SUBMISSION AND RESEARCH REPORT REGARDING THE INTERVIEW OF JUSTICE MOGOENG MOGOENG FOR THE POSITION OF CHIEF JUSTICE

Introduction

1. The Democratic Governance and Rights Unit (DGRU) is an applied research unit based in the Department of Public Law at the University of Cape Town. The mission of the DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary focus is on the relationship between governance and human rights, and it has established itself as one of South Africa's leading research centres in the area of judicial governance, conducting research on the judicial appointments process and on the future institutional modality of the judicial branch of government.
2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, monitoring and commenting on the interviews of candidates for judicial appointment.[1]
3. The DGRU has prepared a research report which we hope will be of assistance to members of the JSC in conducting the interview of the nominee for the position of Chief Justice, and to other interested stakeholders in evaluating the nominee and the interview process. We will now deal with the nature and aim of the report, before turning to consider some of the factors which, we submit, should inform the appointment of a Chief Justice.

The nature of this report

4. This report applies the same basic principles as previous DGRU reports. We set out summaries of the nominee's judgments, as far as possible in their own words. We do not advocate for or against the appointment, and do not provide analysis or criticism of the judgments summarised. Our intention in doing so has always been to attempt to move beyond the often partisan and personalised debates surrounding the suitability of candidates for judicial appointment. Instead, we hope to further a deeper analysis of the criteria in terms of which judicial appointments are made, and enable stakeholders to assess how a candidate's judicial track record matches up to those criteria.

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

5. Having said this, this report differs in certain respects from our usual reports. It is significantly longer, and focuses on many more judgments than would usually be the case. The reason for this is twofold: as there is only one nominee, it has been easier to cover the nominee's judicial record in greater detail. Secondly, the importance of the position of Chief Justice justifies subjecting the record of any candidate to that position to careful scrutiny.
6. We elaborate on the second point. The position of Chief Justice is not only of fundamental importance because of the incumbent's role as the head of the Constitutional Court, but also because of the increasing expansion of the powers and authority of the Chief Justice as head of the judiciary. The ongoing reforms to the system of judicial governance in South Africa vests significant powers and responsibilities in the Chief Justice as head of the judiciary and these may well continue to increase in the coming years. It is therefore crucial that any nominee be assessed not just in terms of their ability to lead the Constitutional Court, but also in terms of their ability to provide leadership to the judiciary as a whole.
7. Should the current nominee be appointed, he would serve for ten years as Chief Justice. This period is likely to be a crucial one in the development of new systems of judicial governance, as well as in the continued development of South Africa's constitutional jurisprudence. It is therefore essential that the JSC (as well as other stakeholders) have as much information available to them as possible in order to make best use of the interview process.
8. In an attempt to provide as much information on the nominee's judicial record as possible, we have moved beyond the normal scope of our research reports. We have not limited our selection of judgments to particular issues or a particular time period. Indeed, although we cannot be certain that the judgments summarised represent a comprehensive selection, we have included all judgments which could be located using a keyword search on the Jutastat and LexisNexis online searches.
9. We have generally not attempted to include unreported judgments, due to time constraints and the difficulties inherent in obtaining these judgments. However, some unreported judgments have featured prominently in the public debate about the nominee's suitability for the position of Chief Justice. This includes one judgment where the nominee did not deliver judgment himself, but concurred in the judgment of a colleague. Where we have been able to locate these judgments, we have included them in order to allow readers of the report to assess issues which have become part of the wider public debate.
10. Similarly, there has been considerable public discussion of what has become known as the nominee's "silent dissent" in the recent Constitutional Court case of *Le Roux v Dey*. We have included a brief summary of the issue and the criticism made on this point, in an attempt to explain why this issue has attracted such attention, and in the hope that it will assist in any questions commissioners may wish to ask on the issue.
11. Furthermore, and again in the interests of having as full a record as possible available about the candidate, we have included some judgments by the Supreme Court of Appeal where judgments by the nominee have been taken on appeal. In many of these cases, the original High Court judgment could not be found (in such instances, the judgments of the Appeal Court are included under a separate heading, entitled "Supreme Court of Appeal"). In the interests of providing as much relevant information as possible on the nominee, we have included the Appeal Court judgments in the report. These judgments are not necessarily

exhaustive of every occasion on which the Appeal Courts have considered the nominees' judgments. They were simply what was found in the course of our search.

12. In broadening the scope of our report as described, we do not intend to advocate implicitly for or against the nominee. We leave an assessment of the merits of the proposed appointment to others. We reiterate our view that the importance of an appointment to the position of Chief Justice is such that a high degree of scrutiny of a candidate's track record is justified and entirely desirable.
13. We now turn to consider the substantive criteria and qualities which we think should inform the appointment of a Chief Justice.

Criteria for the appointment of the Chief Justice

14. We note that anyone who is already a judge has been vetted as fit and proper and appropriately qualified to be a judge under section 174(1) of the Constitution. When appointing a Chief Justice (assuming it be someone, as with the case of the current nominee, from the ranks of the judiciary) the JSC should look at their track record chiefly since appointment as a judge. The fact that a candidate has previously been assessed as fit and proper and qualified to be a judge does not necessarily mean that a candidate has distinguished themselves.
15. Since impeachment may only take place in exceptional circumstances, and since less than good performance (e.g. undue delays in delivering judgment) is unlikely to attract formal sanction from the JSC, it is important to scrutinise a candidate's judicial record to see if they should be appointed as Chief Justice. The question that must be asked is whether a candidate is suitable to be appointed as Chief Justice. The vetting process should be directed towards both the functions of the office and the qualities that are required.
16. We deal first with the **functions of the office**. We note that the responsibilities vested in the Chief Justice have increased significantly in recent years. We note further that the Chief Justice may be required to represent the Republic on international bodies, such as the Southern African Chief Justices' Forum.[2] Therefore, part of the analysis of the suitability of a candidate for the role of Chief Justice ought to include consideration of their suitability for these leadership roles, including representation in international forums. Thus, a Chief Justice needs to instil confidence as a leader at these various levels where leadership is required, with the ability to represent South Africa's judiciary and the country more generally at the highest level.
17. Hence, we respectfully submit that a Chief Justice should have the following qualities:
    a. Stature as a lawyer/jurist: has a candidate acquired respect within the judiciary and the legal profession? Only a person who enjoys this respect will be able to lead the judiciary and inspire confidence.
    b. Leadership qualities are crucial, and in this regard it is important to think about the kind of leadership that South Africa needs at this point in its institutional and constitutional history. This is not only about a person's record or list of positions, but about their style and temperament, their ability to give space for others to grow

[2] Another example of this type of role was seen in former Chief Justice Langa's membership (while Deputy Chief Justice) of the Judicial Group on Strengthening Judicial Integrity, the body which developed the seminal Bangalore Principles of Judicial Conduct of 2002.

and flourish, their ability to forge consensus and give direction where this is required but also to allow dissent and debate. Interrogating leadership qualities is an important aspect of the vetting process. This encompasses an ability to lead at various levels, and in respect of a wide range of functions.

c. The ability to lead the Constitutional Court itself is of great importance, as the Chief Justice chairs the deliberative discussions. So a nominee's stature and intellect, as a lawyer and a jurisprudential thinker and innovator, his or her esteem amongst his or her colleagues, and ability to chair and lead the Constitutional Court itself, is very important.
d. Independent-mindedness is, we submit, crucial for a Chief Justice. The JSC should look for evidence of independent-mindedness and scrutinise a person's record for evidence that corroborates the necessary degree of independent-mindedness in the candidate. Whilst this may impact on contested political issues, it must be done without reference to party political interests.
e. An understanding of the proper role of the judiciary within the three arms of government is important, because the judiciary is always potentially in tension with the other arms of government, given its powers, so its role must be properly understood. This includes an understanding of the space for co-operation with other arms of government and of the limits of the judicial role, so as to ensure the Constitution's values are realised.
f. A Chief Justice's integrity must be impeccable: This would require not only a clean track record, but also an understanding of all the issues underlying the judicial code of ethics. So a full understanding of matters like conflicts of interest is important, as the public may assess the integrity of the entire branch of government through the standards set and imposed by the Chief Justice.
g. Commitment to constitutional values: A candidate's track record is vital here. Judges, despite having been assessed to be suitable for appointment as judges, may have a good or a less good record on the bench. Their judgments should be interrogated to ensure that they have demonstrated a proper commitment to constitutional values.
h. Fairness is fundamental: both as a judicial quality and as a leadership quality, in terms of how a candidate would run the highest court and lead the judicial branch of government.
i. A suitable temperament: Relevant considerations include courtesy and politeness, respectfulness (given the dignity of the office), open-mindedness, and also decisiveness and thoroughness.
j. Capacity for hard work: The Chief Justice probably has the most demanding job within the judiciary, as not only is the Chief Justice the head of the judiciary, but also a judge on the Constitutional Court.

18. Finally and distinctly, it is important that a candidate has the vision and ability to continue the project of transformation of the judiciary and the institutional reform of the judicial branch as a whole, so as to promote access to justice. These are not platitudes, but constitutional imperatives that need to be realised in practical terms. The Chief Justice is

uniquely placed to drive reform which achieves these objectives, so vision about what needs to be done is important, as well as an ability to deliver by forging consensus amongst a full array of political and legal stakeholders. The new Chief Justice should have the aptitude, therefore, and the sense of purpose necessary to be able to sustain with the ongoing process of judicial governance reform, in order to preserve the institutional integrity and the full independence of the judicial arm of government for the long term.

19. In light of these considerations, we now turn to set out the summary of the nominee's judgments, compiled in terms of the criteria set out above. The judgments are organised per court, as follows:

Acknowledgements

Under the supervision of Associate Professor Richard Calland, Director: DGRU, this report was prepared by DGRU researchers Chris Oxtoby, Abongile Sipondo and Sarai Chisala. The criteria for the appointment of a Chief Justice advanced above were developed initially by Advocate Susannah Cowen, who is Senior Research Associate of the DGRU.

DGRU

26 August 2011

SELECTED JUDGMENTS

CONSTITUTIONAL COURT

THE CITIZEN 1978 (PTY) LTD AND OTHERS V MCBRIDE (JOHNSTONE AND OTHERS, AMICI CURIAE) 2011 (4) SA 191 (CC)

Case heard 30 September 2010, Judgment delivered 26 May 2011

The case concerned an action for defamation based on statements made in editorials and articles published in The Citizen newspaper, arguing that the respondent was unfit to hold a position as Head of a Metro Police Force, and that the respondent was a murderer. Writing for the majority, Cameron J held that the Promotion of National Unity and Reconciliation Act did not make the fact that the respondent had committed murder untrue, nor prevent him being described as a criminal. Thus, the Citizen's main appeal against the finding of defamation in the courts below was upheld. However, a statement that the respondent had not been contrite was defamatory. Ngcobo CJ (Khampepe J concurring) found that balancing the rights to freedom of expression and human dignity required the facts on which the citizen's comment was based to include reference to the granting of amnesty. Ngcobo CJ found this to have been done sufficiently, but would have upheld the respondent's cross-appeal regarding allegations relating to dealings with gun dealers in Mozambique. Mogoeng J agreed that the statement regarding lack of contrition was defamatory, and agreed with Ngcobo CJ's finding regarding the allegations about association with gun dealers in Mozambique. However, Mogoeng J dissented further from both judgments:

"I, however, part ways with Ngcobo CJ and Cameron J with regard to their conclusion that statements that Mr McBride is a murderer and a criminal are protected by fair comment and are not malicious. In my view these statements are part of a well-orchestrated character-assassination campaign waged by the Citizen against Mr McBride." [Paragraph 205]

"Truth-telling during the amnesty process was thus not intended to lay the foundation for the endless vilification of South Africans who grossly violated human rights, either in the furtherance of the crime of apartheid or the struggle for freedom from apartheid, in the name of freedom of expression. Nor was the truth, uncovered during the amnesty hearings or even during the trials of those who committed gross human rights violations, intended to be used to undermine the pursuit of national unity and reconciliation. On the contrary, this truth was supposed to be used as the brick and mortar for laying a firm foundation for enduring peace, national unity and reconciliation. Amnesty was, so to speak, designed to help level the playing field and enable all South Africans to make a new beginning." [Paragraph 213]

"We live in an African country which is rapidly being denuded of the values and moral standards which once characterised and defined the very nature of who a substantial majority of its citizens were and what they stood for. Botho or ubuntu is the embodiment of a set of values and moral principles which informed the peaceful co-existence of the African people in this country who espoused ubuntu based on, among other things, mutual respect. Language was used in moderation and foul language was frowned upon by the overwhelming majority. A forgiving and generous spirit, the readiness to embrace and apply restorative justice, as well as a courteous interaction with others, were instilled, even in the young ones, in the ordinary course of daily discourse. ..." [Paragraph 215]

