon the application they required the consent of the other parties or the leave of the court, which was not forthcoming. At best, for the IFP members, they would be liable for the costs up to the time that NADECO considered their affidavits of 10 October 2007. However, by bringing the counter-application, the IFP councillors were persisting with the same relief as had been sought in the first application and so the preparation for and the argument on 22 October 2007 together with the written arguments submitted thereafter dealt to a very substantial extent with relief in respect of which they were unsuccessful in the counter-application. In the circumstances, I am of the view that it would be appropriate for the IFP applicants to share liability for all the costs in the first application.”(Paragraph 56)

WHEELER V WHEELER & OTHER CASES, CASE NUMBER: 9746/07; 1409/07; 7774/09

Case heard 22 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. **Held** that the Children's Act does not employ the concepts "custody" and "access" in listing the rights and responsibilities of parents in respect of children and does not expressly state that those concepts have been abolished. The court found that the common law concepts of custody and access. Instead, it comply

widens the concepts to a degree. The court set out the ambit of the concepts as they now stood, and recommended that court orders use the terms used in the Act to avoid confusion. The Act does not employ the concepts "custody" and "access" but refers to "parental responsibilities and rights".

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)

“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)

MAZIBUKO & CEBEKHULU V S, CASE NUMBER:8774/09

Judgment delivered 19 November 2009.

An appeal against a decision to refuse the two appellants bail. The two 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 Pietermaritzburg regional court. The State opposed bail, the regional magistrate refused bail to all three applicants and the two appellants now appeal against that decision.

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)

“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. This is evident from the examples given in paragraph [76] of the judgment. 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 “It 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 It seems to me that “exceptional” can firstly denote the rarity of something (i.e. the infrequency with which something occurs) as in “It 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” (Paragraph 16)

"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. More precise than that one cannot be. 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)

SELECTED ARTICLES

'THE DOCTOR'S DILEMMA: RELIEVE SUFFERING OR PROLONG LIFE?', 94 S. African L.J. 40 (1977)

This article is about euthanasia. Following the case of Dr Hartman that aroused a great deal of controversy in the news media. Rall noted that despite all the interest in the matter there existed very little legal clarity. There were only three cases that had gone before the courts in the preceding 21 years.(Of which only one was reported in the South African Law Reports) and in none of those cases was the possibility of legalizing euthanasia considered in any depth. Moreover the subject had not attracted much attention in the legal journals or books. Though it is not a purely legal subject, in the article Rall chose to limit himself to the legal aspects.

He discusses the term 'euthanasia' using the Hartman, De Bellocq and Dawidow cases as examples. He then discusses the attitude of the law, I particular the criminal law, towards euthanasia. Finally, he deals with active and passive euthanasia, both with and without consent, with the object of establishing whether euthanasia could be considered lawful in terms of present-day South African law.

'THE NEW HEARSAY RULES', Vol 3 No. 1 Consultus (1990)

This article takes a critical look at 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 ofwhich depends upon the credibility of any person other than the person giving such evidence.’ This definition was suggested by the Commission and is very similar to that suggested by Paizes. 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

STAMFORD TRYES (AFRICA) (PTY) LTD V TRYES PLUS CC AND OTHERS, NCH, 1988/2009

Case heard 26-11-2010, Judgment delivered 10-12-2010

This was an application for summary judgment in which the plaintiff claimed payment of the sum of R 122 307, 05 against the first and second defendants jointly and severally together with interests and costs on an attorney client scale.

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 trail, 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]

"…….summary judgement is no intended to deprive a defendant from having his day in court……." [Paragraph 16]

BRC DIAMONDCORE LTD V SYBRAND ALBERTUS TITINGER N.O AND OTHERS, case 775/2010

Case heard 3-12-2010 Judgement delivered 17- 12- 2010

This was an interlocutory application to compel compliance with a rule 35(12) notice and an application to furnish security for costs.

Henriques AJ held:

"Having regard to the authorities, a party's entitlement to a document arises as soon as reference is made in the pleading or affidavit. In Protea Assurance Co Ltd v Waverly Agencies CC and Others 1994 (3) SA 247 © at 249 D our 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." (Paragraph 13)

"The court has inherent jurisdiction to grant security for costs to prevent an action from constituting an abuse of process. See in this regard Ecker v Dean 1937 at 259 in which the court quotes with approval from the decision of **Western Assurance Co. v Caldwell's Trustee 1918 AD 262** and also **Zietsman v**

Electronic Media Network Ltd 2008 (4) SA 1 SCA at 4E; **Fitchet v Fitchet 1987 (1) SA 450 (ECD)** at 453 J – 454 A" (Paragraph 31)

"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)

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

SCREENING & EARTHWORK (PTY) LTD AND ANOTHER V CAPITAL OUTSOURCING GROUP (PTY) LTD; CAPITAL OUT-SOURCING GROUP (PTY) LTD V SCREENING & EARTHWORKS (PTY) LTD

The plaintiff had purchased its labour brokerage company from a third party which had provided labour brokerage services to the first defendant. Upon taking over the business, the plaintiff sued the first defendant for payment for services rendered. Opposing the claim, the defendents relied on a clause in the contract governing the relationship, which provided that no party may cede any of its rights or delegate or assign any of its obligations in terms of the agreement without the prior written consent of the other party.

Lever AJ held:

"An agreement by way of quasi-mutual assent has been described in a number of different ways. It has been described as a tacit agreement and perhaps erroneously it has also been described as an implied contract. It might be correct to refer to such a contract as an agreement implied by conduct. However one may describe such an agreement, the key question is whether the conduct of the parties establishes that, on a balance of probabilities, the parties intended to, did in fact contract on the terms alleged. The test to be applied at trial in determining this issue is an objective one. On exception one assumes that the allegations made by the plaintiff are true. In the case of an exception that the declaration does not disclose a cause of action one then asks does the exception raise a point of law the decision of which would have effect of disposing of the matter in whole or in part……'" [Paragraph 8]

"……..The essentials that needed to be pleaded for a claim based on quasi-mutual assent are: firstly, that the conduct of both the plaintiff and the first defendant, as pleaded, establishes an agreement between them; and secondly sets out the material terms of such agreement. It must be remembered…that at the stage of an exception the allegations of the plaintiff are accepted as being correct……" [Paragraph 9]

Mayisela v African National Congress and others

This was an application for the Judge to recuse himself from a case on the grounds that there is a reasonable apprehension on part of the applicant that the Judge might be biased against the applicant.

Lever AJ held:

“A useful starting point in considering application for recusal is to remind oneself of the approach of Blieden J when he states: ‘In an application such as the present one, the easy option is to grant the relief claimed and leave the case. However, I am under duty both to justice and to all parties involved in the present litigation to recuse myself from the proceedings only if I am satisfied that there is justification thereof’” [Paragraph 6]

“It follows from the foregoing that the correct approach to this application for recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonable apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience…….At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and the judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial” [Paragraph 7]

“From the passage in the SARFU judgment set out above, it is clear that a party seeking the recusal of a judicial officer bears the burden of showing that a reasonable and informed person would, on the correct facts, reasonably apprehend that the presiding judicial officer is biased against it. The double emphasis on the requirement of reasonableness serves to underscore the weigh of burden resting on a party alleging judicial bias or its appearance.” [Paragraph 8]

S v Mafora 2010 (1) SARC 269 (NWM)

The accused was charged with, and convicted of, escaping from custody in D contravention of s 51(1) of the Criminal Procedure Act 51 of 1977 (the CPA), and sentenced to two years' imprisonment. On review, the question arose as to whether the trial court had had sufficient information at its disposal to determine whether the accused had contravened s 51(1)

Lever AJ held:

“Although s 51(1) of the Criminal Procedure Act refers to 'custody', as opposed to 'lawful custody', Du Toit in their commentary on s 51(1) of the Criminal Procedure Act state that the custody should be lawful. The learned authors base this contention, firstly, on the authority of H S v Ngidi and, secondly, on the necessity of having an element of control over the arrested person. The effect of this argument raised

in Du Toit is that, if this element of control is voluntarily relinquished, 'lawful custody' ceases. If an arrest is lawful, it usually follows that the custody is lawful. It does not necessarily follow that the custody remains lawful. It does not necessarily follow that Public policy dictates that the provisions of s 50(1) (c) and (d) of the A Criminal Procedure Act must be taken into account. If those provisions are not complied with, the custody cannot remain lawful. In our constitutional dispensation the law cannot countenance 'unlawful custody'. This would be an infringement of the rights contained in s 12(1) (a) and (b) of the Constitution. In the present case, it does not appear from the record that the custody of the accused was lawful." [Paragraph 10]

"The fifth requirement set out by Du Toit is that there must have been an arrest for a crime. This is justified on the basis that escaping from an arrest effected under a civil warrant does not constitute a crime in terms of s 51(1) of the Criminal Procedure Act. This fifth requirement has probably fallen away. This is because the common law rule to found or confirm jurisdiction in a claim sounding in money of an incola plaintiff D by way of a mandatory arrest of a foreign peregrinus has been abolished by the Supreme Court of Appeal, who developed the common law to found or confirm jurisdiction on other grounds. Further, as a result of a ruling of the Constitutional Court, imprisonment for civil debt is no longer possible." [Paragraph 12]

Nicor IT Consulting (PTY) LTD v North West Housing Corporation 2010 (3) SA 90 (NWM)

The plaintiff (present excipient) served a simple summons on the defendant (present respondent) and subsequently its declaration claiming moneys allegedly due to the plaintiff in terms of certain written agreements entered into between plaintiff and defendant. In response the defendant filed a special plea and plea, alleging a failure to give notice in terms of s 3(1) of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002 (the Act).

Lever AJ held:

"'Organ of State' is defined in the Act and such definition has already been set out in the extract of the exception quoted above. For the purpose of evaluating the submissions made on behalf of both the plaintiff and the defendant, as to whether the defendant is an organ of State or not, it is useful and instructive to contrast the definition set out I in the Act with the definition set out in the Constitution. In the Constitution:

'"organ of State" means -

(a) any department of State or administration in the national, provincial or local sphere of government; or

J (b) any other functionary or institution -

(i) exercising a power or performing a function in terms of the A Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or judicial officer. . . . '

The definition of organ of State in the Act as contained in clauses (a) , B (b) and (c) of such definition is essentially the same as that set out in s 239 of the Constitution. The material difference is that the definition in the Constitution includes a functionary or institution that exercises a public power or performs a public function in terms of any legislation. The definition in the Act does not go that far and does not include any functionary or institution performing a public power or performing a C public function in terms of any legislation." [Paragraph 7]

"In my view Mr Roos is correct when he submits that one must look to the Constitution to determine whether the defendant derives any power or function directly from it in order to determine if the defendant is an 'organ of State' as contemplated in the Act. Although the National Gambling Board case deals principally with the issues relating to the exclusive jurisdiction of the Constitutional Court and the issue of direct access to the Constitutional Court, it does illustrate the point that different functionaries or entities obtain their powers and status as an organ of State from different parts of the definition set out in s 239 of the Constitution". [Paragraph 11]

"Although Mr Hitge did not articulate it in that way, the effect of his argument is that he wants the court to read para (c) of the definition of 'organ of State' contained in the Act as if the words 'in terms of the Constitution' meant nothing more than 'set out in the Constitution' or 'contained in the Constitution'. If, this were so it would lead to anomalies and an untenable situation. If, for example, a non-government organisation (NGO) had as its main objective the raising of funds for the provision of low-cost housing and in fact provides such housing to the indigent in South Africa, on the reading of the definition implied by Mr Hitge 's argument, that NGO, for the purpose of the Act, would be an 'organ of State' and it would be entitled to notice and institution of the A action within six months, as contemplated in s 3 of the Act." [Paragraph 12]

"In the context of the possible anomalies set out above and in the light of the decision of the Constitutional Court in the matter of Mohlomi v Minister of Defence, which dealt with the time bar and

notice period B contained in the Defence Act, and which found that such section fell foul of the right to access to courts contained in the interim Constitution, the words 'in terms of' must be narrowly construed. This approach is supported by the fact that para (b) (ii) of s 239 of the Constitution has been left out of the definition of 'organ of State' in the Act. It is further supported by the fact that such corporate entities, that C the legislature intended the Act to apply to, are specifically identified in paras (d) , (e) and (f) of the definition 'organ of State' contained in the Act. It is also supported by the fact that, from the title of the Act and its preamble, it is clear that the legislature did not intend the Act to apply to all organs of State." [Paragraph 13]