"Ubuntu gives expression to, among others, a biblical injunction that one should do unto others as he or she would have them do unto him or her. The law, order, generosity, peace and common decency that previously characterised many communities in South Africa were attributed to an unwavering commitment to the philosophy of ubuntu. No wonder the drafters of our interim Constitution deemed it meet to cite ubuntu as one of the ingredients essential to the healing of our country. Sadly, a new culture has taken root and continues to cancerously eat at botho." [Paragraph 216]

"... [T]he right to human dignity must always be allowed to assume its rightful place even when the right to freedom of expression enters the equation. Sufficient room and flexibility have in any event always been allowed to accommodate truthful yet defamatory remarks made in the heat of the moment, in jest and even in circumstances where a somewhat strong language is essential for the effective communication of the message" [Paragraph 220]

"... Another article, which described Mr McBride as 'Bomber McBride', reinforces the conclusion that this was not just a series of articles intended to expose an ill-considered attempt to appoint a person to a position for which he is 'blatantly unsuited'. They are an outward manifestation of a well-orchestrated character-assassination mission." [Paragraph 228]

"Anyone genuinely driven by a civic duty to prevent the subversion of metropolitan security, consequent upon the appointment of a metro police chief who is disqualified for the job, would have checked the facts before the articles were published. Surprisingly, the Citizen chose not to undertake this simple verification exercise to satisfy itself whether, (i) Mr McBride ever expressed contrition for what he did; and (ii) whether the arrest and failure to prosecute Mr McBride for his alleged association with alleged gun dealers were fully explained before, at the time of, or after the quashing of charges against Mr McBride by the Supreme Court of Mozambique, or at the press conference at the airport which has since become known as OR Tambo International, and whether information in this regard was available. This conduct lines up with the Citizen's apparent determination to depict Mr McBride as being amongst the dregs of humanity. And this level of bitterness evinces a desperate effort to crush Mr McBride for some deliberately withheld reason, somehow linked to the bombing, under the guise of an honest attempt to merely oppose his appointment by reason of his alleged unsuitability." [Paragraph 230]

"Freedom of expression is a right to be exercised with due deference to, among others, the pursuit of national unity and reconciliation. It cannot be the ground for excusing the *Citizen* from liability that it made the defamatory statements in the course of exercising its right to freedom of expression, whereas it did so in a manner that infringes the dignity of Mr McBride and impairs the pursuit of national unity and reconciliation." [Paragraph 231]

LE ROUX AND OTHERS V DEY (FREEDOM OF EXPRESSION INSTITUTE AND RESTORATIVE JUSTICE CENTRE AS AMICI CURIAE) 2011 (3) SA 274 (CC)

Case heard 26 August 2010, Judgment delivered 19 February 2010

The case involved a claim for damages by the respondent against the applicants. As schoolchildren, applicants had computer-generated a picture in which the face of the respondent, then a deputy principal of their school, was super-imposed alongside that of the principal on an image of two naked men sitting in a sexually suggestive position. Respondent's defamation claim succeeded in the Supreme Court of Appeal.

Writing for the majority of the Constitutional Court, Brand AJ (Ngcobo CJ, Moseneke DCJ, Khampepe J, Mogoeng J and Nkabinde J concurring) upheld the SCA's finding that the image was defamatory. In a separate judgment, Cameron J and Froneman J found that the image was not defamatory, but that it infringed on the respondent's personal dignity. Yacoob J dissented, finding that the image was neither defamatory nor an infringement of the respondent's injured feelings. Skweyiya J agreed with Yacoob J, but for different reasons.

The role of Mogoeng J in this case has attracted criticism[3] stemming from the following passage in the introduction to the judgment given by the court:

> "All members of the court ... endorse the exposition in the judgment of Froneman J and Cameron J about apology ...and, save for Mogoeng J, regarding expression about constitutionally protected groups..." [Paragraph 9]

Regarding expression about constitutionally protected groups, Froneman J and Cameron J held:

"The Bill of Rights, while respecting sexual orientation, and protecting gay and lesbian people against unfair discrimination, also protects autonomy of choice in relation to sexual orientation. ..." [Paragraph 183]

"It therefore cannot be actionable simply to call or to depict someone as gay even though he chooses not to be gay and dislikes being depicted as gay — and even though stigma may still surround being gay. To hold actionable an imputation based on a protected ground of non-discrimination would open a back door to the enforcement by the law of categories of differentiation that the Constitution has ruled irrelevant." [Paragraph 185]

"Here ... the injury in such a case would have to be located in some further overlay or imputation ... The mere fact of falsely stating that a person has made a particular constitutionally protected personal choice, different to that person's actual constitutionally protected personal choice, is insufficient to found an actionable injury in the absence of some further imputation of indignity associated with it." [Paragraph 186]

"Dr Dey ... pleaded simply that it was defamatory and injurious to convey that he was, inter alia, in a homosexual relationship or that he himself was homosexual. This, by itself, cannot found an action in law, and if that had been his entire pleading, it would have had to fail." [Paragraph 187]

"The image showed Dr Dey's face on a naked body in a sexually compromising position, being photographed. The affront this caused to his feelings is in our view actionable. The wounded feelings relate to constitutionally sanctioned and protected personal choices, and are legally compensable." [Paragraph 189]

Commentators have questioned why Mogoeng J did not write a judgment to explain why he did not associate himself with this section of the judgment of Froneman J and Cameron J. They argue that a failure to provide reasons for a disagreement with other judges allows a judge to avoid the accountability

[3] See Pierre De Vos, ***The silence of Justice Mogoeng***, available at http://constitutionallyspeaking.co.za/the-silence-of-justice-mogoeng/

that judges are normally subjected to in a constitutional democracy. Reasoned judgments are at the heart of a constitutional democracy based on the rule of law, since it allows the constitutional dialogue to flourish, and acts as a safeguard against arbitrary decisions. The principles of openness, transparency and accountability, to which judges of the Constitutional Court should be particularly attuned, were, it is argued, not served by the judge's silence on this issue.

BETLANE V SHELLY COURT CC 2011 (1) SA 388 (CC)

Case heard 24 August 2010, Judgment delivered 24 November 2010

Applicant, a lay litigant, was a former tenant of premises belonging to the respondent. Orders had been made by the High Court, effectively restraining the applicant from petitioning the Supreme Court of Appeal for leave to appeal. The orders would apply until the applicant paid costs or furnished security for them. Applicant approached the Constitutional Court on the ground that the orders infringed his right of access to court. The respondent subsequently abandoned the orders, leaving the court to consider whether there was a live constitutional issue remaining, and if so whether it was in the interests of justice to pronounce on it.

Mogoeng J, for a unanimous court, held that:

"It follows from these prayers that he [the applicant] had three main concerns: first, the security for costs orders; second, his ejectment from the residential premises; and third, the eviction order itself. In all these desperate attempts to hold on to the accommodation, the applicant was not represented." [Paragraph 16]

Mogoeng J then dealt with the issue of direct access:

"It was only when the applicant approached this court... that these orders were attacked on the basis that they infringed his fundamental right of access to courts. This then is an application for direct access to this court, to argue a point that was not raised in the High Court. ..." [Paragraph 22]

"In this case ... the abandonment of the restraint orders is dispositive of the substance of the application for direct access. The parties are agreed that there is nothing left of the security for costs issue to be determined by this court. The application for direct access is, for these reasons, to be dismissed on the basis that the issues connected with direct access have now been rendered moot, and it is therefore not in the interests of justice for this matter to be heard by this court." [Paragraph 23]

Mogoeng J then considered the applicant's application for leave to appeal:

"When the respondent abandoned all the orders that effectively barred the applicant from approaching the Supreme Court of Appeal, the applicant then became free to do what he had always wanted to do. The way was cleared for him to petition the Supreme Court of Appeal for leave to appeal against the eviction and costs orders." [Paragraph 25]

"It is common cause that there are factual disputes relating to the granting of the eviction order, which are still lingering on. Further evidence might even have to be led for all the key issues to be properly ventilated. ... The applicant acknowledges that there is a dispute of facts." [Paragraph 26]

"Although eviction by its very nature implicates the right to housing and, therefore, raises a constitutional issue, it is not in the interests of justice to entertain this appeal at this stage. Besides, it is inappropriate for appeals to be heard by this court directly from the High Court without the benefit of the decision of the full court of the High Court or the Supreme Court of Appeal." [Paragraph 28]

"...A case cannot be made out in the replying affidavit for the first time. It was for this reason that some of the allegations made in the replying affidavit, such as the unlawfulness of the writ of execution, were challenged. The applicant's situation is special, though. He is a lay person who, until recently, did not have the benefit of legal assistance. When he approached this court, he did so on his own. Consequently, his notice of motion and founding affidavit did not properly set out all the relevant issues. It was as a result of the legal advice that was not previously available to him that he became aware of the need to attack frontally the lawfulness of the writ." [Paragraph 29]

"To the applicant's credit, the notice of motion does reveal his desire to challenge the execution of the eviction order. He alludes to that desire by praying for his reinstatement to the residential premises. A compassionate reading of his notice of motion, mindful that it was settled by an unrepresented lay litigant, would lead to no other conclusion. ..." [Paragraph 30]

Mogoeng J thus found that whilst the leave to appeal application ought to be dismissed, leave to appeal ought to be granted in respect of the application to set aside the writ. Mogoeng J turned to consider the lawfulness of the writ, noting that the writ was granted and executed whilst the appellant's application for leave to appeal was pending in the High Court:

"I am satisfied that the writ is unlawful, and it falls to be set aside.
Ordinarily, an eviction that is carried out pursuant to an invalid writ of execution amounts to spoliation. The evictee would therefore be entitled to restitution. However, when the premises are already occupied by a bona fide third party, they are as a matter of fact not available, and restitution is impossible. ... The effect of the setting aside of the writ of execution in this case is merely to allow the applicant to exercise any right that flows from this order, as he might be advised to do" [Paragraphs 35 – 36]

MALACHI V CAPE DANCE ACADEMY INTERNATIONAL (PTY)LTD AND OTHERS 2010 (6) SA 1 (CC)
Case heard 25 March 2010, Judgment delivered 24 August 2010.

This case was an application to confirm an order of constitutional invalidity in respect of sections 40(1) and (3) of the Magistrates' Court Act. The sections empowered a magistrate to order the arrest and detention of a debtor where a creditor reasonably believed that the debtor was about to flee the country in order to avoid paying the creditor (*tanquam suspectus de fuga*).

Mogoeng J identified the constitutional right most directly impacted by the applicant's challenge to be the right to freedom and security of the person under section 12(1).

"The main issue ... is thus whether arrest *tanquam suspectus de fuga* ... is consistent with the Constitution. The issue is broken down as follows:

(i) Does the arrest of a potential debtor in terms of the impugned provisions limit the arrestee's right to freedom of the person? More specifically, is it 'arbitrary' or 'without just cause'?
(ii) If the right is limited, is the limitation justifiable?
(iii) If not, what is the appropriate remedy?" [Paragraph 15]

Mogoeng J then analyses the history of arrest *tanquam suspectus de fuga*, before turning to consider the constitutionality of the impugned sections:

"...[T]he essence of the nature and purpose of this arrest, which is to stop an alleged debtor from fleeing this country with the intention of preventing the adjudication of the dispute within it. ...[T]he object of the arrest 'is to enable the plaintiff to obtain a judgment against the defendant, not to keep him or her in custody until payment is made." [Paragraph 21]

"Although s 30(1) and s 30(3) refer only to arrest and not to detention, the process of arrest is always effected by the police and thus prevents flight by actually limiting the arrestee's freedom until the debt is paid, adequate security is furnished or judgment is handed down." [Paragraph 23]

"There can be no doubt that s 12 is designed to bury our painful history of random, unjust and arbitrary deprivation of physical liberty and to ensure that abuse of State power never again rears its ugly head." [Paragraph 24]

"The protection of the right to freedom of the person in terms of s 12(1)*(a)* has both a substantive and a procedural dimension. The substantive aspect ensures that a deprivation of liberty cannot take place arbitrarily or without just cause, whereas the procedural element ensures that the deprivation will only take place in terms of a fair procedure." [Paragraph 25]

Mogoeng J then considered the Constitutional court judgments in *Bernstein v Bester* and *S v Coetzee*, before turning to deal with the substantive element:

"An arrest and detention, by its nature, limits the freedom of a person. The right to freedom of the person is limited if the deprivation is done arbitrarily, or without just cause. The question is whether the deprivation, or limitation of freedom, authorised by the impugned provisions, is arbitrary or without a just cause. In the view I take of the matter, I choose to deal with just cause." [Paragraph 28]

"... There can be no doubt that arrest *tanquam suspectus de fuga* has the effect of limiting the arrestee's fundamental right to freedom.
The object of the arrest 'is to ensure that [the potential debtor] remains within the jurisdiction of the court until the court has given judgment in the matter'. As soon as judgment is given, a debtor would ... be free to catch the next flight to any foreign destination, even if this is done to evade payment and no realisable asset exists in the country, from the proceeds of which payment may be effected. Arrest does not, therefore, ensure the satisfaction of the judgment debt. Admittedly, the unfairly exerted pressure of incarceration may at times force the arrestee to pay the debt or provide security. But ... the arrest does not necessarily render the judgment any more executable or beneficial to the creditor than would have been the case had the debtor left the country. It simply limits the fundamental right to freedom of the person for no just reason." [Paragraphs 31 - 32]

"The order for the arrest of persons *tanquam suspectus de fuga* under the impugned provisions is ordinarily made at the time when their civil liability has not yet been established. Their debt is only alleged on affidavit, often in an urgent application brought ex parte. The potential debtor is often only afforded the opportunity to resist the severe curtailment of the right to freedom ... on the return date. Potentially the detention may endure for as long as the action is pending. ... Nothing can undo the degrading effect of incarceration, particularly if the order were obtained ex parte. ..." [Paragraph 33]

"Since there is no legal basis for the imprisonment of someone who has been found civilly liable, it is inconceivable that any legal justification can ever exist for putting behind bars a person whose civil liability is yet to, or will possibly never, be proven. Although an order for arrest is granted by a court, the intervention of the judicial process cannot legitimise the deprivation of freedom, since the arrest may stem from a debt which has itself not been established through the judicial process. I therefore conclude that there is no just cause for the arrest in terms of the impugned provisions." [Paragraph 34]

Mogoeng J then turned to consider whether this limitation of the right to freedom could be justified.

"Section 30(1) and s 30(3) are laws of general application. Arrest *tanquam suspectus de fuga*, which they authorise, plays a role in facilitating debt collection. Unfortunately, the impugned provisions go further than is necessary to achieve the objective. They do so without any regard to less invasive options that are available. They also do not insist on the exhaustion of less restrictive remedies before pursuing the option of arrest and detention." [Paragraph 37]

"... [T]he impugned provisions are overbroad. Although they are meant to facilitate the adjudication of the dispute in the country and the effective execution of a subsequent judgment debt against a debtor who has the means to pay, but refuses to do so, they also strike at debtors ... who cannot pay. This is what led this court in *Coetzee v Government* to find that a similar limitation cannot be justified as reasonable." [Paragraph 38]

"Freedom is an important right. The detention of any person without just cause is a severe and egregious limitation of that right. It is difficult to imagine the circumstances in which a law that allows detention without just cause could ever be justifiable.
Other comparable jurisdictions have done away with arrest and detention that aims to prevent flight or to recover civil debts. I therefore conclude that the limitation is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." [Paragraphs 40 – 41].

Mogoeng J then considered the appropriate remedy:
"... Any attempt by this court to ensure that the constitutional invalidity is cured, would be nothing short of legislating. And that would fall foul of the separation- of-powers doctrine. The impugned subsections of s 30 can be severed from the section and what remains will still give effect to the purpose of s 30 and the purpose of the legislative scheme. ..." [Paragraph 47].

"... It is necessary to limit the retrospective application of the order. The order should apply to all pending cases. In other words, the declaration will not apply to cases where the review and appeal processes have been finalised. Consequently those potential debtors who are presently incarcerated in terms of this law will have to be released with immediate effect." [Paragraph 49]

VIKING PONY AFRICA PUMPS (PTY) LTD T/A TRICOM AFRICA V HYDRO-TECH SYSTEMS (PTY) LTD AND ANOTHER 2011 (1) SA 327 (CC)

Case heard 10 August 2010, Judgment delivered 23 November 2010

The case dealt with the application of a preferential procurement policy. The Constitutional Court was required to clarify the nature and extent of the duty of an organ of State when presented with ostensibly true allegations that an enterprise to which a tender had been awarded, had fraudulently manipulated a preferential procurement scheme.

Mogoeng J, for a unanimous court, held:

"One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. ... After 1948 this exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty." [Paragraph 1]

"Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others, the broad-based black economic empowerment programme and the preferential procurement policy. Relevant to this case are the legislative and other regulatory measures which were put in place to enable organs of State to award tenders on the basis of a preferential point system to service providers or enterprises which have a significant shareholding by the previously marginalised. Those enterprises are given preferential points on condition that the historically disadvantaged shareholders actively participate in the running of, and exercise control over, the tendering enterprise to the extent commensurate with their ownership." [Paragraph 2]

"At the heart of this case is the complaint by Hidro-Tech, that historically disadvantaged individuals were neither remunerated nor allowed to participate in the management of Viking to the degree commensurate with their shareholding and their positions as directors. Hidro-Tech further believes that the benefits that Viking received, from tenders awarded by reason of its seemingly progressive shareholding profile, were being routed to its sister company, Bunker Hills Pumps ... which is a wholly white-owned company." [Paragraph 7]

"Hidro-Tech lodged a complaint with the City about Viking's alleged manipulation of the tender system. The question is whether the City has discharged its obligations to investigate the complaint satisfactorily in terms of the regulatory framework provided for that purpose. This issue cannot be properly resolved until the nature of the obligation, which in turn depends on the meaning of 'detect' and 'act against' in reg 15(1), is determined. The meaning of these words must be determined within the context of the Procurement Act and the regulations. ... Taking into account the context and purpose ... the Supreme Court of Appeal correctly held that reg 15(1) 'ensures that no organ of State will remain passive in the face of evidence of fraudulent preferment, but is obliged to take appropriate steps to correct the situation'" [Paragraph 28]

"The context within which 'detect' is used in reg 15(1) dictates that the word be interpreted broadly. It would be incorrect to construe it to mean that something is detected only when its existence has already been conclusively established as a fact. Obtaining any information that gives rise to a reasonable suspicion that preference points might have been fraudulently awarded does amount to a detection. There are, however, different degrees and levels of detection. At the one level the information might be somewhat scanty yet capable of exposing corruption in a particular tender. At times the information

detected might be conclusive. It is the level of detection that determines the appropriateness of the action to be taken against the alleged offending party." [Paragraph 32]

"It follows that 'act against' includes conducting an appropriate investigation which is designed to respond adequately to the complaint I lodged, as well as the determination of both culpability and penalty. All these things, however, depend on the circumstances of each case. ..." [Paragraph 36]

"Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of State decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect." [Paragraph 38]

"The steps taken by the City to investigate, namely the referral of the complaint to its indifferent lawyers, Tradeworld and the DTI, amount to a failure by the City to respond appropriately to the demands of the complaint. The City was duty-bound to 'act against' Viking by investigating the matter properly. It could do so itself, or refer the matter ..." [Paragraph 48]

"An organ of State can punish an offending tenderer only if a finding of prohibited conduct has been made. The Supreme Court of Appeal did not make or endorse the High Court's finding to that effect. It only found that the City breached its duty to investigate Hidro-Tech's allegations of fronting. Read within this context, the Supreme Court of Appeal order cannot be understood to mean that a penalty must be imposed on Viking as the High Court had ordered. The Supreme Court of Appeal order was intended to do no more than direct the City to 'act against' Viking, by launching a proper and effective investigation against it. This is the only remedy which the facts of this case justify." [Paragraph 53]

"The City's dereliction of duty is largely responsible for this protracted and expensive litigation. The fact that the City quietly slid away into the remotest backroom of litigation ought not to be enough to exonerate it from the consequences of its failure to honour its constitutional and statutory obligations. It may not be an inappropriate response to its generally lackadaisical attitude, to mulct it with the costs of this appeal. In the exercise of our discretion, we consider that it may be just and equitable that the City be ordered to pay the parties' costs. The difficulty is that the City chose to abide the decision of the Supreme Court of Appeal and of this court." [Paragraph 57]

"As a result, it made no appearance in this court, and the question of its possible liability for costs was not debated with the parties and with the City itself. A provisional order that the City pay both Hidro-Tech and Viking's costs will be issued. And the parties, including the City, will be afforded the opportunity to make representations on whether the provisional costs order should be made final." [Paragraph 58]

LABOUR COURT OF APPEAL

EDGARS CONSOLIDATED STORES LTD V FEDERAL COUNCIL OF RETAIL & ALLIED WORKERS UNION [2004] JOL 12683 (LAC)

This case dealt with whether, when an employer seeks to withdraw organisational rights from a trade union on the basis that the union is no longer sufficiently representative in the workplace, that withdrawal may only take place in terms of the provisions of section 21(11) of the Labour Relations Act, even in circumstances where those rights had been acquired contractually by the union prior to the coming into operation of the Act.

Mogoeng JA held:

"The respondent's contention is based on section 21(11). ... Section 21 deals with the exercise of organisational rights. It sets out the steps that must be followed by a registered trade union that is representative in the workplace if it wants to exercise certain organisational rights. It also sets out the role and powers of the CCMA in regard to that process. It envisages that a registered trade union must give notice to the employer of the organisational rights it wishes to exercise and its level of representiveness ... Thereafter the union and the employer must hold a meeting to discuss the matter with a view to concluding a collective agreement "as to the manner in which the trade union will exercise the rights in respect of the workplace" ... If the parties conclude a collective agreement, that is then the end of the matter and that collective agreement regulates the manner in which the union will exercise those organisational rights. If, however, the parties fail to conclude a collective agreement, the dispute – and this is a dispute about the manner in which the union will exercise the organisational rights – may be referred by either the union or the employer to the CCMA for, initially, conciliation and, if conciliation fails, arbitration .. The arbitration is conducted by a commissioner of the CCMA. The delivery of the arbitration award in the matter then brings the dispute to an end. The award would deal with the manner in which the union will exercise the organisational rights. Obviously, this would all be if the union does meet the level of representativeness required by the Act for the exercise of those organisational rights." [Paragraph 18]

"From the above it will be clear that section 21 envisages that a trade union that exercises organisational rights ... exercises them in the manner regulated by a collective agreement concluded between that union and the employer or exercises them in a manner regulated by a CCMA arbitration award." [Paragraph 19]

"If, after the union has given the employer the notice required ... that it seeks to exercise certain organisational rights, a dispute arises between the two parties about whether the union has the level of representativeness required before it can exercise those organisational rights, the CCMA resolves that dispute by conciliation or, if conciliation fails, by arbitration ... [S]ubsection (9) empowers the commissioner, in order to determine the level of representativeness or support of a registered trade union, to make necessary inquiries and, where appropriate, conduct a ballot and take into account any relevant information. Subsection (10) requires the employer to co-operate with the commissioner when the commissioner acts in terms of subsection (9)..." [Paragraph 20]

"... On the face of it, section 21(11) would appear to apply to both those organisational rights that are regulated by a collective agreement concluded in terms of section 21(3) as well as those that are regulated by an arbitration award issued in terms of section 21(7). However, there is a distinction that

must be drawn between the organisational rights regulated by a collective agreement and those regulated by an arbitration award. The distinction is that, in the case of those regulated by a collective agreement, the provisions of section 23, which apply to all collective agreements, apply to the collective agreement in which they are contained whereas those provisions do not apply to an award that regulates the manner in which a union must exercise organisational rights conferred on it by an arbitration award in terms of section 21(7). This makes a major difference in regard to the termination of such organisational rights. The difference it makes is to be found in section 23(4). That provision reads thus:

> "Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties."" [Paragraph 21]

"Section 23(4) deals with the termination of a collective agreement. Of course, organisational rights that are contained in a collective agreement fall away when the collective agreement in which they are contained is validly terminated. This provision only deals with the termination of collective agreements that are concluded for an indefinite period. Obviously, a collective agreement that is concluded for a fixed term will come to an end when its term expires. Section 23(4) opens with the words "unless the collective agreement provides otherwise . . .". These words suggest an exception to the general rule that the balance of the sentence provides for. The balance of the sentence is to the effect that a party to a collective agreement concluded for an indefinite period may terminate that agreement by the giving of reasonable notice in writing to the other party. The exception contemplated is where the collective agreement itself provides otherwise. In other words a collective agreement cannot be terminated in the manner provided for in section 23(4) if it itself precludes that. ..." [Paragraph 22]

"...[T]here is nothing inconsistent with any international convention in the proposition that a union or an employer has a right to terminate a collective agreement in accordance with the provisions of such collective agreement or in the proposition that, unless the parties' collective agreement provides otherwise, their collective agreement is terminable upon either party giving reasonable or agreed notice as provided for in the collective agreement. It must not be overlooked that the respondent can still follow the procedure prescribed by section 21 in order to end up enjoying the organisational rights that it enjoyed prior to the termination of the recognition agreement. ... In this matter the construction that I hold to be correct is that section 21(11) only applies to those organisational rights which are regulated by an arbitration award issued in terms of section 21(7) whereas 23(4) applies to those organisational rights contained in a collective agreement regulating such rights. That construction does not render either section redundant or superfluous." [Paragraph 24]

The appeal was upheld with costs.

ACTING PROVINCIAL COMMISSIONER, CORRECTIONAL SERVICES & OTHERS V MATHEYSE (1) (2002) 23 ILJ 2192 (LAC)

Respondent was directed by the first appellant (Nxele) to report for duty at a different correctional facility, in terms of a transfer to which the respondent had objected. Respondent launched an urgent application to remain in his previous position. The Labour Court upheld the application. On appeal, Mogoeng JA (Nicholson JA and Comrie AJA concurring) considered an application to receive further

evidence in terms of section 174(a) of the Labour Relations Act; and an appeal against the decision of the Labour Court.