"In this context the words 'in terms of the Constitution' connote that both the identity of the functionary or institution and the power or function that he, she or it exercises are identified in the Constitution itself. Put differently, the power or function exercised by the functionary or institution arises directly from the Constitution, as is illustrated by the case of National Gambling Board v Premier, KwaZulu-Natal, and Others. Clearly then, the defendant does not derive its powers or functions 'in terms of the Constitution', it derives its powers and functions from its enabling Act, the North West Housing Corporation Act. It therefore follows that the defendant is not an organ of State as defined in the Act. This would be sufficient basis to uphold the plaintiff's exception to the defendant's special plea. However, in case I am wrong in my interpretation of the definition of an organ of State in the Act, I turn to the second issue raised in the plaintiff's exception." [Paragraph 14]

"In the circumstances of this case, the preamble to the Act and the Constitution are of overwhelming importance when considering the context in which the Act came about. The effect of the Act is to limit a creditor's right of access to the courts, which is enshrined in s 34 of the Constitution. The purpose of the Act in this context is not merely to provide uniform periods for providing the required notice, but to bring the limitation of the right to access the courts, contained in the 14 repealed Acts or amended Acts, within the parameters of s 36 of the Constitution. It is in this context that the definition of 'debt' contained in the Act must be interpreted." [Paragraph 28]

"When a right is adversely affected by legislation and particularly when such right is one contained in the Constitution, the offending provision must be interpreted restrictively. If in interpreting the definition of 'debt' para (b) qualifies the whole of para (a) , then the notice contemplated in s 3 of the Act would only have to be given when the claim is one for damages. If on the other hand para (b) qualified only (i) and (ii) of para (a) , then any action would be subject to the provisions of s 3 of the Act." [Paragraph 29]

"On a careful reading of the definition of 'debt' contained in the Act, it is clear that para (b) qualifies para (a) as a whole. This in my view is the 'ordinary and natural meaning' of the words as they are set out in the definition of 'debt' in the Act. Nothing that the defendant has raised has persuaded me otherwise. This 'ordinary and natural' meaning has been considered within the context and purpose of the Act and I

find that it does not offend against the purpose of the Act. More significantly, this 'ordinary and natural' meaning makes fewer inroads into the rights of access to courts and equality enshrined in the Bill of Rights in the Constitution. As such, this ordinary and natural meaning is to be preferred above the wider interpretation of the definition of 'debt' contended for by the defendant. Accordingly, I find that para (b) of the definition of 'debt' in the Act qualifies para (a) of such definition, and consequently a 'debt' for the purposes of the Act is confined to a claim for damages, howsoever such claim arose." [Paragraph 30]

SELECTED JUDGMENTS

PHILLIPS AND OTHERS V THE RICHTERSVELDT AND ANOTHER CASE NO 1639/09

Case heard 29 & 30 – 03 - 2010, Judgment delivered 18-06-2010

The applicants approached the court because they were dissatisfied with the manner in which their names were removed from a register because of the fact that they were not 'ordinarily resident in Richtersveldt.

Phatshoane AJ held:

"It is trite that the applicant cannot create his own urgency by waiting until the normal rules can no longer be applied. The applicant must set out in his founding affidavit circumstances which he avers render the application urgent and the reasons why he cannot obtain substantial redress at the hearing in due course"" [Paragraph 26]

"In Zweni v Minister of Law and order 1993 (1) SA 523 (A) at 532 l- 533A the Court held that a 'judgment or order' is a decision which, generally, is final in effect and not susceptible of alteration by the court of first instance, is definitive of rights of the parties and has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings"" [Paragraph 33]

"……..the Court cannot make a final order interdicting an event which has already passed……." [Paragraph 35]

"The CPA places an obvious premium on the right to be heard before termination of membership……unquestionably the fifth and sixth applicants were not afforded the opportunity to be heard before termination of their membership……" [Paragraph 42]

"In my view the decision taken by the respondent without affording the fifth and sixth applicant the opportunity to be heard does not accord with the spirit of the CPA Act, it defied the tenets of natural justice and is therefore unlawful……" [Paragraph 43]

Isaac and 24 Others v The MEC for Education Northern Cape case no 590/09

Heard 18-02-2010 Judgment delivered 14 -05 -2010

The applicants approached the court for an order reviewing and setting aside some decisions of the Member of the Executive Council of the Department of Education.

Patshoane AJ held:

"The overlapping jurisdiction quandary bestowed on the High Courts and the Labour Court and the precise constraints thereof has been laid to rest in the recent Constitutional Court decision…..the court held that the decisions of the Constitutional court….have resulted in differences of opinion on the proper interpretation and application of overlapping constitutional, administrative ad labour-law provisions and principles, especially with regard to disputes between public sector employees and their employers….." [Paragraph 11]

"……..I am of the view that the applicant's dispute concerning the grading of their salaries is an employment issue referred to in section 1 of the Employment Equity Act and it fails squarely under the fair labour practice parameter as espoused in s23 of the Constitution……." [Paragraph 28]

S v Jacobs case no K/S 57/09

Case delivered on 24- 02- 2010

The accused is charged with murder. In augmenting his plea the accused advanced that he acted in self-defence.

Phatshoane AJ held:

"The State should prove its case beyond a reasonable doubt and mere preponderance of probabilities is not sufficient. It is not important that the court should believe the version of the accused and it is not for the accused to convince the court of his innocence….."[Paragraph 14]

"The right to life is so fundamental that it cannot be sacrificed at the alter of exaggerated self-defence unless there are compelling reasons to do so" [Paragraph 21]

Sentence delivered on 04-03-2010

Potshoane AJ held:

"In imposing a sentence the Court should have regard to the crime, the offender and the interest of the society….The Court should also have regard to the interest of the victim. The objective and purpose of punishment are deterrence, prevention, reformation and retribution……." [Paragraph 3]

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

S V THOKA AND ANOTHER, CASE NUMBER: MA1007/99

Judgment delivered 6November 2001

The 2 accused were convicted of the theft of R2 600 and each sentenced to 2 years' imprisonment. The record of proceedings showed that there were, *inter alia*, serious discrepancies in the evidence of the complainant and another witness and it had not been established when the complainant was last in possession of the money. **Held** that the state had failed to prove guilt beyond a reasonable doubt. The convictions and sentences were set aside.

BAM AJ held:

There are serious discrepancies especially between the evidence of the complainant and that of Richard Baloyi (the same person, who was implicated by accused 1), with regard to:

1.1 the complainant's state of sobriety;

1.2 the events preceding the visit to Machochaone's place; and

1.3 the presence of accused 2 in the vehicle as well as the subsequent request for a lift.

2. The identity of the culprit(s) was never proved beyond a reasonable doubt:" (Page 3 of [2005] JOL 14992 (T))

"2.1 It has never been established when exactly the complainant was in possession of the money for the last time.

2.2 It appears from the evidence that the complainant at least visited three premises and the loss of the money was only discovered after their arrival at Kgatla's place. Therefore, it is unknown when precisely the money was stolen.

2.3 Whilst being at Machochaone's place and whilst the complainant was asleep, the vehicle was not locked and there seems to have been various people in the vicinity.

3. In the light of these discrepancies and improbabilities, I am of the opinion that the State has failed to proved the accuseds' guilt beyond reasonable doubt and submit that the accuseds' versions could be reasonably possibly true.

4.It is therefore recommended that the convictions as well as the sentences ought to be set aside and that the immediate release of the accused ought to be ordered." (Page 4 of [2005] JOL 14992 (T))

S V ANDILE MPANDE AND OTHERS, CASE NUMBER: A259/07

Judgment delivered 26 January 2011

The accused were charged with Murder, robbery with aggravating circumstances, unlawful possession of a firearm, and unlawful possession of ammunition. **Held**: that the State had proved its case beyond reasonable doubt and that the defense of both accused cannot reasonably and possibly be true and is therefore rejected as false.

BAM AJ held:

"The evidence of the identification of accused ni. 1 by the two eyewitnesses of the State has however to be considered with caution. The Court must be satisfied that the identifying witnesses are both truthful and reliable." (Paragraph 20)

"in applying the guidelines in **TRAINOR** supra, it is clear, with due respect, that once the Court has considered the evidence in the way set out in the quoted dictum and concluded that the State has proved its case against the accused beyond reasonable doubt there is no room for a finding that the accused's version may be reasonably and possibly true." (Paragraph 27)

SELECTED JUDGMENTS

LASKARIDES AND ANOTHER V GERMAN TYRE CENTRE (PTY) LTD (IN LIQUIDATION) AND OTHERS NNO 2010 (1) SA 390 (W)

Case heard 27 February 2009, Judgment delivered 27 February 2009

The applicants approached the High Court under rule 53 of the Uniform Rules of Court for the setting aside of a subpoena duces tecum, that had been issued under s 414(2)(b) of the Companies Act 61 of 1973. The subpoena was authorised and issued in terms of ss 414, 415 and 416 of the Companies Act 61 of 1973, as amended (the Companies Act). It calls upon Mr Laskarides, the first applicant, who is the managing director of the second applicant, to attend an interrogation at an adjourned second meeting of the creditors of the first respondent (who had been liquidated and whose enquiry was being held), and produce the documents specified in the subpoena. While this case does not directly involve constitutional matters, it does take cognisance of the constitution.

Bhikha AJ held:

“The Constitutional Court in *Bernstein* 's case, in upholding the constitutionality of s 417, a similar section, found with regard to private enquiries, in terms of the Companies Act, though Ackermann J cautions (at 770E) that examinations of the kind conducted at these enquiries 'is open to abuse and that the proceedings ought to be watched carefully'. Therefore the court reasoned that the judiciary must ensure that the 'examination is not made an instrument of oppression, injustice or of needless injury to the individual'. The learned judge says at 808D:
'As I have endeavoured to show in this judgment, the very purpose of the proceedings under ss 417 and 418 of the Act is in order to provide the company with information about itself, its own affairs, its own claims and its own liabilities, which it cannot get from its erstwhile brain and other sensory organs or other persons who have a public duty to furnish such information but are unwilling or reluctant to do so fully and frankly.'” [Paragraph 10].

“Similarly, from an examination of a s 417 private enquiry, there is a further caution in that in the production of any document, any books or papers in his custody, the witness should not have to infringe any rights under Ch 3 of the Constitution of the Republic of South Africa (the right to privacy and against self-incrimination)” [Paragraph 18]

East Rand Motors v ISS Compliance (PTY) LTD case no 2005/25124

The Plaintiff's representative claim that a statement made on behalf of the defendant to the plaintiff and copied in a communication to the Financial Services Board (FSB) is defamatory and therefore actionable.

Bhikha AJ held:

"The question of publication in the form of communication to employees of a juristic personality, in this case the defendant, in these peculiar circumstances is doubtful to be sufficient for the purposes of the element of publication to be satisfied for defamation…" [Paragraph 14]

"In this regard, the authorities contend that the defence of qualified privilege, in making a defamatory statement prima facie lawful, may be defeated by the plaintiff if he can show, on a balance of probabilities, that the defendant has forfeited his immunity through an abuse of the privileged by proving that the publication was predicated by malice in the sense of improper motive on the part of the defendant" [Paragraph 18]

NHLAPHO v TRANSNET LTD t/a METRORAIL Case no: 2007/26031

In an action for damages, the Parties agreed and this court ordered a separation of the issues in terms of Rule 33(4) of the Rules of this Court, between the merits and quantum. The court only looked at the question of merits of the matter.

Bhika AJ held**:**

"It is conceded that the plaintiff bears the onus to prove, on a balance of probabilities, the culpability of the defendant. The legal test is set out in Ngubane v South African Transport Services 1991 (1) SA 756 (A) at 776 E-F, where Kumleben JA held:

'liability in delict based on negligence is proved if:

(a) A diligence paterfamilias in the position of the defendant-
    (i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
    (ii) Would take reasonable steps to guard against such occurance;
(b) The defendant failed take such steps'

This has been proved in my opinion"

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

None with constitutional values

SELECTED ARTICLES

None with constitutional values

SELECTED JUDGMENTS

CENTRAL PROPERTY DEVELOPMENT JOHANNESBURG (PTY) LIMITED AND ANOTHER V THE MEMBER OF THE EXECUTIVE FOR AGRICULTURE, CONSERVATION AND ENVIRONMENT CASE NO 2009/17614

This case deals with the validity of an environmental compliance notice issued by the Second Respondent in respect of the development of property by the Applicants. The applicants seek an order setting aside a compliance order issued by the Second Respondent, and upheld by the First Respondent, on the basis that Respondents had no jurisdiction over the development of and that the MEC's upholding of the order was procedurally unfair.

Kolbe AJ held:

"The supremacy clause, Section 2 of the Constitution of the Republic of South Africa, 1996 ("the Constitutions" reads as follows: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' Section 24 of the Constitution further provides: 'Everyone has the right a) to an environment that is not harmful to their health or wellbeing and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that i) prevent pollution and ecological degradation ii) promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'" [Paragraph 19 - 20]

"It is now settled that 'The court's power to review administrative action no longer flows directly from the common law by from PAJA and the Constitution itself. The grundnorm of administrative law is now to be found in the first place not in the doctrine of ultra vires, sovereignty, not in the common law itself, but in the principals of our Constitution. The common law informs the provisions of PAJA and the Constitution, and derives its source from the latter. The extent to which the common law remains relevant to administrative review will have to be developed on a case by case basis as the Court interpret and apply the provisions of PAJA and the Constitution.'" [Paragraph 57]

"…I am satisfied that the Applicants' statement that the MEC "…rode roughshod over…"their request to appear in person sufficiently pleads an unreasonable exercise by the MEC of his discretion although the Applicants' described this conduct as a denial of procedural fairness. " [Paragraph 65]

"Returning to the facts of this matter, it is clear that: 72.1) the pre-compliance notice sets out in detail the legal basis on which the HOD intended to issue the compliance notice; 72.2) First Appicant's attorneys were able to respond to this by drawing attention to the fact that the establishment of the township had been approved in 1996 before the coming into operation of NEMA regulations and referred the HOD to Choice Decisions where it was held that the HOD did not have exclusive jurisdiction to

enforce the provisions of NEMA; 72.3) the compliance notice contained a detailed rebuttal of the points raised in the aforesaid response… ” [Paragraph 72]

“In considering whether the MEC properly excercised his discretion in not allowing the Applicants an oral hearing (with legal representation), the complaint regarding the presence of Ms. Olewa must be considered.” [Paragraph 74]

“On a proper analysis of the content of the answering affidavit it is clear that Ms. Olewa was not a representative of the HOD nor did she have any involvement in the matter prior to considering the objection and the legal argument raised therein. Ms. Olewa’s function at the meeting was to advise the MEC who takes advice from senior officials when determining appeals. This appeal turned on a point of law and Ms. Olewa considered the objection with a view to advising the MEC thereon as a legal matter within her mandate. ” [Paragraph 76 - 77]

“Therefore, in conclusion, it cannot in my view, in the circumstances of this matter be said that the procedure was objectively unfair or that the MEC did not properly exercise his discretion in failing to afford the Applicants an oral hearing with legal representatives.” [Paragraph 80]

The application was dismissed.

MOSES MOTSITSI V MINISTER OF CORRECTIONAL SERVICES AND OTHERS CASE NO 09/32009

The page on which the main relief set out in the notice of motion is missing in the judgment.

Kolbe AJ held:

“Although the Respondents took the point that the Applicant has failed to exhaust his internal remedies, Respondents did not draw my attention to any provision for such internal remedy open to the Applicant should he be dissatisfied by a decision by the Parole Board or any authority for the existence of such a procedure.” [Paragraph 9]

“I therefore find, that although an aggrieved person may be able to approach the Commissioner or the Minister to refer a decision by the Parole Board to the Review Board, the provisions of the Correctional Services Act do not confer any such right on an aggrieved prisoner and do therefore not provide for a viable internal remedy as contemplated in Section 7(2)(a) of PAJA.” [Paragraph 16]

“On 10 June 2009, Applicant addressed a request to the Chairperson of the CMC to recommend to the Parole Board to apply to the Clerk of the Court to have him appear before Court in order to reconsider his sentence pursuant to the provisions of Section 276A(3) of the CPA… ” [Paragraph 18]

"The CMC and the Parole Board were of the view that in the event of the trial Court holding a the time of sentencing that correctional supervision is an inappropriate sentence that fact disqualifies an offender from a subsequent conversion of sentence into correctional supervision in accordance with Section 276A(3) of the CPA. This reasoning is fundamentally flawed for the following reasons: 24.1) The only persons to whom the provisions of Section 276A(3) of the CPA could possibly apply are those persons who are sentenced to imprisonment for a period exceeding five years; 24.2) A presiding officer, when imposing a sentence must consider all sentencing options including correctional supervision; 24.3)In all matters therefore where a person is sentenced to imprisonment exceeding five years, the presiding officer would have formed the view that correctional supervision is an inappropriate sentence at the time. Should a court at sentence stage be of the view that correctional supervision in whatever form provided for in the CPA is an appropriate sentence, the Court will impose that sentence; 24.4) Every presiding officer who imposes a sentence is well aware of the provisions of the CPA, the Correctional Services Act in particular the provisions relating to the conversion of sentences and parole and imposes whatever sentence it imposes with that knowledge ; 24.5) Should a presiding officer for whatever reason omit to mention that her considered correctional supervision (an omission to consider that option would constitute an irregularity although an omission to mention that it was considered would not) that omission would benefit a sentence prisoner as he would now be saddled with the remark to the effect that correctional supervision was not an appropriate sentence at the time; 24.6) Although the factors relevant at the time of sentencing remains relevant, other factors become relevant at the conversion stage, which facts should be weighed with factors that existed at the time of sentencing." [Paragraph 23 - 24]

"When the trial court reconsiders the sentence it does not consider whether the initial sentence was appropriate or not. It does not sit as a Court of appeal on its own sentence. What is required is that the trial court should consider the sentence imposed in light of all the circumstances, including facts and circumstances which arose since the imprisonment of the person concerned." [Paragraph 28]

"I therefore conclude that the decisions of the CMC and Parole Board were materially influenced by an error of law and that irrelevant considerations were taken into account and that both decisions fall to be reviewed and set aside pursuant to the provisions of section 6 of PAJA." [Paragraph 31]

"The only question remaining is what the appropriate order should be. In terms of Section 8 of PAJA a Court may grant any order that is just and equitable. " [Paragraph 32]

"Considering all of the above and in particular that: 39.1) it will eventually be the duty of the Court to consider whether Applicant's sentence should be converted; 39.2) the decision of the CMC and the Parole Board was nothing more than whether Applicant was a suitable candidate for such a

recommendation; and 39.3) the CMC and Parole Board would clearly, had it not been for the error of law referred to above, have found him to be a fit and proper person to be subjected to correctional supervision. It will therefore in my view be fair to everybody concerned to substitute the recommendation of the CMC and the Parole Board with an appropriate order. ” [Paragraph 39 - 40]

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

EMERGENCY CARE TRAINING ASSOCIATION V THE MINISTER OF HEALTH AND OTHERS, CASE NO 35280/2009

Case heard 26 April 2010

Kollapen AJ has made reference to various judicial authorities such as the then Transvaal Division, the then Cape Provincial Division as well as the Constitutional Court in handing down this judgement.The applicant seeks to review and set aside a 'decision' made by the 3rd and 4th respondents . The decision includes the closure of the registers of Basic Ambulance Assistant (BAA), the Critical Care Assistant (CCA) as well as the Ambulance Emergency Assistant (AEA). The dates for the closures of each register varies and the implication of such closures is that once the closure takes place, no new qualifications will be recognised for registration. The respondent's further state that regulations relating to such closures will be published by the Minister of Health in the Government Gazette for public comment before promulgation. Applicant's argue that “the decision is ultra vires in that neither the 3rd or 4th respondent has any power to phase out training or close a register. That power is vested in the Minister only” and that the “decision was arbitrary and in conflict with the legitimate expectations created by the various meetings between the 3rd and 4th respondent and stakeholders in the emergency care industry including the applicant, namely that the phasing out of the short courses and the closure of the registers would only commence after 2014.” The respondent's opposed the relief sought on a four grounds. The judgement, however, focuses only on one, that of the challenge to the locus standi of the applicant to bring the proceedings.

Kollapen, AJ held:

“There can hardly be opposition to the proposition that in constitutional matters a broad approach to standing, both in relation to interest as well as capacity, is not only justifiable but is also necessary to give full effect to the spirit of the Constitution.” [Paragraph 22]

“A question critical to and central in the determination of these proceedings is whether the broad and expansive approach to standing with which I associate myself is authority for the proposition that in Constitutional matters the common law requirements of standing in so far as they pertain to voluntary associations have been rendered obsolete or indeed that the departure from them is justifiable under any or all circumstances. I do not interpret and understand that to be the case. An analysis of the dicta in both the Highveldridge and Rail Commuter Action Group matters suggests that the facts and circumstances of each matter weighed heavily in the decision as to whether a departure from the common law requirements was justified.” [Paragraph 22]

"In the present matter apart from failing to attach its Constitution to its founding papers the applicant offers no explanation for its failure to do so or indeed fails to set out any facts from which the court could possibly conclude that it has the necessary capacity to bring these proceedings." [Paragraph 30]

"In my view the position of the applicant as well as the nature of the relief it seeks...distinguish it from the instances where the courts have regarded departures from the common law requirements justifiable and consistent with the spirit of the constitution. Accordingly I am not convinced that the applicant has made out a case why on the facts of the present matter such a departure is warranted." [Paragraph 31]

FROMENTIN V DE HAAS IN RE: DE HAAS V FROMENTIN AND OTHERS CASE NO 6073/2000

This case dealt with the variation of a divorce settlement, among other things.

Kollapen AJ held:

As to the question regarding variation of a divorce order Kollapen AJ states:

"However the SCA also reaffirmed the principle that in appropriate circumstances an agreement, unobjectionable in itself will not be enforced because the object it seeks to achieve is contrary to public policy. The court went on the affirm that public policy is, having regard to the constitutional state, firmly rooted in our constitution and the fundamental values it enshrines which values include human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racism and non-sexism. " [Paragraph 11]

"In order to maintain the balance alluded to by Cameron AJA (as he was then) it is important therefore that those considerations of public policy not lead to unpredictability or uncertainty, in circumstances where certainty and predictability is both necessary and desirable. It may well be that the adoption of the constitution underpinned by certain fundamental values provides the framework to determine indeed those considerations of public policy that would ultimately determine whether a departure from the Shifren rule is justified or not. " [Paragraph 14]

"It must thus be clear and apparent that the risk alluded to by Lord Atkin that public policy should not depend on the determination of subjective judicial minds is unlikely to materialise in the constitutional dispensation of our society as the constitution and its values provide, in the most compelling fashion, a framework to determine the scope and parameters of such public policy." [Paragraph 15]

"While the Shifren principal was not articulated as being confined to contracts of a commercial nature and on the face of it would have general application it must also be evident that in matters that relate to

the rights and obligations [in the context of family law] different and other considerations distinguishable from the world of commercial contracts may well warrant consideration. Those considerations include: 18.1. The Constitutional imperative that in all matters concerning children the principle of the best interest of the child must apply as a guiding and paramount principal. 18.2. Parents have the obligation to maintain their children in accordance with their ability as well as the need of the minor children. It should follow that it is indeed a matter of public policy to ensure that those guiding principals insofar as they relate to the reciprocal and mutual reinforcing obligations of parents are maintained and are not sacrificed as it were at the altar of ensuring certainty at all times. 18.3. In the real world parents entrusted with the responsibility of ensuring that the best interests of their minor children are always advanced must invariably make and take decisions that may warrant a departure from or a variation of the express terms of settlement agreement. It would be impractical and inconvenient to suggest that in all such instances, and in the face of non-variation except in writing clause, parents should then be constrained in their ability to take decisions and to do things, even by mutual agreement that would advance the interests and wellbeing of such minor children. "[Paragraph 18]

"Certainly and for the considerations alluded to above there must be instances where public policy may justify a departure from the Shifren principle in the area of family law. Without suggesting that such departure should be easily justified or readily countenanced, there must be due regard to the context within which parenting takes place and within which decisions that may on the face of it vary in express obligation are arrived at towards some other socially desirable objective – the best interests of the child. In all the circumstances the demands and the consideration of public policy in the context of ensuring the development of family law that is consistent with the values of the constitution including the values of equality, non-discrimination as well as insuring the advancement of the best interest of the child would in my view in appropriate instances and where a proper case is made out certainly justify a departure from what has become known as the Shifren principle. In conclusion I find that while such principals remain a firm entrenched and necessary part of the law the departure may not only be constitutionally permissible, but perhaps constitutionally required. If indeed the Shifren principal was entrenched and did not apply in the context of family law it may well have the effect of achieving all kinds of unintended consequences that may well militate against the development of public policy consistent with the norms and values of our constitution. .." [Paragraph 20 - 22]

IAN GORDON MURREL AND ANOTHER V MINISTER OF SAFETY AND SECURITY, CASE NO 24152/2008

In this case Kollapen AJ refers to (the then) Appellate Division authorities as well as several local division authorities. This is an action for damages for wrongful arrest and detention brought by the Plaintiffs

against the Defendant arising out of the arrest and detention of the Plaintiffs by members of the South African Police Services acting in the course and scope of their employment with the Defendant.