Regarding the application, to receive further evidence, Mogoeng JA held:

"...The respondent said that the reason he has applied that annexure A be admitted was that there are several disturbing differences between annexure A which is a letter sent to Ms Cynthia Nozipho Dumbela, who was to take over from the respondent ...and a similar letter to the respondent. He contended that these differences illustrate that the first appellant treated Dumbela and the respondent in radically different ways. ... The respondent intended to rely on annexure B to prove that a final decision was taken to appoint Dumbela to his position on 16 January 2001, while at the same time the first appellant created the impression that the consultative process with the respondent was still open ... [T]he appellants have since admitted that the final decision to transfer the respondent was actually taken on 16 January 2000. The respondent intended to use these annexures to establish the ulterior motive which he said actuated Nxele to transfer him. ... The respondent contended that ... the ulterior motive ... was the implementation of the Employment Equity Act contrary to Resolution 4/99. That resolution was agreed to by all parties at the departmental bargaining chamber and it was to the effect that staff members should not be transferred or dismissed to reach the objective of the employment equity plan. ... It is apparent ... that ... Nxele had finalized the respondent's transfer without first seeking the approval of the commissioner." [Paragraph 10]

"I accept the respondent's explanation that but for his informant in the office of Nxele he could not have laid his hands on the documentation in question. ...[I]t is clear that the respondent did not know that the documents in question existed. He cannot, therefore, be blamed for not searching diligently for documents which he did not even know existed. ... " [Paragraph 12]

"I am persuaded that the evidence is important and materially relevant to the outcome if regard is had to how the respondent intended to use the evidence in this appeal. I am satisfied that the appellants stand to suffer no prejudice in the event of all these annexures being admitted." [Paragraph 13]

Mogoeng JA thus granted the application to admit new evidence, and turned to the substantive appeal. Mogoeng JA found that two of the grounds supporting the decision of the Labour Court, namely that the transfer constituted unfair administrative action and violated the appellants' transfer policy, were dispositive of the appeal. Their effect would be that the transfer was unfair and irregular in that it conflicted with an undertaking given by the commissioner and Nxele himself.

"The power to transfer employees of the Department of Correctional Services was ... and is ... vested in the commissioner. This is also the position in terms of the departmental regulations as well as its policy on transfers. The Correctional Services Act did not seek to provide in detail how transfers were to be effected. It was left to the commissioner to develop a mechanism and policy ... Any official statement from the commissioner, in respect of transfers in particular, must be taken seriously because he is not only the chief accounting officer of the national department, but he also has the final say in respect of transfers. ... [I]t is also important to bear in mind that his aforementioned undertaking was not just given on his own initiative. It was provoked by a complaint by the PSA ... By virtue of the powers vested in him, and expecting his word to be taken seriously the commissioner assured the PSA, and by implication all

the department's employees in the Western Cape, that no employee would be transferred against his/her will." [Paragraph 18]

"[T]he respondent did not make much of the breach of undertaking in the Labour Court. Be that as it may, this court cannot in law prevent the respondent from raising that legal point on appeal. ... It would in any event not be unfair to the appellants to entertain the undertaking point which is ... based on facts which were specifically alleged and not disputed." [Paragraph 20]

"A question arose ... as to whether the respondent had a legitimate expectation not to be transferred against his will as a result of the undertaking given or express promise made by the commissioner on behalf of the department. ... The legitimate expectation ... is neither contrary to the law nor does it prevent any of those repositories of power from discharging their statutory power to transfer employees of the department. ... the undertaking only relates to how the commissioner intends to discharge his discretionary power." [Paragraph 21]

"Mr *Oosthuizen*... contended that the commissioner's joint opposition, with Nxele, of the respondent's application resisting his transfer constitutes the commissioner's approval of the decision to transfer the respondent and also an implied revocation of the undertaking. That cannot be correct. From a conspectus of the authorities ... it should be evident that nothing short of an unequivocal and preferably written revocation of the undertaking was required in order for the undertaking to cease to be of any effect. ... I reject this contention that the undertaking so important could be revoked so casually, by implication and retrospectively. ... For as long as the undertaking still stands, the department's staff members in the Western Cape have a legitimate expectation that the commissioner and other senior officials of the department would transfer staff members in accordance with that undertaking." [Paragraph 22]

"Nxele committed a gross irregularity when he decided to transfer the respondent against his will, in total disregard of the express undertaking given or promise made by the commissioner and Nxele himself that no employee would be transferred against his/her will. Since the promise ... has not yet been withdrawn, the respondent had a legitimate expectation of not being transferred against his will..." [Paragraph 24]

The appeal was dismissed.

ACTING PROVINCIAL COMMISSIONER, CORRECTIONAL SERVICES & OTHERS V MATHEYSE (2) (2002) 23 ILJ 2205 (LAC)

"Judgment in this matter was handed down on 21 August 2002. On the next day, the attorneys for the respondent wrote a letter to the registrar of this court ... to ask the registrar to draw our attention 'to what appears to be a typographical/administrative error in the final paragraphs of the judgment'." [Paragraph 1]

"There is indeed a patent error ... I will first address the question whether this court has the power to vary, rescind or amend its decision, judgment or order. Section 165 of the Labour Relations Act ... and rule 16A of the Labour Court Rules clearly spell out that power for the Labour Court. There is no similar

provision for the Labour Appeal Court. Be that as it may, this court does have the power to change, vary, amend, etc its decision, judgment or order by virtue of its inherent powers set out in s 167(3) of the Act..." [Paragraph 2]

"This court is called upon to clarify its judgment and give effect to its true intention since, on the reading of paras 25 and 26.1 thereof, its meaning is ambiguous or uncertain with regard to the costs relating to the application in terms of s 174*(a)* of the Act. ..." [Paragraph 3]

"... [W]hat follows is a brief explanation regarding how that error came about. The original thinking ... in the draft judgment was that the respondent would be granted costs of the appeal and of the s 174*(a)* application. ... Shortly before judgment was signed and delivered, the thinking changed. All three of us agreed that the respondent should only be granted costs for the appeal and not for the indulgence he sought in the s 174*(a)* application. As a result, para 26 was changed to accord with that decision. There was, however, an oversight which resulted in para 25 being inadvertently left unchanged and this has resulted in the ambiguity that necessitated this judgment." [Paragraph 4]

SABC V CCMA & OTHERS [2002] JOL 9838 (LAC)

Case heard 8 November 2001, Judgment delivered 28 May 2002

This was an appeal against finding that the appellant's dismissal of the third respondent was unfair. The dispute between the parties was whether there had been a dismissal. The appellant contended that the third respondent's persistent failure to report for duty despite warnings resulted in the employment contract being terminated due to his having absconded. The employee claimed that he had been dismissed.

On the contention by the appellant that the CCMA lacked jurisdiction over the dispute, Mogoeng JA held:

"I am unable to uphold this contention in the light of the decision of this Court in Fidelity Guards Holdings (Pty) Ltd v Epstein NO & others. In that case an employee referred a dispute about the fairness of his dismissal to the CCMA outside the statutory 30-day period from the date of dismissal ... Attempts were made to conciliate but no agreement was reached. The commissioner who had conciliated the dispute issued a certificate of outcome ... to the effect that the dispute remained unresolved. Thereafter the matter was duly arbitrated upon and an award was issued against the employer. The employer then launched an application in the Labour Court to review and set aside the award. This was based, inter alia, on the same ground as presently relied on ... The Court ... held as follows:

> *"In my view the language employed by the legislature in s 191 is such that, where a dispute about the fairness of a dismissal has been referred to the CCMA or a council for conciliation, and the council or commissioner has issued a certificate in terms of section 191(5) stating that such dispute remains unresolved or where a period of 30 days has lapsed since the council or the CCMA received the referral for conciliation and the dispute remains unresolved, the council or the CCMA, as the case may be, has jurisdiction to arbitrate the dispute. That the dispute may have been referred to the CCMA or council for conciliation outside the statutory period of 30 days and no application for condonation was made or one was made but no decision on it was made does not affect the jurisdiction to arbitrate as long as the certificate of outcome has not been set aside. It is*

the setting aside of the certificate of outcome that would render the CCMA or the council to be without the jurisdiction to arbitrate" (my emphasis).” [Paragraph 10]

On procedural fairness, Mogoeng JA held:

“The substantive fairness of the ... dismissal is not in issue. The facts of this case clearly demonstrate that the third respondent had indeed earned his dismissal. The appellant contended that the court *a quo* had erred in not setting aside the second respondent's finding that the dismissal had been procedurally unfair. It sought to persuade this Court that that finding was wrong and should be set aside. The appellant's argument was that in cases of desertion there is no obligation on an employer to give the employee a hearing. The second respondent found the third respondent guilty of failure to report for work or "desertion". He did not make a definite finding that the third respondent was guilty of desertion.” [Paragraph 12]

“Where an employer has an effective means of communicating with an employee who is absent from work, the employer has an obligation to give effect to the audi alteram partem rule before the employer can take the decision to dismiss such an employee for his absence from work or for his failure to report for duty.” [Paragraph 15]

“...The question whether or not an employer is obliged to pay notice pay is a question of law. The law in regard to notice pay is clear. ... [A]n employer only has an obligation to pay notice pay ... on termination of employment if the termination is not due to misconduct on the part of the employee of a sufficiently serious nature to justify the termination...” [Paragraph 20]

The Appeal was upheld in part and dismissed in part.

NUMSA OBO ITS MEMBERS V LUMEX CLIPSAL (PTY) LTD [2002] JOL 9634 (LAC)

Case heard: 22 November 2001, Judgment delivered 19 April 2002

The respondent manufactured electrical fittings and accessories. The appellant trade union represented 31 employees who were dismissed for having refused to comply with an instruction requiring each of them to operate two machines. Negotiations on ways to avoid retrenchment resulted in an agreement that employees in one of the respondent's divisions would each operate two machines instead of one. The employees failed to comply with that requirement, with the result that a disciplinary enquiry was held and they were dismissed. A referral of the dispute to the Labour Court saw the claim being dismissed with costs.

Mogoeng JA held:

“...It also appears from the motivation contained in the communique of 23 October 1997 that the system in a broader sense is the three-shift system. The doubling-up is nothing more than a task allocation which is subsumed under the system. ... [The] allocation of tasks and of machines to operators is discussed...” [Paragraph 12]

“The dispute which the employees referred for conciliation also shows that the practicality of the implementation of the three-shift continuous operations system, which evidently incorporates the one-operator two-machines requirement, was never an issue. The employees asked for improved wages as a

reciprocal for the implementation of the system precisely because they knew that they would each have to operate two machines, which would mean slightly more work for them on a regular basis..." [Paragraph 14]

"The omission to mention the task allocation or the doubling-up in subsequent correspondence is inconsequential. The system and how it was intended to work had already been thoroughly explained. There was no need to keep on repeating the one-operator two-machines task allocation in the communiques that followed that of 23 October 1997. There can, therefore, be no doubt that when the appellant's legal representatives gave an undertaking that the employees would work the six-day/three-shift system under protest, they and their clients knew exactly what that system entailed. To suggest, as the employees do, that the system as referred to in the undertaking of 5 December 1997 did not entail the aforegoing task allocation, is to be rather too opportunistic as the court a quo found. Each employee was certainly under an obligation to operate two machines. Their refusal to operate two machines constituted a repudiation of the undertaking of 5 December 1997." [Paragraph 15]

The appeal was dismissed.

ESKOM V NATIONAL UNION OF METALWORKERS OF SA & OTHERS (2002) 23 ILJ 2208 (LAC)

Case heard 2/08/2002, Judgment delivered 4/10/2002

The first respondent and the appellant employer had entered into a recognition agreement. During the 2001 wage negotiating session the parties could not agree on the percentage wage increase and other conditions of employment. A dispute was declared and a mediator issued a certificate that the dispute remained unresolved. Meanwhile the employer gave notice that it would implement its proposal for a wage increase. The union regarded this as a second dispute and one about the unilateral change to terms and conditions of employment as contemplated by s 64(4) of the Labour Relations Act. The union referred the dispute to the CCMA. The union required the employer not to implement its intended wage increase. The union then gave the employer notice of its intention to strike. The union subsequently sought an undertaking from the employer that for 30 days it would not implement the wage increase. When this was refused the union applied to the Labour Court for an interdict restraining the employer from implementing the increase for a period of 30 days. The interdict was granted. The employer appealed against the decision to the Labour Appeal Court. The Labour Appeal Court, on the basis of certain assumptions regarding the facts, examined s 64(4) which refers to the 'the period referred to in subsection (1)(a) ' and held that there are two periods contained in the subsection. Each one commences when the dispute is referred to a council or the CCMA. The one ends when a certificate is issued in terms of s 64(1)(a) (i). The other one ends 30 days after the referral of the dispute. The circumstances of each case determine which of the two are contemplated by s 64(4). The court pointed out that when the application was brought the period referred to in s 64(1)(a) (i) had expired. There was no longer an obligation on the employer not to implement the wage increase.