Kollapen AJ held:

“It is clear that the test of reasonableness contemplates a thorough and critical assessment and evaluation of all the relevant and available information by the arresting officer. That this is so is both understandable and justifiable. Our new Constitutional order place a high premium on individual freedom and liberty. From the founding provisions and beyond, the commitment to freedom and dignity resonates powerfully in the architecture of the Constitution both as values as well as fundamental and justifiable rights.” [Paragraph 14]

“It was argued for the Defendant that the information from the SAPS Circulation System reflecting the vehicle as stolen, the confirmation by Inspector Botha that the vehicle was indeed still on the stolen list and the denial by Lotz about the vehicle being stolen was sufficient to found a reasonable suspicion. I am unable to agree with this contention and it is certainly not sustainable. In making the determination of reasonableness, all the relevant information should be considered. This cannot be a selective process where reliance is placed on some factors while other which do not support the stance taken are ignored. It must therefore follow...that the Defendant has failed on the probabilities to prove that the arrest and subsequent detention of the Plaintiffs was justified and that the requirements of Section 40(1)(b) of the Criminal Procedure Act No 51 of 1977 was satisfied.” [Paragraph 22]

As to the quantification of damages, Kollapen AJ held:

“There is little doubt that the Plaintiffs experience was traumatic and distressing. At one point they were carefree holiday makers exploring the beauty and experiencing the splendour of a remarkable country and within an hour they were rendered criminals and confined to cells where the conditions fell shockingly short of the constitutional imperative found in Section 35(2)(e) of the Bill of Rights that every detained person be held under conditions consistent with human dignity. They were alone with no access to family, friends or a lawyer and until their release were totally uncertain about how the matter of their arrest and detention would unfold. It is accordingly necessary that the award of damages must recognise both the significance of the values of freedom and dignity that we are enjoined to uphold as well as respond to the human trauma and the anguish the Plaintiffs had to undergo under circumstances that were not of their making and were easily avoidable.” [Paragraph 28]

“Of course one must guard against the danger of a mechanical approach to awards in these matters where freedom and liberty are computed by reference purely to time and an hourly rate for such deprivation begins to root. Freedom and liberty are germane to the identity and the very existence of the

individual and when they are undermined without justification Courts should through their award reaffirm the primacy of such value and rights." [Paragraph 30]

S V B DE NATION CASE NO CC194/09

The accused is charged with two counts of attempted murder, one count of murder, one count of unlawful possession of a firearm and one count of unlawful possession of ammunition. Two witnesses were called in respect of the first count of attempted murder. Kollapen AJ refers to many Supreme Court of Appeal authorities when handing down judgement.

Kollapen AJ held:

The first witness, the complainant "came across as quiet spoken but made a good impression. She was not dramatic nor did she exaggerate the offence of the night in question. She was persistent in her view that it was indeed the accused who shot her. She was nervous but that is understandable and does not detract in any way from the competency in which she tendered her evidence" [Page 7]

The second witness "came across as a reluctant witness and made a rather poor impression on the Court. She appeared to be evasive and hardly forthcoming. Her testimony was quite clear that she did not see the actual shooting, that she could say who did the shooting and that she could not offer an opinion whether the shooting was accidental or not. I am accordingly reluctant to attach any weight to her evidence for these reasons, while I will not go so far as to say she was being untruthful, I am of the view that doubt with regard to exactly where she was just prior to the shooting, that is outside the flat or inside, and her limited observation of the actual shooting on her own evidence raised concerns about the overall reliability of her evidence...her evidence should be disregarded"[Page 8]

"Having disregarded the evidence of Miss Livingston one is mindful that what is left is the evidence of a single witness." [Page 9]

The complainant "knew the accused and she knew him for a long time prior to this incident. She had ample opportunity to observe him. The kitchen in which they were standing was well lit and she was about two and a half metres away from the accused. She was steadfast in her view that it was the accused who took out the shotgun and shot her." [Page 10]

"She would certainly have no reason to make such a fundamental error in identification under those circumstances, nor would she have any reason to deliberately or falsely implicate the accused in the attack on her." [Page 10]

"I am accordingly satisfied that as a single witness her evidence is clear and satisfactory in every material respect." [Page 10]

With respect to the second count of attempted murder, Kollapen AJ held that the since the "complainant was not called and in light of that was the evidence of a single witness, hardly clear and satisfactory in every material aspect, an application for the discharge of the accused in terms of section 174 of the Criminal Procedure Act was successfully launched and the accused was acquitted" [Page 12]

With respect to the final three charges, two witnesses were called. "Our courts have expressed caution in dealing with discrepancies between police statements and oral evidence given the often generic nature of the former and the possibility that in taken them there is often room for miscommunication or a lack of detail. In any event, it can hardly be said that even if there are discrepancies in the statement and the oral evidence, that they are material of significant."[Page 14]

The accused then testified in his own defence. "While I am mindful that an accused is under no duty to prove his alibi, the alibi evidence must be considered with all the other evidence in determining whether the State has proved its case beyond reasonable doubt and whether the version of the accused can be said to be reasonably true." [Page 18]

"The danger, obviously, is one cannot view the accused's evidence in isolation. It has to be viewed with regard to the totality of all the evidence." [Page 22]

"I have considered the evidence of the accused...I am accordingly of the view that on all the evidence before me, the reasonable possibility that the accused is innocent is excluded and may I say, convincingly so." [Page 23]

S V B DE NATION CASE NO CC194/09: SENTENCING

Kollapen AJ referred to three different Supreme Court of Appeal authorities.

Kollapen AJ held:

"The crafting an appropriate sentence is perhaps one of the most difficult tasks that a judicial officer has...Balancing competing and conflicting interests, blending justice with a measure of mercy may be easy to articulate as an academic concept but in practice it becomes difficult when one is dealing with real people and real communities." [Page 1]

"It was, in our view, simply a viciously violent expression of authority from someone who was in possession of a shotgun...[the complainant] is entitled to enjoy the fullness of her life. No person can just randomly take advantage of another in such a brutal manner...I am of the view that in respect of [the first count] a sentence of 5 years would be an appropriate sentence." [Page 2]

As to the count of murder Kollapen AJ held: "We live in a constitutional democracy where the right to life is important. It is in our constitution and this society is about ensuring respect for the right to life. We also live in a rules based society where we must expect conduct, especially from young people that accords with the values of equality of human dignity and respect for life." [Page 3]

"…in my view sentencing you to life imprisonment would be sever. It would be harsh and I do not think that would be appropriate. I do believe that the following considerations must cause me to find that there are substantial and compelling circumstances. Your age, that you were 18 years old when this offence was committed; the fact that you spent 20 months in custody; the fact that you are first offender and the fact that gang activity may have had a role to play. All of these, in my view, justify a departure from the minimum sentence that the legislature has decreed. " [Page 7]

ZIMBABWE EXILES FORUM AND 34 OTHERS V MINISTER OF HOME AFFAIRS AND OTHERS CASE NO 27294/2008

Case heard 6 August 2010

This case dealt with numerous issues surrounding the rights of asylum seekers. The application seeks an order declaring that the following be declared as invalid and inconsistent with the Constitution: 1)the failure of the First and Second Respondents to issue section 22 permits to asylum seekers upon their application 2)failure to verify the identity and status of detainees who have informed the Respondents that they have applied for asylum and not yet received their permits 3)declaring the practice where asylum seekers who make asylum applications whilst in immigration detention must remain in detention pending the outcome of that application 4)a practice wherein asylum seekers, whose applications are rejected as unfounded and who indicate their intention to appeal are to be detained pending the outcome of the appeal 5)the practice wherein detainees, whose detention under the Immigration Act becomes unlawful by virtue of it exceeding the 30 day period referred to in the act, are released and summarily rearrested.

Kollapen AJ held:

"The legal regimes that apply to migrants asylum seekers and refugees have their foundations deeply rooted within the constitution and in particular within the chapter of the Bill of Rights. Given that what is often at stake is the liberty of an individual, their freedom and security and their right to just administrative action including their right to seek and receive the protection of the state in appropriate circumstances it is therefore essential that in all matters the policy and practice followed by the State and

its organs are consistent with both the values of the Constitution and the human rights imperative set out therein. For the purposes of this application the right to dignity, the right to freedom and security, the right to movement and the right to just administrative action all are relevant." [Paragraph 9- 10]

"Section 7(2) provides that 'the State must respect protect and promote and fulfil the right sin the Bill of Rights' while section 8(1) provides that 'the Bill of Rights applies to all law and binds the legislature, the executive the judiciary and all organs of state.' It must follow accordingly that any policy practice directive or conduct which is inconsistent with the Constitution and/or undermines the constitution and its values falls to be declared inconsistent as such and in terms of section 172(1) of the Constitution the court has both the power and the responsibility when deciding a constitutional matter within its power to 'declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency. On that basis and of course provided that the evidential burden is discharged in demonstrating conduct in the form of a practice policy directive or a decision that is unlawful or inconsistent with the constitution then the applicants would in the ordinary course be entitled to the relief they seek. " [Paragraph 11 - 13]

"It is simply untenable in a constitutional democracy that someone should have to give up their liberty on account of administrative difficulties or inefficiencies on the part of an Organ of State. For these reasons I am satisfied that on the evidence before me the applicants have established a practice with regard to immigration officers simply failing to take the necessary steps to verify and assist applicants in verifying their identity and status and that the failure to take such measures is clearly inconsistent with the provisions of the Constitution and the Bill of Rights insofar as they relate to the freedom and liberty of the individual, the right to movement and the right to just administrative action." [Paragraph 32]

SELECTED ARTICLES

'THE RIGHT TO SAFETY AS PART OF THE HUMAN RIGHTS DISCOURSE ', African Safety Promotion, vol.4 issue 1, pages 29-33

"The South African constitutional dispensation, incorporating within it a very sophisticated and highly regarded human rights framework, has been central to the structural transformation of South Africans society. Against the backdrop of the South African Constitution, and in relation to the complexity of the threats to safety facing South Africans, this paper considers efforts to enhance the safety and security of individuals and communities as informed by South Africa's new rights framework. The paper concludes that safety is an integral part of understanding and constructing the rights discourse." (Abstract)

"The 1996 Constitution, and the Bill of Rights which it incorporates, has been hailed as one of the most progressive, far-reaching and courageous commitments to advancing human rights. In particular, the Bill of Rights not only guarantees traditional civil and political rights such as the right to vote and the right of freedom of expression, but is also inclusive of such constitutional rights as the right to assemble and demonstrate. Importantly, the Bill of Rights recognises social and economic rights, and includes them as justifiable and enforceable rights.." (Page 1)

"Section 1 of the Constitution articulates the following foundational values: human dignity, the achievement of equality, and the advancement of human rights and freedoms. Inherent in this is the recognition that the integrity and the dignity of the individual and the community as a whole must be advanced, and that the state is under a general obligation to adopt measures to protect the individual from threats that impact on the integrity and the dignity of that individual. Given our history and the nature of the violence of the apartheid state, the Constitution sought to define clear parameters for the use of state power. Accordingly, much of the early developments from a rights perspective were to ensure that there were effective checks and balances with regard to the power of the state, and to protect the individual from state violence." (Page 2)

"One of the first pronouncements of the Constitutional Court was to declare the death penalty to be unconstitutional. In the case of the State vs. Makwanyane, the 11 judges of the Court reached the unanimous conclusion that the use of the death penalty contradicted the provisions and values that the new South African society was trying to create…At other levels, Parliament has taken several measures to advance the general safety of the nation. These measures include the Domestic Violence Act; The Schools Act, which prohibits corporal punishment in schools; various measures to advance commuter safety; and laws to further regulate the ownership and possession of firearms" (Page 2)

Kollapen continues by describing the case of *Charmichele v Minister of Safety and Security 2001 (10) BCLR 995 (CC)* and *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and Others 2005(4) BCLR 301 (CC)* and states:

"Both cases illustrate that in a modern constitutional democracy such as ours, there is an understanding around the issue of safety and security that transcends the traditional approach, and that allows for the creation of new and formidable obligations on the part of the state, as well as on non-state actors in appropriate instances to undertake positive duties to enhance the safety and security of a defined or general group of people. Of course, there is the risk that the scope and range of the duty imposed can simply become too wide and create unreasonable obligations. The manner in which the courts approach similar cases in future will therefore be of great interest." (Page 3)

"…the right to freedom of movement is rendered academic when one is unsafe to move around, and the right to property is undermined when invasive crime runs roughshod over the sanctity of the home. Consequently, the notion and understanding of human security has come to mean much more than simply securing the individual against the threat of state violence, but also implies assessing all forms of threats to the security of the individual and providing security against them.." (Page 4)

"The measures taken by the state have been impressive over the past 12 years of our democracy, but much remains to be done. One of the gravest challenges we face as a nation in this regard is the matter of bridging the divide between the two worlds, which is South Africa. These two worlds have been differently described but, in the main, they represent one that is affluent, resourced and largely white, while the other is poor, under-resourced and largely black. The quality of life enjoyed in these two worlds differs rather starkly. There is thus much to be accomplished in efforts to close this gap." (Page 4)

"These two worlds enjoy different levels of safety, and indeed the efforts that go into realising some of the socio-economic rights referred to are undermined when critical matters of safety are not dealt with decisively. A few examples may illustrate this point. The state has invested considerable resources in building schools, and to provide much needed education to the children of South Africa. Yet, too many children have to navigate a high-risk route to school in order to access this education. Un-roadworthy vehicles, the lack of adequate public transport, resulting in children walking long distances across dangerous terrain to get to school, and crossing rivers all place the young learner at great risk. " (Page 4)

"Human rights are the subject of on going contestation. While they may be regarded as universal, eternal and as the birth right of all humankind, they are under threat at the best of times. National security, the need to combat crime and violence, and more recently the fight against terrorism have been used to justify all kinds of incursions into the content of human rights. While we should strive to be practical in dealing with legitimate threats that our countries may face, we should also be vigorous in defending the gains we have made. We have witnessed how so-called security and counterterrorism measures have often caused more harm than good, and how they have compromised in many instances the safety of the broader society. Although questions about national and global security often pose difficult challenges for our times, and evoke high emotions and much paranoia, we are required to forge the most useful responses in dealing with the challenges." (Page 5)

"There can be little doubt that in the past 12 years South Africa has achieved considerable success in advancing a culture of human rights and, in so doing, has attempted to secure the individual against a myriad of threats. The right to safety and the need to feel secure has been central in the processes of promoting a human rights culture. Looking forward, it is impossible to envisage progress on many of the challenges we face without centrally locating safety in our human rights discourse." (Page 5)

'PAPER ON THE PROTECTION OF RIGHTS OF OLDER PERSONS IN AFRICA COMMISSION BY HELPAGE INTERNATIONAL', 2008.

This paper focuses on the rights of the elderly on the African continent. It illustrates the ongoing violation of their human rights and how African human rights instruments, while significant, do not sufficiently protect them. Problems faced by the elderly include age discrimination, abuse, and failure to provide them with basic social and economic rights. Furthermore, the spread of the HIV/Aids pandemic, the spread of globalisation, etc. all contribute to a situation where elderly people are no longer taken care of by the younger generation.

"While in traditional African societies older persons were generally supported and cared for by their children or extended family, the changing societal dynamic brought about by among other factors, globalisation, urbanisation and the HIV/AIDS pandemic has impacted negatively on the cohesion of the family and its ability to create a nurturing and enabling environment for the protection of older persons. Under these circumstances there is clearly a need for increased state intervention in support of the elderly based on universal human rights norms and standards. While the African Charter provides a broad normative rights framework, there may be merit in developing a specific treaty that articulates both clear and concise human rights standards for older persons and provides a mechanism for implementation and accountability, both of which are lacking." (Page 1)

"A number of international policy documents have been adopted to strengthen the protection of older persons. The 1982 Vienna International Plan of Action on Ageing and the 1991 United Nations Principles for Older Persons were reinforced in 2002 through the Madrid International Plan of Action on Ageing at the global level, and the African Union Policy Framework and Plan of Action on Ageing at the regional level. Underlying these plans are the five 'areas of concern for older persons' as expressed in the 1991 UN principles: independence, participation, care, self-fulfilment and dignity." (Page 2)

"In 2007 the African Commission on Human and Peoples' Rights (African Commission) decided to establish a Focal Point on the Rights of Older Persons in Africa with the view to initially consider developing a declaration to be followed by a treaty dealing with the rights and welfare of older persons in Africa. The African Commission held a consultative meeting on the rights of older persons in Mauritius at the beginning of October 2008. " (Page 2)

"Only a few countries in Africa have specific legislation dealing with older persons. Mauritius adopted The Protection of Elderly Persons Act in 2005 and South Africa adopted the Older Persons Act in 2006. In most countries legislation dealing specifically with older persons is limited to issues dealing with pension

funds for civil servants or those in other formal employment. National policies or plan of actions on ageing have been adopted in a few African countries. Other legislation and policies have an impact on older persons. Ghana's country report on the implementation of the Madrid Plan of Action on Ageing notes the importance of the National Population Policy, the National Social Protection Strategy, the National Disability Policy and the National Health Insurance Scheme. " (Page 4)

"The African Charter on Human and Peoples' Rights does not explicitly prohibit discrimination on the grounds of age, but it could be argued that such discrimination would fall under the prohibition of discrimination on the grounds of 'other status'. Such an interpretation is reinforced by the Protocol on the Rights of Women. Measures to improve access to employment for older persons is included in some national development plans, but as noted below the vast number of Africans work in the informal sector." (Page 5)

"While human rights have become an important medium through which we can advocate and advance the idea of a more just and caring society, the reality is that in the complexity of things human rights norms and standards cannot in themselves always change social reality. What they do however is to provide a universal framework for the type of standards we wish to achieve, serve as a basis by which public opinion can be mobilised and hopefully contribute to changing the consciousness of society and ultimately become the common basis by which States agree to hold each other accountable to commonly agreed norms and standards." (Page 9)

"The lack of an effective response to the various violations of rights of older persons constitutes a violation of the African Charter on Human and Peoples' Rights. It is therefore imperative that the rights of older persons take on a more important role in monitoring compliance with the African Charter and other human rights treaties. NGOs active in the field of the rights of older persons should be encouraged to submit shadow reports to monitoring bodies and make use of the complaints procedure under the African Charter. It may well be that an African Declaration, followed by a treaty would provide the necessary specificity and serve as a vehicle through which there can be a greater mobilisation of opinion and resources to effectively address the legitimate rights demands of older persons." (Page 9-10)

SELECTED JUDGMENTS

RAYNETH V S [2005] JOL 15487 (W) UNREPORTED

Case heard 11 March 2005, Judgment delivered 15 March 2003

This refers the Constitution, various Local Division decisions as well as Supreme Court of Appeal decisions. It is an appeal against a Magistrate's Court decision deals with criminal procedure, the splitting of charges and the right to a fair trial. Bashall AJJ concurred with his decision to uphold the appeal.

Louw AJ held:

“Section 35(3) of the Constitution of the Republic of South Africa, 108 of 1996 provides that "every accused person has a right to a fair trial". Fifteen rights are then tabulated which are included in the overarching concept of a fair trial. Section 35(3)(m), the thirteenth right, is the right "not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted". There is no specific right not to be convicted more than once in the same proceedings of an offence in respect of the same act or omission. The Constitution thus expressly prohibits serial double jeopardy but is silent on parallel double jeopardy. The question is whether parallel double jeopardy can be brought to bear under the general fair trial provision” [Paragraph 14]

“To my mind there is a constitutional dimension to the test for the splitting of charges. There is, as I pointed out above, a constitutional imperative to ensure that the accused person had the benefit of a fair trial. It is no longer simply a matter for common sense to determine whether one or more convictions are in order. An accused person is entitled to demand that convictions are not multiplied. The problem should be approached within this context” [Paragraph 20]

“What must be guarded against is to punish one act more than once merely because it has different facets, each of which reflect a different crime or constituent element of a crime. Quite distinguishable from this type of case is the class where the accused person committed more than one act as part of a series and interconnected number of unlawful acts committed with one purpose. In this type of case the reported judgments tell us that the emphasis must fall on the intent of the accused person. If it appears that all the different unlawful acts were committed as part of one over-arching intent, it could be unfair to convict the accused of all the different crimes. Although the prosecutor may throw the proverbial book at the accused, it is the duty of the court to ensure that justice is fairness, and not pettiness. For example, A and B are involved in some sort of altercation. B is fully clothed and he sports an expensive cashmere coat. A produces a firearm, aims it at B and shoots him in the chest. On its way to B's heart where the bullet ends B's life, it passes through the coat. A clearly had the intent required to damage the coat of the

hapless B, but the intent required for the crime of malicious injury to property would be an adjunct to the intention to kill B." [Paragraph 25]

"The appellant's constitutional right to a fair trial was infringed by the three convictions. In my view, he was guilty of rape. The elements of the other two crimes may be discerned from the evidence, but I think that it would be an injustice to punish the appellant separately for those crimes." [Paragraph 42 - 43]

SELECTED ARTICLES

None with constitutional values.

SELECTED JUDGMENTS

S V JIMMY MOKGOSI KS65/09

Judgment delivered 20 May 2010

This was a case involving murder and briefly dealt with the admissibility of hearsay evidence provided for in The Law of Evidence Amendment Act 45 of 1988.

Pakati AJ held:

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

SELECTED ARTICLES

NONE IDENTIFIED.

SELECTED JUDGMENTS

None with Constitutional values.

SELECTED ARTICLES

None with constitutional values.

SELECTED JUDGMENTS

FORD V FORD [2004] ALL SA 396 (W)

Case heard 14 November 2001

In this case the applicant sought leave to remove the minor child from South Africa to the United Kingdom as well as leave to dispense with the requirement of obtaining the consent of from the Respondent in terms of section 1(2)(c) of the Guardianship Act 192 of 1993. In it, there is brief mention of the Constitution and its importance in ensuring that the best interests of children are taken into account.

Weiner AJ held:

"It is trite law that the guiding principle in all matters involving children is that the interests of the children are paramount. Our courts have consistently applied that principle and it is now entrenched in section 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996."

The matter was taken on appeal. The appeal with dismissed.

SELECTED ARTICLES

NONE WITH CONSTITUTIONAL RELEVANCE.

SELECTED JUDGMENTS

POLARIS CAPITAL (PTY) LTD V THE REGISTRAR OF COMPANIES AND POLARIS CAPITAL MANAGEMENT INC (C) CASE NO 11607/2005, UNREPORTED.

This case related to an application to review an order of the registrar of companies that the applicant, a South African financial services company, change its company name, after the second respondent, an American financial services company, objected to the name because it created confusion and was undesirable.

Brusser AJ held:

"... Whilst proceedings brought in terms of s 48 of the Companies Act are not review proceedings *strict sensu* (see generally *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 114 – 116: and in particular *Link Estates (Pty) Ltd v Rink Estates (Pty) Ltd* 1979 ...: *Hollywood Curl (Pty) Ltd v Twins Products (Pty) Ltd (2)* 1989 ..., it has been held that such proceedings are in the nature of a rehearing. See *Kredietbank van Suid Afrika Bpk v Rigistrateur van Maatskappye* ... and *Deutsche Babcock SA (Pty) Ltd v Babcock Africa (Pty) Ltd* 1995 ...." [Paragraph 46]

"The fact that Second Respondent is not registered with the South African registrar of companies as a company in terms of the South African Companies Act does not deprive it of *locus standi* to lodge an objection in terms of s 45 of the Companies Act. See *Charmfir of Hollywood v Registrar of Companies*..." [Paragraph 78]

"... the focus in an application in terms of s 48 of the Act is not on the extent to which a pecuniary right (constituted in this instance by the vested right) has been violated but rather on whether the existence or absence of such a vested right might materially and adversely affect the good governance and administration of companies." [Paragraph 88]

"In the context of a s 48 application the question upon which a court must be satisfied is whether the First Respondent had exercised his discretion in terms of s 45 of the Act reasonably. In other words, whether on the facts of the case, it was reasonable for the registrar to have concluded that the registration of Applicant's name does, or might, deleteriously affect the maintenance and promotion of the good governance and administration of corporate entities in the interests of the general public." [Paragraph 95]

"The imperative that a court must take into account the class of persons who are likely to be customers of the parties simply requires it to locate its determination within the current, applicable business conditions as opposed to the rarified atmosphere of academic legal constructs. See: American Chewing

Products Corporation v American Chicle Company 1948 ...; Reckitt & Colman S SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd 1993 ...; and Triomed (Pty) Ltd v Beechman Group plc 2001. ...” [Paragraph 133]

The application was dismissed.