Mogoeng JA held:

"For the appellant Mr Sutherland argued that the appellant's implementation of its suggested wage increase constituted the use of economic power in relation to the main dispute. As such, he argued, it did not constitute a unilateral change to terms and conditions of employment. Mr Sutherland further argued

that, for the same reason, the intended implementation of the wage increase did not constitute a dispute separate from the main dispute: It was an integral part of the main dispute. The argument raises several questions as to the correct interpretation of the phrase 'refers a dispute about a unilateral change to terms and conditions of employment'. ... I shall assume for the purpose of this judgment that the appellant's action constituted a unilateral change in terms and conditions of employment. I shall further assume that it gave rise to a second dispute, separate from the main dispute. I shall also assume that the first respondent properly referred the second dispute to the CCMA ... I shall finally assume that the first respondent was entitled to the rights set out in s 64(4)(a) and that the appellant incurred the obligation provided for in s 64(5).” [Paragraph 8]

“I agree that the period of 30 days in s 64(1)(a) (ii) is the only one referred to by reference to a number of days, but I cannot agree that it is the only period referred to in s 64(1)(a) . The primary meaning of the word 'period' is 'a length or portion of time' ... Such a length of time can be expressed in a number of time units such as seconds, minutes, hours or days. It can also be expressed by reference to the events marking the and the end of the period. The latter is no less a reference to a period than the former.” [Paragraph 10]

“When the application was brought in this case and also when the court a quo issued the order, the period referred to in s 64(1)(a) (i) had expired. The second dispute had been referred to the CCMA and the latter had issued a certificate stating that the second dispute remained unresolved. It follows that, when the court a quo issued its order, even on the assumptions I have made, the appellant no longer had an obligation not to implement the wage increase. The court a quo should accordingly not have issued the order it did. The appeal must succeed.” [Paragraph 14]

The appeal was upheld.

MEYER V BUTLER T/A WACK-EM [2001] JOL 7953 (LAC)

Case heard 22 August 2000, Judgment delivered: 15 February 2001

The Appellant was dismissed by the respondent for operational reasons. A dispute arose and was arbitrated under the auspices of the CCMA. The respondent failed to comply with an arbitration award in favour of appellant, and the latter applied to make the award an order of court. The order was granted and a warrant of execution was issued against respondent's property. Another judge of the Labour court subsequently set aside the attachment, finding that the CCMA lacked jurisdiction as the Labour Relations Act required express, rather than tacit or implied, agreement to submit a dispute to arbitration once conciliation had failed.

Mogoeng JA held:

“All dismissal disputes must first be referred for conciliation. In the event of those disputes not being settled through conciliation, they may either be arbitrated under the auspices of the CCMA or be adjudicated by the Labour Court. As to whether the CCMA or the Labour Court has jurisdiction over a dismissal dispute would depend on the nature of the dismissal dispute. The dispute in this matter arose from a dismissal based on operational reasons. Such a dispute must ... be referred to the Labour Court to adjudicate upon. It may only be arbitrated under the auspices of the CCMA if all the parties to the dispute agree to refer it to the CCMA in terms of section 141(1)...” [Paragraph 6]

"For the purpose of determining this appeal I am prepared to assume, without deciding, that it was competent for Waglay J to set aside the order of Landman J. However, even if it was competent to do so mero motu, such a step should not be taken save in exceptional circumstances." [Paragraph 9]

"A statute must be interpreted in the light of and in conformity with the common law unless that statute provides otherwise. ..." [Paragraph 10]

"It is trite that, in terms of the common law, an agreement may be concluded expressly, tacitly or impliedly. Therefore a construction of section141(1) which is in conformity with the common law is that the word "agreement" means any lawful agreement express, tacit or implied. Section 141(1) does not explicitly say that the agreement must be express. Furthermore, there is nothing in section 141, or even the LRA itself, to justify the conclusion that the legislature plainly intended to alter the common law with regard to forms of agreements so as to exclude tacit and implied agreements. All that section 141(1) requires of the parties to the dispute to do in order to clothe the CCMA with jurisdiction, is to agree to its (i.e. the CCMA's) jurisdiction. This section does not prescribe the form of that agreement." (Paragraph 11)

The appeal was upheld.

CROWN FOOTWEAR (PTY) LTD v NATIONAL UNION OF LEATHER WORKERS & OTHERS (2001) 22 ILJ 1109 (LAC)

Case heard 24 August 2000, Judgment delivered 15 August 2001

The respondent employees, members of the respondent union, joined in a protected national strike in support of a demand by the union for a 12% wage increase. The appellant company was of the view that the employees, all supervisors and therefore part of management, were not entitled to strike. When management notified the employees that their action was considered to be illegal, the employees indicated that they would be willing to return to work if they were granted a 10% increase. The company issued an ultimatum to the employees to return to work immediately or face dismissal. The union also advised the employees that they should return to work as their strike was illegal. The employees refused to return to work and remained on strike until the strike ended. A disciplinary enquiry was held, the company charging the employees with participation in an unprotected strike solely on the ground that their demand for a 10% wage increase was different to the union's demand. They were found guilty and dismissed. On appeal the decision of the disciplinary enquiry was confirmed. The employees challenged their dismissal in the Labour Court. The court upheld the finding of participating in an unprotected strike, but reduced the sanction from dismissal to a final written warning. The company appealed only against the sanction.

Mogoeng JA held:

"The court a quo found that the individual respondents were confused and that it was as a result of that confusion that they demanded a 10% wage increase. What led to the confusion was, according to the court a quo, Mr Ashworth's statement that their withdrawal of labour was unprotected because as managers they were outside the bargaining unit. Had he not done this, so says the court a quo, the individual respondents would not have made a separate demand from that of the union. I find it difficult to understand this statement. The individual respondents knew why they took part in the strike action. They participated in the balloting process, the ballot papers spelt out what the envisaged strike would be

all about, and they knew that the majority of employees voted in favour of the strike. All they needed to tell Mr Ashworth was that their union was demanding a 12% wage increase across the board and that the strike was protected. I cannot understand how an allegation that their strike was unprotected could confuse them to the point where they had to make a demand for a 10% wage increase. The individual respondents failed to explain how a simple allegation that the strike was unprotected could confuse them." [Paragraphs 9 and 10]

"Counsel for the respondents submitted that the confusion was caused by the ultimatum. This cannot be correct. The ultimatum was issued long after the 10% demand was made. ...." [Paragraph 12]

"I am satisfied that the finding of the court a quo that the demand for a 10% wage increase was the result of the confusion caused by the appellant is wrong. ..." [Paragraph 13]

"It is not disputed that the individual respondents were members of the union, that they participated in the balloting process and even voted in favour of the industrial action. These are the steps they took to comply with the LRA. It is also common cause that the strike which followed this process was protected. However, the individual respondents did not fall within the bargaining unit and the appellant partly relied on this point, from the outset, for suggesting that the individual respondents were participating in an unprotected strike. This issue is settled as appears in Chemical Workers Industrial Union v Plascon Decorative (Inland) (Pty) Ltd ...:

> *'The issue in the present case is whether non-bargaining unit employees, whose conditions of service the strike demand did not directly affect, could embark on an otherwise protected strike. That parallels the question Zondo AJ dealt with in Afrox Ltd v SA Chemical Workers Union & others (1) , where workers employed by the same employer at different plants embarked on strike action. Zondo AJ concluded (at 403I) that ''once a dispute exists between an employer and a union and the statutory requirements laid down in the Act to make a strike a protected strike have been complied with, the union acquires the right to call all its members who are employed by that employer out on strike and its members so employed acquire the right to strike'. It follows that in my view this conclusion was correct.'*

Clearly, the fact that the individual respondents were non-bargaining unit members cannot on its own render the strike unprotected insofar as they participated in it whereas it remains protected for the participating employees who fall within the bargaining unit." [Paragraph 18]

"In the light of all the above circumstances I am of the opinion that the sanction of dismissal was inappropriate and that it rendered the dismissal unfair. For the above reasons, I can see no basis for interfering with the decision of the court a quo. Accordingly, the appeal is dismissed with costs." [Paragraph 22]

A RAHLOGO AND ANOTHER V ADVENTURA LOSKOPDAM [2000] JOL 6353 (LAC)
Case heard 15 September 1999, Judgment delivered 3 October 1999

The case concerned an appeal against a determination made by the Industrial Court in terms of the Labour Relations Act of 1956. After receiving the respondent's heads of argument, the appellant's legal representatives filed a notice of withdrawal, with the appellant's heads of argument outstanding. On the date of the hearing, neither the appellant nor their representatives were in Court. The notice of appeal

has also not been filed in time, and the appeal was thus struck off the roll. Mogoeng AJA then dealt with the question of costs:

"The respondent has asked for costs against the appellants' representatives *de bonis propriis*. In principle there is merit in that request and I would have been inclined to grant such an order but for the reasons which follow." [Paragraph 5]

"This appeal is governed by the provisions of the Labour Relations Act 66 of 1995 ("the Act"). Section 179(3) of the Act provides that this Court "may order costs against a party to the dispute or against any person who represented that party in those proceedings before the court". This Court is therefore empowered to grant costs against a party's representative *de bonis propriis.* The question then is who may represent a party to the proceedings before this Court." [Paragraph 6]

"The appellants' ... representatives were ... labour and industrial relations consultants. Their representatives are not a firm of attorneys. Section 213 of the Act defines a legal practitioner as "any person admitted to practise as an advocate or an attorney in the Republic"." [Paragraph 8]

"It follows, therefore, that a labour and industrial relations consultant is neither a legal practitioner nor any of the persons who have a right to appear on behalf of a party to the proceedings before this Court. Consequently he or she cannot be a representative envisaged by the provisions of section 179(3) of the Act against whom costs may be ordered.
... The appellants' representatives are, as I said, consultants and this Court cannot, therefore, order costs against them prayed for by the respondent. In this matter costs can, therefore, only be ordered against the appellants." [Paragraphs 9 – 10]

Conradie and Nicholson JJA concurred in the judgment of Mogoeng AJA.

HOSPERSA AND ANOTHER V NORTHERN CAPE PROVINCIAL ADMINISTRATION [2000] JOL 6301 (LAC)

Case heard 1 December 1999, Judgment delivered: 9 March 2000

The dispute concerned whether the second appellant, who had been acting in a more senior position, was entitled to be paid an acting allowance. An arbitration award was made, in which the employer was ordered to pay the employee an acting allowance for a stipulated period. The respondent launched an application to the Labour Court for the review and setting aside of the award.

Mogoeng AJA held:

"...[A]n unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving an unfair conduct of the employer "relating to the provision of benefits to an employee;". Item 3(4)(b) provides in turn that if the dispute remains unresolved after an attempt at conciliation then any party to the dispute which is about an act or omission referred to in 2(1)(b) may request that it be resolved through arbitration. ... [I]t is necessary to deal with the question whether the payment of acting allowance is a provision of a benefit to an employee. It is also essential to decide whether this dispute is one of interest or of right so as to resolve the question of the forum to which it should have been referred." [Paragraph 7]

"It appears to me that the legislature did not seek to facilitate ... the creation of an entitlement to a benefit which an employee otherwise does not have. I do not think that item 2(l)(b) was ever intended to be used by an employee, who believes that he or she ought to enjoy certain benefits which the employer is not willing to give him or her, to create an entitlement to such benefits through arbitration in terms of item 2(1)(b). It simply sought to bring under the residual unfair labour practice jurisdiction, disputes about benefits to which an employee is entitled ex contractu (by virtue of the contract of employment or a collective agreement) or ex lege (the Public Service Act or any other applicable Act). ... The dispute relating to what the second appellant claims seems to be a dispute of interest whereas item 2(1)(b) was designed only for disputes of right. ...[T]he second appellant has not established any right to the acting allowance." [Paragraph 9]

" A dispute of interest should be dealt with in terms of the collective bargaining structures and is therefore not arbitrable. A dispute of interest should not be allowed to be arbitrated ... under the pretext that it is a dispute of right. To do so would possibly result in each individual employee theoretically cloaking himself or herself with precisely the same description of the dispute that is the true subject-matter of collective bargaining. And if such an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, the result would inevitably be a fundamental subversion of the collective bargaining process itself ... If individuals can properly secure orders that have the effect of determining the evaluation of differing interests on the merits thereof, then the distinction between disputes of interest and disputes of right would be distorted and the collective bargaining process self-evidently would become undermined. ..." [Paragraph 10]

"A question then arises whether the words transferred to or employed in, as used in this section were intended to bear so broad a meaning as to include an acting appointment. ... The ordinary meaning of the word "transfer" within the context of the employment situation is, in my view, open to a construction which would include an acting appointment. Section 1 of the PSA provides that:

> " 'transfer' includes a change-over to a regraded or renamed post, or from one grade to a higher grade connected to the same post, or from one rank to a higher rank."

Although an element of permanence seems to be implied in this word and its definition, there really is nothing to suggest that a public servant may not be temporarily transferred 'to a higher grade connected to the same post'. In my view ... an acting appointment may well be construed to mean a temporary transfer to a higher grade. Such a conclusion would then render the provisions of section 14(3) (c) applicable to an acting appointment such as that of the second appellant. Even if this construction of the word 'transfer' is incorrect, section 14(3)(c) would still serve as a very significant guideline in the determination of the question whether a public servant appointed to act in a higher position would by reason of such an acting appointment be entitled to additional remuneration. Logic dictates that if a public servant can be employed in a higher post on a permanent basis but not be automatically entitled to an additional remuneration, then there is no basis for a similarly positioned public servant who is, however, appointed on a temporary basis to lay claim to the difference between his or her normal salary and the salary applicable to the higher post in which he or she is acting, by reason only of such an acting appointment." [Paragraph 17]

"...[A]n acting appointment does not per se entitle a person who was appointed to act, to an acting allowance. There are, therefore, no statutory provisions which give rise to or create a right to an additional remuneration which the second appellant contends for. However these sections are not inimical to the payment of an acting allowance. None of them states that an acting allowance will not be

paid under any circumstances. Therefore the legislature has left open the possibility for the employer and the employee to enter into a contract of employment or to conclude a collective agreement which stipulates, as one of the conditions of employment, that additional remuneration would be paid should employees be called upon to act in a higher post. ..." [Paragraph 19]

The appeal was dismissed.

NATIONAL UNION OF METALWORKERS OF SOUT HAFRICA V DRIVELINE TECHNOLOGIES (PTY) LTD AND ANOTHER [2000] 1 BLLR 20 (LAC)
Case heard 11 October 1999, Judgment delivered 21 October 1999.

This case concerned an appeal against the refusal of the Labour Court to grant an application for the amendment of the appellant's statement of case. The individual appellants contended that their dismissals for operational reasons were unfair because respondents had not complied with its obligations under section 189 of the Labour Relations Act. The intended amendment sought to attack the dismissals on the basis that they were automatically unfair.

In the course of his judgment, Conradie JA said that:

"There is in the Act no comparable provision [to a section of the previous Act which denied jurisdiction to the Industrial Court unless the dispute had been referred for conciliation] which might be thought to impose preconditions to a Labour Court's jurisdiction. Section 157(4)(a) provides that the Labour Court may refuse to determine a dispute if the court is not satisfied that an attempt has been made to resolve the dispute through conciliation. The court clearly has jurisdiction: it may or may not, in its discretion, determine a dispute which has not been submitted to conciliation. ... This jurisdiction [under s 157(1)] should not in my view be made to depend upon the parties' compliance with prescribed procedures. ... Obligations imposed on parties are not usually intended to be jurisdictional preconditions. ... Non-compliance with conciliation formalities made the [Industrial] court powerless to deal with certain issues other than to declare itself powerless. I do not consider that one should travel that road again. In exercising its discretion the court will undoubtedly ask itself whether the dispute, in the sense of the essential quarrel between the parties, had been submitted to conciliation." [Paragraph 8]

Conradie JA then considered the decision of the Labour court in *Numsa and other v Cementation Africa Contracts*, which had been relied on by the court *a quo*, and continued:
"Landman J understood these *dicta* as support for the proposition that a court is jurisdictionally unable to adjudicate a dispute other than the one which is described in the commissioner's certificate. ... I am not persuaded that Waglay AJ intended to go that far. A party would be "bound" by the commissioner's categorisation only in so far as the court may conclude that the issues before it had not been ventilated adequately or at all during the conciliation phase and, before hearing the matter, refer it back to the CCMA for this to be done properly." [Paragraph 13]

Conradie JA rejected the argument that the Labour Court lacked jurisdiction to grant the amendment, and further rejected arguments that the pre-trial minute and alleged irreparable prejudice to the respondent barred the granting of the amendment.

Zondo AJP agreed that the appeal should succeed, but for different reasons. Zondo AJP rejected the argument that the proposed amendment introduced a new dispute into the case, holding that the claim that the dismissal was automatically unfair would simply constitute another reason for dismissal. Zondo AJP expressly disagreed with Conradie JA's finding at paragraph 8 of the judgment, namely that it was not a precondition that a dispute be referred to conciliation before the Labour Court had jurisdiction to adjudicate it. Zondo AJP held that section 191(5) of the LRA imposed the referral of a dismissal dispute to conciliation as a precondition before the dispute could be arbitrated or adjudicated by the Labour Court [paragraph 73].

Mogoeng AJA held:
"I have had the benefit of reading both judgments prepared by my colleagues Zondo AJP, and, Conradie JA, in this matter. Except for what Conradie JA says in paragraphs 8 and 13 of the judgment, I agree with both judgments."

KOTZE V REBEL DISCOUNT LIQUOR GROUP (PTY) LTD [2000] 2 BLLR 138 (LAC)
Case heard 8 September 1999, Judgment delivered 8 November 1999.

Appellant had been employed as an executive director of the respondent, and was retrenched in the course of a cost-cutting exercise instituted in response to serious financial difficulties experienced by the respondent. Appellant was informed that the last in, first out principle (LIFO) was used as the criteria to select him for retrenchment. Appellant challenged his retrenchment, on the basis that the respondent had presented the retrenchment as an accomplished fact, and that there was no proper commercial rationale for the termination of his services.

Mogoeng AJA considered the parties' arguments:

"These submissions will be dealt with hereinafter without necessarily individualising them. I intend adopting a more general approach which will have the effect of addressing all of them." [Paragraph 19]

"The paragraphs following [in exhibit "H", a letter to the appellant advising him of his retrenchment] seem to be premised on the assumption that the retrenchment of the appellant will be or would have been accepted when exhibit "H" is presented to the appellant. These paragraphs do not seem to leave room for the decision to retrench the appellant being changed. What remained to be discussed appeared to be the retrenchment package. ... The appellant contended that exhibit "H" proves not only that the respondent had no intention to consult him about his retrenchment but also that his retrenchment was presented to him as an accomplished fact. On the other hand, Pearman and Erasmus [the managing director and group human resources director of the respondent] testified that exhibit "H" was only meant to initiate the consultation process and to confirm the discussion between the appellant and Pearman. It is imperative, therefore, to examine this exhibit in its proper setting and context so that its true meaning and purpose can be established." [Paragraph 21]

"There is nothing in the exhibit which hints at the possibility of any further discussions on the merits of the appellant's retrenchment. ... Pearman, Erasmus and the appellant said that some alternatives to retrenchment were discussed ... These are, in my view, not alternatives to the appellant's retrenchment. On the contrary, they all have as a condition precedent, the appellant's retrenchment. They are measures intended to soften the blow of retrenchment and are package-related. Thus far, it appears that the

respondent had concentrated its efforts on discussing the package and was not keen to deal with the merits." [Paragraph 23]

"...[T]his staff notice [advising of the appellant's retrenchment] bears the same date on which the appellant was told, for the first time, that his job was on the line. It could not have been a draft because it was already signed by Pearman. This notice betrays the real purpose of the meeting ... This exhibit, therefore, seems to support the appellant's allegation that his retrenchment was a foregone conclusion before he was told about it." [Paragraph 25]

"It is common cause that the respondent recruited the appellant because of his special negotiating skills, his expertise in the liquor retail trade and his capacity to turn around the ailing respondent. To this end, he acquitted himself well. It was admitted by both Pearman and Erasmus that he was a more experienced and better director than Maloney and that they did consider offering him Maloney's position as an alternative to his retrenchment. However this was not disclosed to him and the merits and demerits of such a move were not discussed with him. ... The correct legal position is that alternatives must still be disclosed even if the employer believes that they are likely to be rejected ..." [Paragraph 29]

"Instead of disclosing and consulting on the alternative to the appellant's retrenchment, the respondent was over-zealous to reach an agreement on the retrenchment package. This is a wrong and undesirable procedure ... Only when retrenchment is accepted or when consultation has taken place but no agreement can be reached may the package be discussed." [Paragraph 31]

Mogoeng AJA considered the circumstances surrounding the appellant's retrenchment, and held that they were "consistent with the desire to steamroll the retrenchment process and irreconcilable with the intention to consult meaningfully and contructively." [Paragraph 33]
"...[T]he respondent went further on the way in making the decision to retrench the appellant than it was entitled to go before consulting him. I am therefore satisfied that the appellant's retrenchment was procedurally unfair." [Paragraph 34]

Mogoeng AJA then dealt with the commercial rationale for the retrenchment:

"... These so-called alternatives [submitted by the appellant] do not only fly in the face of the appellant's own admission that retrenchment was fair and necessary but also the correct approach that this Court has to adopt in scrutinising the consultation process. The appellant now wants this Court to second-guess the commercial and business efficacy of the employer's decision to retrench. He also wants us to decide whether the employer made the best decision under the circumstances. This we cannot do. What we have to do is to decide whether the respondent's decision to retrench was informed and is justified by a proper and valid commercial or business rationale. If it is, then that is the end of the enquiry even if it might not have been the best under the circumstances. In the present case, I am satisfied that there was a genuine commercial rationale for a staff reduction." [Paragraph 36]

"The failure to consult the appellant on known alternatives does not affect or detract from the existence of a valid or genuine commercial rationale for retrenchment. It only affects his selection. The selection of an employee for retrenchment does not only impact on the procedural purpose of consultation but also on its substantive purpose. ..." [Paragraph 37]

"Therefore, it is necessary to consider the impact on compensation of the respondent's failure to consult with the appellant on the alternatives to his retrenchment. ... The respondent should, therefore, have given the appellant the opportunity to persuade it to retain his services as Inland Director and to retrench Maloney instead ... The fact that the respondent was entitled to use the LIFO principle does not detract from the importance of consultation on the alternatives including those which are likely to be rejected." [Paragraph 39]

Mogoeng AJA concluded that, had proper consultations been held, the appellant might have remained in the employ of the respondent at least for a further two years. The appeal was upheld, and the retrenchment found to be procedurally unfair. The case was remitted to the Industrial Court to determine compensation.

Conradie JA wrote a separate judgment concurring in the finding that "the appellant's dismissal was procedurally unfair." [Paragraph 45]. Nicholson JA concurred in the judgments of Conradie JA and Mogoeng AJA.

NATIONAL UNION OF MINEWORKERS AND ANOTHER V AMCOAL COLLIERY T/A ARNOT COLLIERY AND ANOTHER [2000] 8 BLLR 869 (LAC)

Case heard 03/12/1999, Judgment delivered 17/03/2000

This was an appeal against the finding that the dismissal of appellant was fair and did not constitute an unfair labour practice. The appellant had been dismissed for refusing to obey a reasonable instruction. The appeal was based on the allegation of inconsistent application of discipline in that the employer had not reduced the penalty of the appellant as it had done for the other employees regarding the same misconduct.

Mogoeng AJA held:

"The second appellant had a long list of previous misconduct. The offence of refusing to obey a lawful instruction is a fairly serious one. The second appellant was conspicuous by his aggression towards two of his superiors... on the day in question. When Basson told him that he was going to lodge a complaint against him, he told Basson to his face that even if he were to complain 20 times he would still not obey his instruction. It appears to me, therefore, that the nature of this offence and the second appellant's defiant attitude or utter contempt are sufficiently aggravating to outweigh the mitigating effect of his length of service. This is, therefore, not a trivial transgression which may well be dismissed lightly so as to justify the extension of a final warning ..." [Paragraph 17]

"Even on the assumption that the present offence is unrelated to the previous misconduct, I still do not think the second appellant's disciplinary record should have been disregarded. The first respondent's disciplinary code provides for a progression of penalties. The rationale behind it must have been that there would come a stage beyond which the accumulated penalties cannot be allowed to progress further. Their cumulative effect would then provide clear evidence of ill-discipline which would render a continued employer-employee relationship intolerable." [Paragraph 21]

"There was therefore justification for a differentiation of the penalties imposed on the three categories of employees. Each penalty was dictated by the different disciplinary record of each category of employees. All the circumstances of this case point to dismissal as the appropriate sanction for the second appellant." [Paragraph 22]

The appeal was dismissed.

SACCA (PTY) LTD V THIPE AND ANOTHER [1999] 12 BLLR 1241 (LAC)
Case heard 5 August 1999, Judgment delivered 12 August 1999.

This case was an appeal from an order of the Industrial Court which "effectively condoned the respondent's late filing of a statement of case". The issues to be considered by the Labour Appeal Court were whether the order was a simple interlocutory order which was not appealable, and whether the filing of a statement of case three years after the dispute was referred to the Industrial Court did not require condonation since the appellant had not barred the respondent.