Upheld by the Supreme Court of Appeal in **POLARIS CAPITAL (PTY) LTD v REGISTRAR OF COMPANIES AND ANOTHER 2010 (2) SA 274 (SCA).**

THE STATE V ARNOLD PRESENCE AND OTHERS, (C) CASE NO SS 108/2007, UNREPORTED.

The five accused were charged with attempted murder, kidnapping, robbery with aggravated circumstances and murder.

Brusser AJ held:

“… the facts … disclose a sadly all too familiar scenario which has repeatedly been characterised as an ugly blight on the landscape of a nascent democracy.” [Paragraph 2]

“Lawlessness and the crass disregard for the sanctity of human life know no barriers. It is not the product of any rationality, whether politically or socially based.” [Paragraph 3]

“The court must … decide whether [the state witnesses] are entitled to the discharge from prosecution for these crimes referred to in s 204 (2)(a) of the Criminal Procedure Act.” [Paragraph 8]

“[the state witnesses] were particularly poor witnesses and their testimony was roundly criticized by counsel for the defence, in many cases with a not inconsiderable degree of justification.” [Paragraph 9]

“However… s204(2) requires me only to be of the opinion that [the state witnesses] answered all questions put to them “*frankly and honestly*”.” [Paragraph 11]

“Having reviewed these witnesses evidence in my opinion they answered all questions put to them “*frankly and honestly*” and accordingly [MD] is hereby discharged from prosecution for the offences of attempted murder; kidnapping; robbery with aggravated circumstances and murder as set out in the charge sheet in this matter and [KS] is hereby discharged in respect of the offence of accessory to murder and theft; and [AM] is hereby discharged in respect of the offence of theft.” [Paragraph 12]

“Plainly, the evidence of any accomplice must in most circumstances be approached critically. The prospect of conviction may motivate such a witness to tailor his evidence so as to portray himself as innocent by trying to shift the blame onto the other accomplice. However, where the evidence of such a witness is given in terms of s204 of the Criminal Procedure Act, the witness’ fear of conviction must be attenuated. On the contrary, such a witness would in al probability be more concerned about trying to

secure immunity in terms of the section by giving his evidence frankly and honestly rather than trying to convince the court that he is innocent." [Paragraph 22]

"The doctrine of the common purpose was unsuccessfully challenged in *S v Thebus* 2003 (6) SA 505 (CC). At 527 D-H paragraph 34 Moseneke J (as he then was) remarked as follows: …" [Paragraph 27]

The five accused were found guilty as charged.

SELECTED JUDGMENTS

STELLENBOSCH WINE & COUNTRY ESTATES (PTY) LTD V SAFAMCO ENTERPRISES (PTY) LTD

Judgment delivered 3 December 2010

The application was an exception brought by a defendant/excipient to a plaintiff's/respondent's amended particular of claims to a contract of sale of immovable property. The defendant, 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. ... See: Erasmus: Superior Court Practice B1-151 and 152A-153 and the cases cited therein." [Paragraph 11]

Referring to *Major v Business Corners (Pty) Ltd* 1940, Cloete AJ concluded that "[i]n my view, and having regard to the aforegoing, 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* 1948 ... (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.

MARK ALEX MOIR V ANN VIANA (born NORDOFF)

Judgment (points in limine) 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. …"

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." Cloete AJ referred 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 (CPD) 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) …* at 233H-234A" [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]

DIANA LIEBENBERG V GERARD FRATER N.O. AND OTHERS

Judgment delivered 9 December 2010

This case related to the return of a *rule nisi* obtained by the applicant in relation to the operation of a restaurant on the first four respondents' (a trust) property. It also related to the Drakenstein municipality's consideration of an amendment to rezoning conditions – which the applicant opposed – and the approval of building works to the trust. In relation to the second part of the case:

"The Trust also contended that the Municipality is furthermore entitled to grant permission to the Trust to temporarily utilise its premises for purposes not otherwise allowed in terms of the current zoning of the property. …" [Paragraph 17]

"In my view, the first submission on behalf of the Trust has no merit. Firstly, counsel for the Trust conceded ... that s7(1) of the National Building Act applies also to [the Land Use Planning Ordinance 15 of 1985 (LUPO)], and that the Municipality can only grant approval in terms thereof once Liebenberg's appeal is dismissed. Secondly, if '*nothing*' precludes the Municipality from considering the granting of permission or authorisation in terms of s 14(1A) of the National Building Act, then this would defeat the very purpose of s 20 of the regulations made in terms of s 47(1) of LUPO. Section 14(1A) refers to such permission or authorisation being granted '*on such conditions*' as the local authority may deem fit. It could never have been the intention of the legislature that the Municipality could, of its own accord, dispense with the peremptory provisions of the regulations which govern the operation of LUPO itself, particular if regard is had to the following sections of LUPO: …" [Paragraph 18]

"To my mind, the interpretation which I have placed on the relevant legislation achieves the objective set out in s 150 of the Constitution and, on this interpretation, no conflict results as envisaged in s 148 thereof." [Paragraph 20]

SELECTED JUDGMENTS

MYERS V MINISTER OF SAFETY AND SECURITY AND ANOTHER 1998 (1) SA 258 (C)

Case heard 9 May 1997, Judgment delivered 20 May 1997

The applicant held a rank of captain in the SAPS and, as a result of having been found guilty in disciplinary proceedings, the Minister had decided to postpone him being considered for future promotions. When the applicant challenged this decision before the court, the respondents recognised that this decision was *ultra vires* and offered a retrospective promotion to the rank of major. The applicant however was not satisfied with the offer.

Fitzgerald AJ held:

"In concluding that applicant's conduct was not of a serious nature, I regard it as significant that the tender authorised on behalf of the Minister and the Commissioner impliedly accepted and endorsed a three-month deferment period. ... It must ... be emphasised that the tender was not one made in a commercial context but rather in a military context and related to the advancement and promotion of a commissioned officer to a high ranking position within the SAPS. Viewed in this context, it must, in my view, be construed as confirmation of the appropriateness of a three-month deferment period... The tender in effect authorises, with full knowledge and awareness of the nature of applicant's conduct, his promotion to the rank of major, subject to a three-month deferment. It need hardly be added that the tender implicitly contains an acknowledgement and recognition of the competence and appropriateness of applicant's promotion, notwithstanding his previous transgressions." [Page 266 C-F]

"[Counsel for the applicants] submitted that the decision not to accord to applicant the benefits of such backdated promotion constitute an impermissible discrimination which is offensive to applicant's rights under s 8 of the Interim Constitution of the Republic of South Africa Act 200 of 1993. ... " [Page 268 D-E]

"According to [counsel for the applicants], the failure to extend to applicant the aforegoing benefit of back-dating, amounts as well to administrative action in conflict with s 24 of the interim Constitution." [Page 268 F-G]

"While these submissions of [counsel for the applicants] are *prima facie* not without merit, it is my view that this aspect of the matter can be resolved simply by reference to our common law. In *Du Preez and Another v Truth and Reconciliation Commission* 1997 ... (A) ... Corbett CJ ... had regard to the common law, and 'more particularly the rules of the common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner'" [Page 268 H-J]

“The learned Chief Justice referred to the *audi alteram partem* principle and continued as follows ... : 'The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly.’” [Page 269 A]

“In my view, no basis exists for not applying these principles to the instant case. Having regard to the manner in which the various decisions affecting applicant were taken, it cannot be said that the Minister and/or the Commissioner acted fairly towards him. Indeed, Prinsloo has conceded that applicant was prejudiced thereby. Certainly, applicant's attempts to motivate his promotion appear to have been ignored and his requests for a hearing were disregarded. In the circumstances, it would be unfair to treat applicant differently from his fellow officers. In my view, his promotion to the rank of major should, like that of other officers in a similar position to that in which applicant should have been, likewise be backdated to 1 October 1993. ” [Page 269 A-C]

SOUTH AFRICAN POST OFFICE LTD V INTERLINK POSTAL COURIER SA (PTY) LTD AND OTHERS 2002 (1) SA 221 (C)

Case heard 16 August 2001, Judgment delivered 30 August 2001

The case related to a courier service and street delivery service of post that the respondents were offering, which the plaintiff alleged was in contravention with the Post Office Act 44 of 1958. They were conducting such activity before the amendment of the Act allowing for the privatisation of certain postal services. Also, none of the respondents were licensed to offer postal services. The Act required persons providing a courier service before its amendment to apply for a licence 90 days after the commencement of the relevant legal provisions.

Fitzgerald AJ held:

“There was some debate before me as to the admissibility of the legislative history of the Act and the weight, if any, to be given to representations and submissions made on behalf of sections of the courier industry in regard to the proposed Postal Bill of 1998.” [Page 228 H]

“It was, in any event, not disputed that because the words used in s 16 of the Act are not plain, regard could be had to 'surrounding circumstances', namely the circumstances which led to and prevailed at the time of the enactment of the Act.” [Page 229 A]

“I am satisfied on a construction of the Act, and its context, that the Legislature must have been aware of the fact that courier services were indeed conducted, prior to 1 April 2000, in contravention of the Post Office Act. It is also apparent that it was only because of representations made on behalf of the courier industry that s 16(5) was eventually included in the Act.” [Page 230 E-F]

“Accordingly, and having regard to the stated intention of Chapter III of the Act to regulate postal services, and to the reference in s 16(5) to 'any person' and 'a courier service', and further, to the omission of a qualified term such as 'lawfully' before the phrase 'provided a courier service' in such section (such a qualifying term is indeed used in s 10 of the Act), it seems to me that the Legislature clearly intended that s 16(5) of the Act should relate to all existing courier services, even those that operated unlawfully in respect of the reserved postal services prior to the commencement of the Act. It accordingly sought thereby to provide for the regulation of such courier services under the Act.” [Page 230 I-J and 231 A-B]

“By failing to have prescribed the manner in which applications should be made, the Minister must, by implication, be regarded as having extended sine die the 90-day period referred to in s 16(5) (b). ...” [Page 232 E-F]

The parties argued as to which interpretation should be given to the term ‘courier service’ contained in s 16(5)(d) of the Act. Fitzgerald AJ held “While it is indeed so that the absence of any specific definition of the term 'courier services' in the Act is deliberate, and while acknowledging the belated inclusion therein at s 16(5), it seems to me that there is merit in [the argument of counsel for the applicants]. ” [Page 233 G]

“Accordingly, were I to give the language used in s 16(5) (d) its ordinary, grammatical meaning ... I would, in my view, ... ignore that the Legislature did, in terms of the Act, intend to preserve a statutory monopoly (albeit while permitting courier services within the activities of reserved postal services) for the applicant.” [Page 233 H]

“Accordingly, and having regard to the attributes of a courier service as described in the representations made on behalf of the industry ..., the language used in s 16(5) (d), in my view, falls to be restrictively interpreted to exclude (notwithstanding the apparently unqualified use of the words 'deliver' and 'delivery' therein) street to street deliveries by a courier service.” [Page 233 I-J and 234 A]

The court prohibited those respondents that were not exercising any courier service before the amendment of the Act to continue such activities, prohibited the other respondents to conduct street delivery, and prohibited the first respondent from subcontracting its services.

Upheld by the Supreme Court of Appeal in **INTERLINKPOSTAL COURIER SA (PTY) LTD v SOUTH AFRICAN POST OFFICE LTD 2003 (5) SA 111 (SCA)**

SELECTED JUDGMENTS

Although the candidate has been a magistrate for over 20 years and a regional magistrate for over 10 years, he did not attach any magistrate court judgment to his application. Due to time constraints, we were unable to source these magistrate court judgments.

EDWARD STREET PROPERTY INVESTMENTS CC V JEAN LAMBRECHTS AND OTHERS, CASE NO 3657/07, UNREPORTED.

Judgment delivered 1 December 2010

The case related to an application for summary judgment to have a previous judgment, which had ordered a corporation to pay rental arrears, executed against the three respondents, who were members of the corporation which had in the meantime been deregistered. The defendants claimed they had a *bona fide* defence.

Henney AJ held:

"In the present matter there is no question of an incomplete... defence. It is an attempt to substitute the initial defence with a completely new defence. The reference [counsel for the defendants] made to the *Juntgen* decision ... would in my view find application in a deserving and *bona fide* case. It may also find application in a matter where the defendant is taken by surprise, or would not have had information at their disposal when his or her affidavit was initially deposed to. Whether it is permissible to file a supplementary affidavit for the purpose of substituting a defence would depend on the circumstances of each particular case." [Paragraph 12]

"... The defendants in my view did not make out a case to justify the filing of the supplementary affidavit because, it does not seek to rectify, amend or supplement their initial defence as set out in the initial opposing affidavit. It seems rather to substitute a defence in circumstances where the defendants would not be permitted to do so. ..." [Paragraph 13]

"The argument by counsel for the defendants is without merit for the following reasons: Firstly, it is a completely different defence than that averred in their initial opposing affidavit. This itself is enough reason to hold that it lacks bona fides; Secondly if they had this bona fide defence, they should have stated it in the initial opposing affidavit, which they purposely omitted to do; and finally, during the proceedings in the Paarl Magistrate's Court, before judgment was given, no such defence was raised. In fact, it was submitted in argument by defendant's counsel that a conscious decision was made by the three defendants, as members of the "CC", that judgment by default be granted against the "CC"." [Paragraph 16]

Summary judgment was granted.

PIET HOORNIET V THE ROAD ACCIDENT FUND, CASE NO A279/10, UNREPORTED

Judgment delivered 10 December 2010

The case was an appeal against a Magistrate's Court ruling not to grant the appellant damages for injuries allegedly sustained after a motor accident. The main issue was one of weighing evidence.

Henney AJ held:

"In my view, in his assessment and evaluation of the evidence, the magistrate took a very simplistic view. He was more concerned with the number of contradictions in the evidence of the witnesses than the importance thereof. He lost sight of the fact that the adjudication of evidence in a factual dispute is not dependant on the number of times a witness contradicts him or herself or is contradicted by another witness. An assessment of the context of the evidence is also required, as well as a consideration of the probabilities inherent in such context." [Paragraph 19]

"The magistrate... failed to have regard to the fact that under such circumstances, it is to be expected that, after almost 3 years, the eyewitnesses would not have a perfect recollection of the events. ..." [Paragraph 20]

"I am therefore of the view, that the magistrate erred in holding in favour of the respondent. He should have on the evidence of A and C found that there was a green Golf that was driven by an unknown driver in a negligent manner. He should also on the evidence of A and C have found that as a result of this green Golf that was driven negligently, it caused the driver of the bakkie wherein the appellant was a passenger to lose control, resulting in the appellant sustaining injuries and suffering damages. It follows that the appeal should succeed." [Paragraph 26]

SELECTED JUDGMENTS

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 (CASE NO NOT INDICATED)

Judgment delivered in 2009 (no precise date indicate)

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, 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), 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 are two companies owning 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 diverged 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]

“LUPO confers upon the municipality weapons to enforce compliance with conditions imposed by the council, which are not at the disposal of a court. Section 31(1) of LUPO … provides that,” [Paragraph 56]

“It is thus 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

GARY WALTER VAN DER MERWE V THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS, CASE NO 8845/08, UNREPORTED

Judgment delivered 8 April 2009

The applicant, who had been charged with contravening the Exchange Control Regulations and defeating the ends of justice, sought a relief as a *rule nisi*. He alleged that the head of the Directorate of Special Operations and one of its inspectors, who were investigating him for fraud, had acted outside their mandate because of how they interacted with the SAPS in relation to the contravention to the said Regulations, and had violated the applicant's constitutional rights and the rule of law. The applicant mainly relied on s172(1)(a) and s179 of the Constitution.

Olivier AJ held:

"There is no evidence to support the central theme, namely that Inspector Haywood was himself actively investigating the matter and that he was co-ordinating all the role players required in order to arrest and prosecute the Applicant." [Paragraph 86]

"Bearing in mind that, although the application raises questions of the infringement of the Applicant's constitutional rights, no consequential relief is sought, nor will the Applicant be deprived of exercising his rights to a fair trial, or his reliance on those rights at the trial. Taking all these factors into account I am not persuaded that I should exercise any discretion beyond the application of the rule in *Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 ... in ordering oral evidence to be adduced." [Paragraph 90]

"Section 41(1)(h) of the Constitution provides that all spheres of government and all organs of the State within each sphere must co-operate with one another in mutual trust and good faith by, *inter alia*, assisting and supporting one another... and informing one another of, and consulting one another on, matters of common interest... and adhering to agreed procedures. ..." [Paragraph 100]

"Section 41(1)(h) of the Constitution, of course, must be read taking into account the provisions of sections 28, 31 and 41 of the NPA Act, as well as the obligations imposed upon Inspector Haywood in terms of section 30 of the Act. The "agreed procedures" are set out in sections 28(1)(d) and 31 of the NPA Act. These procedures are clear and peremptory, but ... the Ministerial Co-ordinating Committee was never put in place and the practice is to communicate relevant information amongst the various authorities. I am not convinced that provisions of section 28(1) preclude the exchange of information in this manner." [Paragraph 101] Olivier SC then continued by referring to paragraphs 20, 85 and 90

Pharmaceuticals Manufacturers Association of SA and Another: in re ex parte President of the Republic of South Africa and Others 2000 (CC).

"There is no basis, in my view, for holding the decision to share the information as being unlawful or against the principles as set out by Chaskalson P in the *Pharmaceutical* case." [Paragraph 106]

"[Counsel for the respondents] pointed out that the Applicant had not yet pleaded to the charges and, in any event, has not shown that he has suffered any prejudice as a result of the involvement of any specific "unauthorised" prosecutor or, for that matter, any of the Directorate of Special Operations prosecutors mentioned in the papers. Section 106(1)(h) of the Criminal Procedure Act permits an accused to plead that the prosecutor has no title to prosecute. Should that plea be upheld the accused will in terms of section 106(4) be entitled to demand that he or she be acquitted... I agree with these submissions." [Paragraph 118]

"The new constitutional order incorporates common law constitutional principles and gives them greater substance. The rule of law is specifically declared to be one of the foundational values of the new constitutional order. The content of the rule of law principle under our new constitutional order cannot be less than what it was under the common law." [Paragraph 123]

"In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 ... (CC) the Constitutional Court sketched the role of the rule of law as a form of constitution control on the exercise of public powers as follows: ... [citation to paragraphs 48 and 49 of the case]" [Paragraph 125]

"There is, of course, a heightened expectation of procedural fairness in criminal trials. Our Constitution recognises this by entrenching the right of an accused to a fair trial and provides a non-exhaustive list of the requirements of a fair trial. ..." [Paragraph 126]

"The arguments ultimately boiled down to one issue: does this Court enjoy any discretion in relation to the declaratory orders sought by the Applicant? ..." [Paragraph 131]

"Because the Applicant seeks a declaratory relief in terms of the Constitution itself, and not in terms of section 19(1)(a)(iii) of the Supreme Court Act, the considerations set out in *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality and Others* 2001 ... (C) and *Cordiant Trading CC v Daimler Chrysler Financial Services* 1005 ... (SCA) and relied upon by the Respondents, do not seem to be immediately relevant to these proceedings, but... there remains, on the face of it, discretion in deciding applications under section 172." [Paragraph 135]

"In *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 ... (CC) O'Regan held ... that section 172 obliges the Court, once it has concluded that a provision of a statute is unconstitutional, to declare that

provision to be invalid to the extent of its inconsistency with the Constitution. The Court may then also make an order that it considers just and equitable including an order suspending the declaration of invalidity for some time. ...” [Paragraph 137]

“... [In *Islamic Unity Convention v Independent Broadcasting Authority* 2002 ... (CC)] Langa DCJ continued to point out that it is settled jurisprudence that a Court should not ordinarily decide a constitutional issue unless it is necessary to do so and it should also not decide a constitutional issue which is moot.” [Paragraph 143]

Olivier AJ then held that the constitutional issue relating to the sharing of information between the DSO and the SAPS was not moot, but that the issue of the authority of the prosecutors was moot. [Paragraph 144]

“It seems to me that an order in terms of section 172(1)(a) cannot, and should not, be given when appropriate relief is sought under section 172(1)(b). To render such relief may very well result in unintended consequences and improper results. I may, for example, if I were asked to do so, have held that very little turned on this breach and ordered the trial to proceed. But a finding in isolation may be interpreted as finding that no prosecution should take place. The fact that Inspector Haywood may have infringed the Applicant’s right to privacy by sharing the information with other authorities and a finding in that regard, should therefore not used (*sic*) to bind another decision maker (in this case the National Prosecution Authority, on whether to proceed with the prosecution, or the trial court (which may not, in any event, be bound by the finding – see *Hollington v Hewthorne* 1943 ... (CA)). They should all make those decisions and findings independently.” [Paragraph 156]

“I therefore find it inappropriate to exercise a discretion (*sic*), in the sense anticipate by Langa P in *Islamic Unity Convention*, *supra*, to decide the constitutional issues raised by the Applicant. It seems to me that these issues are best reserved for the trial court as stated in *Key v Attorney-General, Cape Provincial Division and Another* 1996 ... (CC).”[Paragraph 157]

The application was dismissed.

Upheld by Supreme Court of Appeal in **VAN DER MERWE v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2011 (1) SACR 94 (SCA)**.

PAMELA MEARA V JOHAN VAN DER MERWE N.O. (CHAIRMAN OF THE REVIEW BOARD) AND OTHERS, CASE NO 6444/2007, UNREPORTED.

Judgment delivered 21 June 2010

The Municipality (second respondent) had approved the building plans for an alteration of the applicants' house. However, that decision was reviewed after the neighbours complained once they saw the new constructions. The applicants appealed against the latter decision to the Review Board, who dismissed the appeal, which brought the applicants to seek a review of the latter decision before the Court.

Olivier AJ held:

"In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 … (CC) Navsa AJ dealt with the standard of review of (*sic*) applicable under the Labour Relations Act … and whether it is constitutionally compliant. … He held that section 145 of the LRA – which provides for a review of arbitration proceedings under auspices of the Commission for Conciliation, Mediation and Arbitration – must be read to ensure that administrative action is lawful, reasonable and procedurally fair. …" [Paragraph 20]

"The reasonableness standard was dealt with in the context of section 6(2)(h) of the Promotion of Administrative Justice Act … in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 … (CC). …" [Paragraph 21]

"In my view the plans do reflect the purpose as required by the Building Standards Act, and bearing in mind that the occupancy class H4 – Hospitality – was not yet in existence, the applicant cannot be criticised for not stating that the alterations would be used for the purposes of a bed and breakfast establishment." [Paragraph 58]

"The question is whether the operation of a guesthouse falls within the definition of the term "*dwelling*". If dwelling includes the operation of a guesthouse, then there would be no contravention of the township subdivision condition embodied in paragraph B.4(d)." [Paragraph 60]

"… it is clear to me that "*dwelling*" includes the use of the property also for the purpose of guests …, accordingly, the applicant did not fall foul of the provisions of the restrictive condition. …" [Paragraph 61]

"In the premises I am of the respectful view that the Review Board had misdirected itself in coming to the finding that it did." [Paragraph 64]

On the question of a possible bias of the Review Board, Olivier AJ held: "[counsel for the applicants] relied upon section 6(2)(a)(iii) of the Promotion of Administrative Justice Act, … namely that administrative action falls to be reviewed in the event of the administrator being biased or reasonably suspected of bias. …" [Paragraph 110]

"I have little doubt that if some association was established between the third applicant, its directors and the chairman of the Review Board, [the decision of the Review Board would be set aside on the basis that the chairman was disqualified to hear the matter]." [Paragraph 124]

"In *President of the Republic of South Africa and Others v South African Rugby Union Football Union* (*sic*) 1999 … (CC) a decision on the application by a party to proceedings before the court for the recusal of certain of its members, including Chaskalson P, on the basis of '*reasonable apprehension*' that they would be biased against the applicant, the Constitutional Court held …" [Paragraph 126]

"The question is not whether there was indeed a bias, the question is whether the applicant had a reasonable suspicion of bias." [Paragraph 128]

"In my respectful view, the applicant has made out a case of bias in respect of the decision made by the Review Board." [Paragraph 130]

"Given this finding and where the appeal is to be remitted to the Review Board differently constituted, that is, excluding the first respondent. I am of the view that any reasonable litigant in the position of the applicant would have a legitimate reason for concern where it appears that there is co-operation between the decision-maker and a party who had appeared before the decision-maker in the review process." [Paragraph 132]

The decision of the Review Board was set aside.