Mogoeng AJA held:
"There can be no doubt that the decision to allow the respondents to proceed on the merits, notwithstanding the late filing of the statement of case was an order in the ordinary sense of the word which, if wrong, could be corrected on appeal. The real question is whether it can be corrected forthwith and independently of the outcome of the main proceedings or whether the appellant is constrained to await the outcome of the main proceedings before the decision can be attacked..." [Paragraph 5]

"A judgment or order is a decision which, as a general principle, has three attributes;

> *firstly*, the decision must be final in effect and not susceptible of alteration by the court of first instance;
>
> *secondly*, it must be definitive of the rights of the parties;
>
> *thirdly*, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings ..." [Paragraph 8]

"It follows, therefore, that unless an interlocutory order has a final and definitive effect on the main action it is not a judgment or order. It amounts to a simple interlocutory order which is not appealable..." [Paragraph 9]

"The courts have made a subtle shift from a strict adherence to the abovementioned requirements and adopted a more pragmatic and flexible approach to a situation where a party seeks to appeal against some preliminary or interlocutory decision which is made by a court before it has arrived at a final conclusion on the merits of the dispute between the parties. ..." [Paragraph 10]

"The effect of the foregoing approach in the circumstances of the present case would be as follows:

> *Firstly*, the order "condoning" the failure of the respondents to file the statement of case in time is for the purpose of the main proceedings, dead and buried. ... [I]t is therefore final in effect and not susceptible to alteration by the Industrial Court.

> *Secondly*, if the decision sought to be corrected was decided in favour of the appellant, thereby refusing "condonation", that order would certainly have been definitive of the rights of the parties. ...
>
> *Thirdly*, had "condonation" been refused or should this appeal succeed, such an order would necessarily lead to a more expeditious and cost effective final determination of the entire dispute ... The appellant would get the same relief as in the main proceedings namely the dismissal of the application." [Paragraph 12]

"I am therefore satisfied that an order granting "condonation" of the late filing of a statement of case is in nature and effect an appealable interlocutory order." [Paragraph 14]

"The order sought to be corrected in this appeal is very much in the nature of an order granting condonation for the late filing of a statement of case. No condonation was sought by the respondents in the Court *a quo*." [Paragraph 16]

"... The essence of the respondents' contention was that rule 29(4) entitled the appellant to bar the respondents. Appellant failed to utilise this remedy and was therefore estopped from trying to prevent them from prosecuting their application. The Court *a quo* ruled in favour of respondents for this very reason." [Paragraph 24]

"There can be no doubt that the rules of any court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts ... Consequently, they must be interpreted and applied in a spirit that will enhance and facilitate the work of the courts and enable the litigants to resolve their disputes in as speedy and inexpensive a manner as possible..." [Paragraph 27]

"Rule 29(1) does not create an obligation to file a statement of case within the specified time limit. However, an applicant is obliged to file it within a reasonable time ... rule 29 as a whole goes a long way to underline the urgency which must characterise the resolution of labour disputes. ..." [Paragraph 28]

"The appellant was not only courteous enough to warn the respondents, well in advance, that it intended to take a point *in limine* regarding their delay, but it also advised the respondents to apply for condonation and explain away their delay, so as to protect their own interests. They spurned the opportunity..." [Paragraph 29]

"The respondents' failure to file their statement of case in time or within a reasonable time and their consequent remissness to prosecute their application as well as the refusal to explain the delay makes it very difficult to understand why they were granted the indulgence. A delay of three years four months is by all standards grossly unreasonable. The import of rule 29(4) and (5) has been misconstrued. The failure of the appellant to bar the respondent, and thereafter to apply that the application be dismissed, did not render the provisions of rule 29(1) ... inconsequential. ... I am satisfied that the point *in limine* should have been upheld." [Paragraph 30]

The appeal was thus upheld, and the application dismissed due to an undue and unfair delay. Conradie JA wrote a separate judgment agreeing with the order proposed by Mogoeng AJA. Nicholson JA concurred in the judgments of Conradie JA and Mogoeng AJA.

SUPREME COURT OF APPEAL

This section lists cases where the original high court judgments could not be found, but judgments by the Supreme Court of Appeal, dealing with judgments written by the nominee, were found.

MOLOTLEGI AND ANOTHER V MOKWALASE [2010] 4 ALL SA 258 (SCA)

This case concerned a claim for defamation. Appellants (defendants in the court below) had applied for a separation of issues in terms of rule 33(4), whereby the meaning of the alleged defamatory words were to be determined separately. This application was granted by the High Court (per Matalapeng AJ). On appeal to the Supreme Court of Appeal from the subsequent judgment of Mogoeng JP, Bosielo JA (Mthiyane and Shongwe JJA and Seriti AJA concurring) noted that counsel for the appellants relied on the ground of appeal that Mogoeng JP had erred in finding that the words uttered were defamatory without having heard evidence of the special circumstances surrounding them:

" ... [C]ounsel for the respondent conceded that the learned Judge President erred in deciding that the words uttered were defamatory without any evidence of the special circumstances under which the words were uttered. He argued further that, given the fact that the respondent relied on the secondary as opposed to the primary meaning of the words uttered, the court below erred in granting separation of the issues in the manner it did..." [Paragraph 9]

"It is common cause that this matter proceeded to trial on the issue as separated in terms of rule 33(4). No evidence was led at the trial. Notwithstanding the fact that no evidence regarding the context and the special circumstances surrounding the utterance of these words was led, the court below found the alleged words to be defamatory of the respondent. Furthermore, the court below found the words to be wrongful and to have been uttered with *animus iniuriandi*." [Paragraph 13]

"... [T]he respondent did not rely on the alleged words as being defamatory *per se*. The respondent averred ... that these words were defamatory because of the context of the meeting, his position at the meeting and the manner in which they were uttered. In other words, the respondent pleaded special circumstances giving rise to an innuendo." [Paragraph 14]

"The appellants' first prayer unduly limited the issue to be separated ... No reference is made to ... the context under which the words were uttered and the innuendo which the respondent attributes to the words uttered. It is clear to me that this was a mischaracterisation of the issues pleaded ... Given the issues as pleaded by the respondent, it is not possible to determine if the alleged words uttered about the respondent are capable of bearing the meaning attributed to them in the innuendo without any evidence of the background facts being led." [Paragraph 15]

"The logical conclusion is that the court below erred in attempting to determine the meaning of the words used without any evidence of the special circumstances being led. It follows that the order of the court below has to be set aside so that the respondent can be afforded the opportunity to lead the necessary evidence regarding the special circumstances and context under which the alleged words were uttered..." [Paragraph 16]

"...[B]oth counsel are *ad idem* that the learned Judge President went beyond what he was required to decide. Evidently he was not required to determine the issues of wrongfulness and *animus iniuriandi* at that stage. He was only required to determine if the words uttered were defamatory *per se* or not. I agree that the learned Judge President erred in deciding issues which were not before him." [Paragraph 17]

Heher JA dissented, holding that the application under Rule 33(4) should "neither have been made nor granted", and further that:
"The fact that the learned Judge erred in arriving at his conclusion by assuming that the context had been proved and was such as to imbue the words with a defamatory meaning, does not mean that his final word has been expressed on the pleaded issues. Once such evidence as the parties may wish to place before the court has been considered and the context, if any, established, a proper appraisal can be undertaken of the real issues." [Paragraph 26]

MATLHOLWA V MAHUMA AND OTHERS [2009] 3 ALL SA 238 (SCA)

This case dealt with whether the purported expulsion of the appellant from the third respondent (the United Christian Democratic Party) was lawful. A "Management Committee" of the Party had purported to expel the appellant from the party and also from the North West Provincial Legislature, allegedly on the grounds of his failure to comply with instructions from the party. Van Heerden JA (Farlam, Nugent, Lewis and Maya JJA concurring) held that:

"The application, which by the time of the hearing was limited to an order that his expulsion from the Party be "declared null and void *ab initio*" or alternatively set aside, was dismissed with costs by the court below. Notwithstanding the absence of a counter-application (and despite the fact that such orders were not sought), Mogoeng JP purported to confirm the appellant's expulsion from the Party, as well as his expulsion from the North West Provincial Legislature." [Paragraph 6]

"As was correctly emphasised by the court below, a political party is a voluntary association founded on the basis of mutual agreement. Like any other voluntary association, the relationship between a political party and its members is a contractual one..." [Paragraph 8]

"In coming to the conclusion that the appellant's expulsion from the Party was lawful, the court *a quo* reasoned as follows:

> " ... On a preponderance of probabilities, the Party does have a Management Committee which has, over the years, been dealing with issues such as the possible sale of its farm worth about R1.5m, projects, Human Rights Day celebrations, salaries of permanent staff members of the Party, traditional leadership, deployment, the Party's youth, religious affairs, etc. By any standards, these are the issues expected to be discussed and addressed by a supreme structure which is responsible for the running of all the important affairs of the Party, and that is what the Management Committee is said to be.
>
> The only Management Committee mentioned in the constitution of the Party is the Federal Council Management Committee. The Federal Council generally meets at intervals of 6 months. Obviously, a lot would ordinarily have to be done in a month let alone 6 months, and the need for a structure that has to look after the day-to-day affairs of the Party requires no motivation. That structure can only be the Federal Council Management Committee. I think this Committee was purposefully named the Management Committee since its responsibility is to do a whole lot more than just

> convene meetings of the Federal Council and of the Federal Congress and determine the date and the place for the meeting. It has to manage the Party. After all, that is the duty of the Federal Council for which the Management Committee is filling in. Common sense and logic dictates that the Federal Council Management Committee is the same Management Committee, whose meetings the Applicant attended in the past, and that it is also the same Management Committee which expelled him from the Party.
>
> On the probabilities, the version of the Deputy National Leader, the Chairperson and the Deputy Secretary Administration of the Party that the Applicant was expelled from the Party by the Federal Council Management Committee is the correct one and not that of the Applicant. The duties entrusted to the Management Committee are so important that they cannot be left to an *ad hoc* committee to handle. It would also be absurd to accept the Applicant's contention that the entire top leadership of the Party, whose names appear on the first page of the minutes of the meetings of the Management Committee, is part of an *ad hoc* committee, which according to the Applicant, is led by the Deputy Secretary Administration. I am satisfied that the Party did establish the Federal Council Management Committee. It then clothed it with the powers of the Federal Council."

"I am afraid that I cannot agree with this reasoning. It is true that there is authority for the proposition that the constitution of a voluntary association should, in appropriate circumstances, be interpreted "broadly and benevolently ...", ... However, this "principle of benevolent construction" does not apply to a situation such as the one forming the subject of this appeal. ... [T]he power to expel a member may be exercised only by a body in which such power has been vested by the constitution expressly or by clear and unambiguous implication, failing which the purported expulsion will be *ultra vires* the constitution and void." [Paragraph 11]

"In terms of ... the only clauses in the entire constitution in which the FCMC is mentioned – the powers conferred on the FCMC are limited. ... There is nothing in the constitution of the Party that confers any disciplinary powers on the FCMC, much less the power of expulsion." [Paragraph 15]

"It follows that ... it has not been shown that the FCMC was either authorised or empowered by the constitution of the Party to expel the appellant and that its decision ... in this regard cannot stand." [Paragraph 16]

"As regards the orders of the court *a quo* confirming the appellant's expulsion from the Party and from the North West Provincial Legislature, as I have already stated no such orders were sought. The learned Judge President misdirected himself in making those orders and they should in any event be set aside." [Paragraph 17]

The appeal was thus upheld.

HIGH COURT

BMW FINANCIAL SERVICES (SA) (PTY) LTD V DR MB MULAUDZI INC 2009 (3) SA 348 (B)

The respondent defaulted on his rental payments for the lease of a motor vehicle from the applicant. Respondent was obliged to pay rental in the amount of R24 860.77 per month over 59 months. Regular and prompt payments were made until sometime in August 2007, when he fell in arrears in the amount of R8110,84. The applicant sent him a notice in terms of the National Credit Act, notifying him of the default. After expiry of the ten-day period stipulated in the notice, the respondent deposited an amount of R28 205,23 into the plaintiff's account. That payment notwithstanding, the applicant proceeded to cancel the agreement and issue summons out of the High Court for payment of such additional amounts of money as might then be due. In due course, the applicant applied for summary judgment.

Mogoeng JP held:

"At the time, when the payment of 12 September 2007 was made, there is room for arguing, as the defendant intends to do, that all amounts that were overdue were paid and the credit agreement which had not yet been cancelled was reinstated. The defendant continued to possess the vehicle which, unlike in the situation contemplated by s 129(3)(b) [of the National Credit Act], had not yet been repossessed. This is a defence which the defendant intends to rely on and it strikes me as a bona fide defence." [Paragraph 18]

"The second defence intended to be raised by the defendant is that, after the defendant had paid the amount which was by far more than what was overdue, the notice of 10 August 2007 fell away. If the plaintiff wanted to rely on the default that existed after the payment of 12 September 2007 had been made, so goes the argument, then a new notice in terms of s 129(1)(a) read with s 130(1), should have been given to the defendant. Since this was not done, the defendant contends that this amounts to non-compliance with the provisions of the Act." [Paragraph 19]

"The defendant further contends that the history of this requirement is traceable to s 11 of the Credit Agreements Act ... That section afforded the credit receiver the opportunity to be given notice, similar to that provided for in ss 129 and 130, of 30 days twice and the third notice was reduced to 14 days. This requirement has not, according to the defendant, been done away with and s 129 of the Act implicitly provides for such a repeat notice, the only difference being that notice must each time be for a period of 20 business days." [Paragraph 20]

"It is obviously premature to decide whom of the parties should succeed in the main action. However, I am satisfied that the defendant has disclosed a bona fide defence to the plaintiff's claim against it." [Paragraph 21]

The defendant was thus granted leave to defend.