SYNTELL (PTY) LTD V THE CITY OF CAPE TOWN AND ACTARIS SOUTH AFRICA (PTY) LTD, CASE NO 17780/2007, UNREPORTED.

Judgment delivered 13 March 2008

The applicant was unsuccessful in its application for a tender. It exercised its right to internal appeal provided in the Local Government: Municipal Systems Act, which suspended the second respondent, to whom the tender was granted, from executing the tender until the outcome of the appeal. However, in the meantime, the High Court decided on a similar case (*Reader and Another v Ikin and Another* 2007 (CPD)) and interpreted the Act in such a way that the City considered the right to internal appeal void. The applicant challenged that interpretation in the present case.

Olivier AJ held:

"It is trite that the conduct and determination of a public tender process amounts to administrative action within the meaning of s33 of the Constitution … and the Promotion of Administrative Justice Act … Syntell is clearly a party whose rights are affected by the tender award to Actaris. Those rights include, not least, the right to just administrative action. …" [Paragraph 30]

"I pause to point out that this finding [whether or not the Reader judgment still permitted an internal appeal by the party aggrieved by the City's award of a tender to another party] has far reaching

consequences: first, it would seem that only an unsuccessful applicant would have the right to the internal appeal mechanism created by section 62. Any other interested party would not have this remedy available to it as, invariably; (*sic*) it would be argued by the successful applicant that rights had accrued to it. Second, it would result, one would imagine, in an increase in the number of reviews brought before court, a process which is more expensive, time consuming and require a more onerous burden to discharge than doe san internal appeal." [Paragraph 35]

"[Counsel for the respondents] submitted that Syntell's argument proceeds from a misdirected characterisation of the facts, which is premised on the contractual extension by the City to third parties of a right to appeal in terms of s 62 of the Systems Act. That was plainly not the position. Section 62 operates, where it applies, *ex lege* and not *ex contractu.*" [Paragraph 41]

"… There is no reason to be pessimistic about the constitutional implications of distinguishing between different kinds of decisions and appeals. First, one is not dealing with a "suspect category" as referred in section 9(3) of the Constitution, so the reference to "discrimination" is inapposite. One is simply concerned with a case of "differentiation", and a differentiation will only be set aside if there is no rational connection between the action and the purpose it is intended to achieve. One can think of many reason (*sic*) why it would be rational to permit existing suppliers to the City who are tendered for a consolidated contract to have a right of appeal against a decision refusing their tenders, and yet not to grant a right of appeal to a home-owner aggrieved by a decision to approve a building application submitted by a neighbour. …" [Paragraph 52]

"The tender award may … not legally be implemented at this stage. In terms of the tender award letter, no rights would accrue to Actaris until any appeal in terms of the Systems Act had been finalized. The word "*finalized*" in the tender award clearly contemplated a final determination or decision on the merits of the appeal by the relevant appeal authority and not … a decision by a different functionary that no appeal was available. The very condition to which the accrual of rights pursuant to the tender was made subject presupposed that unsuccessful tenderers did have a right of appeal. It is no answer for the City now to suggest that, in the light of the *Reader* judgment, the condition must be regarded as having been based on a wrong premise (unless the City is successful in its appeal against that decision). The City is bound by its own decisions (even if flawed) unless and until the are set aside (*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 … (SCA)). The City also cannot depart from its Supply Chain Management Policy, even if any of its provisions appear to have been inserted on the basis of a wrong interpretation of a law. In the absence of any final decision on the merits of Syntell's appeal, no rights in relation to the tender can thus have accrued to Actaris." [Paragraph 60]

"In the circumstances I am not persuaded by the argument that the tender had been finally awarded; that the letter could not detract from the finality of the award – and hence that rights had accrued." [Paragraph 81]

The Court declared that the applicant was entitled to appeal and that the tender award could not be implemented until the outcome of the appeal.

SELECTED JUDGMENTS

IRVIN & JOHNSON LTD V TRAWLER & LINE FISHING UNION & OTHERS 2003 (24) ILJ 551 (LC)

Judgment delivered 17 December 2002

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" (para 28), 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 (see section 2(a)). 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]

"… when 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]

"Compulsory testing is not limited to the case of taking a sample from an employee by physical force. In the absence of consent, such conduct would amount to an assault, and it would not require any statutory provision in order to render it unlawful. By compulsory testing is meant, in this context, the imposition by the employer of a requirement that employees (or prospective employees – see section 9 of the Act) 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. This is a view which in my opinion is fortified by a consideration of the consequences which attach to a violation of section 7. Medical testing is not itself an act of discrimination. Section 7 is a pre-emptive 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 (section 10(6)(a)). 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

Rogers AJ held:

The plaintiff, a bank, sought summary judgment against the defendant company on four mortgage bonds. The defendant raised an issue of constitutionality of the National Credit Act 32 of 2005 (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. [Paragraphs 1 to 5]

The question of legality raised by the defence was whether s 228 of the Companies Act 61 of 1973 "apply to the registration of mortgage bonds over a company's main asset. …" [Paragraph 10]

"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 and Others* 2004 … (CC) 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 the 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.

They attempted to engage with the DoHA and the City to convey their grievances but did not, in their opinion, receive appropriate consideration.

Rogers AJ held:

"Prior to the new constitutional era in South Africa 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, *Union Government v Tonkin* 1918 ... *and South African Railways and Harbours v Smith's Coasters (Prop) Ltd* 1931 ..., the presumption has ancient roots in English constitutional law, the position of the monarch and sovereign prerogative. ... This was said at a time when laws in this country were assented to by the Governor-General or some other official as a representative of the Crown. ..." [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 (see, for example, *Minister of Water Affairs and Forestry and Others v Swissborough Diamond Mines (Pty) Ltd and Others* 1999 ... (T); see also *Somfongo and Another v Government of the Republic of South Africa and Others* 1995 ... (TkSC) ...)." [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 (s1(c)). 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]

"Finally on this aspect, I see that in *Director of Public Prosecutions, Cape of Good Hope v Robinson* 2004 ... (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 (see paras 26-31). ..." [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. ... the 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 (see, generally, *East London Western District Farmers' Association and Others v Minister of Education and Development Aid and Others* 1989 ... (A); .... For a recent statement by this court of the

factors which typically fall to be assessed in determining reasonableness, see *Laskey and Another v Showzone CC and Others* 2007 ... (C) ....” [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 – perhaps they are, but on the other hand they have pressing calls on their resources. They need to prioritise their activities... 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 on … (LAWSA …). 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 (cf *Herrington v Johannesburg Municipality* 1909 ...; *JL Armitage v Pietermaritzburg Corporation & GS Armitage* 1908 ..., being two of the cases cited in *LAWSA* ... – both cases of statutory authority). I regard this approach as all the more apposite since the advent of the Constitution. 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]

"... I am not prepared to accept the proposition that if I were to issue an interdict I would effectively be ordering the Department to commit an illegality (namely, a violation of its duties under the Refugees Act). The Department cannot cure one illegality by another. If the unlawful activities … are interdicted and if the result is that the Department thereby falls into breach of its statutory duty to receive asylum applications, that will not be because of the court's order but because the Department has failed over a substantial period of time to take the steps necessary to put itself in a position to provide a lawful service." [Paragraph 175]

"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. Those choices have to do with the way in which the pool of public funds available for the attainment of various governmental objectives are allocated and with striking a balance between the rights of land users and the rights of asylum seekers. 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.

SELECTED ARTICLES

'WHEN ALL ELSE HAS FAILED: ILLEGAL STRIKES, ULTIMATUMS AND MASS DISMISSALS' (1991) *Indus. L. J.* 1171 (co-authored with Mr Jeremy Gauntlett SC).

The article examined whether the legality or illegality of a strike can determine the fairness of a subsequent dismissal.

"The strike action may or may not be illegal; this in itself will not determine whether a consequential dismissal is an unfair labour practice, as defined by the Labour Relations Act." (Page 1171)

"An employee who goes on strike or refuses to work commits a material breach oh his contract of employment for which he may be summarily dismissed. This is so whether the strike is legal or illegal. It follows that even the summary dismissal of an employee in these circumstances would be *lawful*." (Page 1172).

"The legislature has defined the circumstances in our law in which a strike is *legal.* To engage in a legal strike is however not to acquire immunity from dismissal. The fairness of dismissal … is a separate question to be determined in the light of all the relevant circumstances." (Page 1172)

"The court will enquire whether the strike was 'acceptable' or 'legitimate' within the framework of the collective bargaining process. The acid test is whether there is still a reasonable prospect of demands being modified. … Where a legal strike is not 'legitimate' or 'acceptable' in the sense we have described, the court is less inclined to protect the strikers from dismissal." (Pages 1172 and 1173)

"Even where the circumstances are such that the employer is entitled as a matter of substantive fairness to dismiss striking employees, he must implement his decision in a fair manner." (Page 1173)

"It is immediately apparent from the decisions of the industrial court that employees who strike illegally are less likely to receive the protection of the court." (Page 1174)

"It has been suggested that the rationale for this fundamental distinction is the doctrine of unclean hands or the fact that the employee, having repudiated his contract, has waived his rights to a hearing (and presumably other aspects of fairness). Both explanations on analysis are not really satisfactory. The jurisdiction created for the industrial court by statutory definition of 'unfair labour practice', read with the attendant procedural provisions, is broad and pragmatic." (Page 1175)

"The real rationale, we suggest, is that a serious disregard for the prescribed machinery will generally render the further prospect of conciliation remote. It will bring about a degree of industrial anarchy in which an employer must generally be free to resort to the ultimate weapon. The doors of the court are

not automatically barred to the participant in the illegal strike who is dismissed. He will however have to establish exceptional circumstances which render his dismissal an unfair labour practice." (Page 1175)

"Material illegality (as opposed to a minor technical illegality) is of such significance that the approach of the industrial court is to refuse relief unless the strikers advance a satisfactory explanation for their conduct." (Page 1175)

"What precise circumstances may be considered in the light of these cases to be relevant?" (Page 1176)

"In short, before the court will assist participants in an illegal strike, (i) the relevant circumstances giving rise to the illegal strike must not have been created by the employees; (ii) the employees must have been faced by such conditions that the resultant strike was their only reasonable option; (iii) all other reasonable channels (and in particular, collective bargaining and the conciliation machinery of the Act) must have been closed or in the special circumstances of the case, inappropriate to them." (Pages 1176 and 1177)

"The point of departure is, it must be plain, that the strike action is illegal. As already noted, at common law it is also unlawful. The statutory definition of 'unfair labour practice' is however such that a court may yet find a consequent dismissal to be unfair. Ordinarily the court will not do so, because that would be to subvert the statutory mechanism for achieving conciliation and averting the use of the last resort of strike action. An illegal strike will in most cases be a serious form of misconduct justifying (as a matter of substantive fairness) dismissal. However, it has to be acknowledged that circumstances of an exceptional nature can and do arise where a dismissal consequent upon strike action is unfair, notwithstanding any illegality of the strike itself. … It must appear that either the illegal strike action was indeed a weapon of despair, … or at least that the circumstances were such as to render reasonable the strike response." (Page 1178)

"The problem of procedural fairness in relation to the dismissal of illegally striking workers often relates to the use of mass ultimatums. Three aspects may be distinguished in this regard." (Pages 1178-1179)

"The first is the period allowed. … In each instance it must be asked whether the duration was reasonably adequate to achieve the purpose of an ultimatum…" (Page 1179)

"The second is the fact that a mass ultimatum usually results in all striking employees being treated without differentiation. Again, the prevailing circumstances will determine whether this is unfair. Mass action itself militates against individual disciplinary action. It is sometimes suggested that this is so only in respect of the initial decision, but that the effect may be ameliorated by differentiation after the event. The difficulty in this regard is that the disciplinary action, if fair in all the circumstances at the time it is taken, can hardly become unfair because it is not abandoned. Even less feasible would be to subvert the effect of the ultimatum – and even the dismissal itself - by announcing that it is, in effect, subject to a

resolutive condition: to some, upon the basis of a further decision yet to be taken, it may not apply." (Page 1179)

"The third is the failure to give a hearing. …" (Page 1179)

"The conduct of the strikers is of great importance. If they indicate an unwillingness to listen, let alone a threatening attitude, any form of hearing or inquiry may be rendered not reasonably practicable. … The inquiry is simply whether the employer in fact acted fairly in the light of all the known circumstances." (Page 1180)