EZEKIEL MODISE V S, UNREPORTED JUDGMENT CA NO 113/06

Case heard 28/9/2007, Judgment delivered 09/11/2007

This was an appeal against a conviction and sentence for attempted rape. The appellant and complainant were husband and wife who were in the process of getting a divorce. The complainant had effectively moved out of the marital home and was living with his parents at the time of the incident. For almost a year prior to the incident the couple had ceased sharing a bedroom and there were no conjugal relations. The two shared a bed on the night of the incident and there was a tussle and the complainant fled to her neighbours for safety before later returning to the marital home and bed.

Gura J, Mogoeng JP concurring, held:

"This was a man whose wife joined him in bed, clad in panties and a nightdress. When life was still normal between them, they would ordinarily have made love. The appellant must therefore, have been sexually aroused when his wife entered the blankets. The desire to make love to his wife must have overwhelmed him, hence his somewhat violent behaviour. He, however, neither smacked, punched nor kicked her. Minimum force, so to speak, was resorted to in order to subdue the complainant's resistance." [Paragraph 19]

"The relationship between the complainant and the appellant seems to have played no role in the exercise of the Magistrate's discretion. This relationship of husband and wife should never be overlooked by any judicial officer. ..." [Paragraph 21]

"The trial Court seems to have over-emphasised the appellant's previous conviction of assault. Clearly, such a record is not an indication that a person did not learn any lesson. It is true that the complainant was injured, outside the house when she fell, but the appellant himself did not inflict any injury on her directly. He never chased after her. No real harm or injuries resulted from the throttling. It is not in the interest of justice to send the appellant to prison. This case is not comparable to a case where a lady comes across a stranger on the street who suddenly attempts to rape her. An effective term of imprisonment is therefore inappropriate in this case." [Paragraph 22]

The appeal against conviction was dismissed. The appeal against sentence was upheld.

S V DUBE AND OTHERS (204/2004) [2007] ZANWHC 8 (19 MARCH 2007)

Applicants sought application for a special entry relating to a case in which Mogoeng JP presided over a case with his wife, Ms Mogoeng, representing the State. Mogoeng JP refused to recuse himself from the case, saying:

" From 1998 to 2001 I have come across at least 13 cases3 in which Matthew Chaskalson appeared in matters where his father (our esteemed former Chief Justice, Arthur Chaskalson) was not only a member of the panel but was also presiding." [Paragraph 4]

" The application for special entry in this matter is somewhat interesting. Mr Shapiro, counsel for the State, Ms Mogoeng, and the Presiding Judge were previously involved in a Full Bench Appeal in the matter of S v Balatseng… The relationship between the Presiding Judge and counsel for the State was, as readily admitted by Mr Shapiro, known to him then, and obviously now before this matter

was heard on appeal. He, however, chose not to apply for the recusal of the Presiding Judge in the Balatseng matter and in this case for the reasons stated in the Applicants' papers." (Paragraph 5)

Mogoeng JP (Gura J concurring), however, acknowledged the reasonable prospects of success on appeal, and allowed the matter to be resolved by the Supreme Court of Appeal.

On appeal, in ***Dube v The State*** **(523/07) [2009] ZASCA 28 (30 March 2009)**, Mhlantla JA (Mthiyane, Lewis, Cachalia and Snyders JJA concurring) held that because the litigants in the case held a reasonable suspicion that bias on the part of the president judge could occur, it was irregular for Mogoeng JP not to recuse himself *mero motu* from the case.

" It is settled law that not only actual bias but also the reasonable perception of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings." (Paragraph 6)

" Counsel for the respondent submitted that the perception of bias could not be established because counsel for the appellants had been aware of the relationship between the Judge President and the state advocate. This argument in my view is without merit. The test set out… does not relate to counsel but to the litigant. It is the litigant who must entertain a reasonable apprehension of bias for the disqualification to be sustained." (Paragraph 16)

The appeal to the extent of the Special Entry was thus upheld and sent back to the High Court for rehearing.

S V BALATSENG 2005 (2) SACR 28 (B)

Case heard 25/6/2004, Judgment delivered 22/9/2004

An undefended accused was convicted of murder, attempted murder, theft of a firearm and possession of a firearm without a license to possess it. The appellant had appeared before a High Court for trial. At the first date of hearing he had indicated that he did not wish to continue with counsel appointed by the Legal Aid Board, but desired to engage his own counsel. The Court postponed the matter, for a period of 18 days, and advised the appellant that the matter would proceed on the date of resumption, and if he did not have counsel he would have to accept legal aid counsel. On the date of resumption the appellant did not have his own counsel present and the Court informed him that he would have to continue with the trial unrepresented. The appellant pleaded guilty, but during questioning by the Court it emerged that he did not admit all the elements of the offence, even when this became evident, the trial Court had continued to question the appellant.

Mogoeng JP held:

"The Court caused the appellant to admit that he had undertaken to defend himself in the absence of counsel of his choice. This was obviously incorrect. The matter had been postponed on condition that the appellant would, in the absence of counsel of his choice, be willing to be defended by counsel provided by the legal aid board. At no stage did he undertake to defend himself. What the Court did flew in the face of its duty articulated by Goldstone J in S v Radebe, S v Mbonani ... as follows: 'If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused

should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should be given a reasonable time within which to do so. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice. I should make it clear that I am not suggesting that the absence of legal representation per se or the absence of the suggested advice to an accused person per se will necessarily result in such an irregularity or an unfair trial and the failure of justice. Each case will depend upon its own facts and circumstances.'(My emphasis.)" [Paragraph 11]

"In line with this decision and the preceding remarks, I am of the view that undefended accused persons need to be made aware, at the commencement of the trial in brief and understandable terms, of what it entails to plead either guilty or not guilty to the charge(s) that would have just been explained to them. They have to plead either guilty or not guilty being fully aware of what the elements of the crime they face are, and that if they do not admit any one of them then they are in effect pleading not guilty. The Court must ensure that they are au fait with the options at their disposal. ..." [Paragraph 15]

"It does not appear from the record that the appellant's right to give evidence in his defence was properly explained to him. All that the Court said in this regard was: 'Explain to the witness, to the accused that it is the State case. Now what he told me from there was not evidence. What he said there, was not evidence. He's now got the chance to come and give evidence for his case.' One would have expected of the Court at least to explain to the appellant, inter alia, that he must refute every piece of material evidence given by the State witnesses which he knows to be incorrect, and to assist him to do so within acceptable bounds. Such an explanation should have included his right to call witnesses, if any, in support of his defence or case. As the record shows, the rights of this undefended accused were not explained in a satisfactory manner. " [Paragraph 20]

It was held that a new trial should not be ordered, thus leaving the matter in the hands of the Director of Public Prosecutions to decide whether or not to try the appellant afresh.

S V DE BEER & ANOTHER [2005] JOL 15411 (B)
Case heard 20 June 2005, Judgment delivered 22 June 2005

The accused had entered a special plea, to the effect that only the Transvaal Provincial Division (and not the then- Bophuthatswana Provincial Division) had territorial jurisdiction to hear the criminal case against them. The special plea was dismissed [judgment not available]. In an application for leave to appeal to the Supreme Court of Appeal, Mogoeng JP held:

"The question to be addressed is whether this is the appropriate stage at which the matter may, assuming that there are reasonable prospects of success, be allowed to go on appeal, or whether the trial should rather be allowed to proceed..." [Paragraph 2]

Mogoeng JP cited case law and academic authority, and continued:

"On the above authority I am satisfied that the appropriate stage at which the accused may launch this application for leave to appeal against this Court's decision that it also has territorial jurisdiction in this matter, would be after the trial is finalised." [Paragraph 5]

"The underlying principle is that the whole trial be allowed to run its course to finality, rather than entertain appeals piecemeal ... An appeal may then be lodged if at the end of the whole trial it is still thought that there is a need for an appeal." [Paragraph 6].

"The only possible unfairness of the trial ... was that in the event of the accused being convicted after a long trial, the court of appeal may well find that this Court lacks territorial jurisdiction, then set aside the conviction and sentence and order a trial *de novo*. The accused would presumably be prejudiced in that they would have spent money on the trial and still be expected to spend further financial resources on the new trial." [Paragraph 8]

"It is not inherently unfair and prejudicial to the accused to be tried in a court which does not have territorial jurisdiction ... It all depends on the circumstances of each case. The trial ... was set down for five days. ... All indications are that the trial will be short, lasting for at most five days. The question of a long trial and the resultant unfairness, does not, therefore, arise. Furthermore ... there is nothing to suggest that grave injustice would result or justice might not by other means be attained except by allowing an appeal to be prosecuted now rather than later." [Paragraph 9]

"Finally, it is in the very least debatable whether a court of appeal may, in the interests of justice and in pursuit of fairness, set aside the conviction and sentence and order a new trial solely because the division of the High Court of South Africa that tried the matter did not have territorial jurisdiction." [Paragraph 10].

The application for leave to appeal was dismissed. However, leave to appeal was granted by the Supreme Court of Appeal. In **De Beer & another v S [2006] JOL 17560 (SCA)**, Cachalia AJA (Harms, Mthiyane, Nugent JJA and Maya AJA concurring) overturned the decision of the High Court and upheld the special plea. Cachalia AJA noted that the events from which the charges against the appellants arose from events that occurred at or near a farm situated in the northern district of Gauteng Province, "just outside the magisterial district of Mankwe in the North-West Province, but within four kilometres of its boundary." Due to the farm's location in Gauteng, the Pretoria High Court had jurisdiction. The appellants had however been indicted in the North West [Mafikeng] High Court, and the National Director of Public Prosecutions had refused to grant a certificate authorising the transfer of the trial to the North-West High Court. [Paragraphs 2 – 3] Cachalia AJA continued:

"The matter came before Mogoeng JP ... The appellants ... [pleaded] ... that the Court had no jurisdiction to try the offences. When such a plea is entered, and it appears that the Court does not have jurisdiction to try the offences ... the Court is, in terms of section 110(2) of the CPA [Criminal Procedure Act] obliged to "adjourn the case to the court having jurisdiction." The learned judge however dismissed the objection. He held that on a proper construction of section 19(1)(a) of the SC Act [Supreme Court Act], read together with section 90(2)(a) of the Magistrates' Courts Act ... the Mafikeng High Court had jurisdiction to try the offences because they were alleged to have been committed within four kilometres of the boundary of the district of Mankwe." [Paragraph 4]

“In the present case the appeal ought to be entertained at this stage because it is clear that the Court has no jurisdiction and also because it is manifestly in the interests of justice to permit an appeal against the ruling without the appellants first having to be exposed to the prejudice of an irregular trial.” [Paragraph 5]

“I turn to consider the first of the court *a quo*'*s* reasons for dismissing the appellants' objections to it exercising jurisdiction, ie, that it is absurd for a lower court to exercise jurisdiction over an offence that is committed within its jurisdiction but to deny such jurisdiction to a high court as a court of first instance. The absurdity, in the view of Mogoeng JP, stems from the fact that provincial and local divisions have the power to "to hear and determine appeals from all inferior courts within its area of jurisdiction" ... "review the proceedings of all such courts" ... and entertain committals from the regional court for sentence in terms of the Criminal Law Amendment Act ... but may not act as a court of first instance simply because section 19(1) of the SC Act does not extend the territorial jurisdiction of the high court by four kilometres beyond the province's boundary...” [Paragraph 8]

“... [T]he areas of jurisdiction of the provinces have been determined by statute. So too the areas of jurisdiction of magisterial districts. The fact that the legislature has extended the territorial jurisdiction of magistrates' courts to four kilometres beyond their boundaries, to overcome practical problems referred to above does not, in my view, carry with it any necessary implication that the area of jurisdiction of the high court is similarly extended. On the contrary, if the 4 km rule was extended to the boundaries of the provinces, thus causing areas of overlapping jurisdiction between them, serious jurisdictional disputes would arise. ... There is no reason to read section 90(2)(a) of the MCA with section 19(1)(a) of the SC Act, as the court below did, so as to harmonise them. Indeed such a reading manifestly conflicts with section 19(3) of the SC Act which prohibits the section from being construed in a way that deprives any provincial division from lawfully exercising jurisdiction conferred upon it by statute...” [Paragraph 10]

“The court below considered it anomalous for a provincial division to exercise appellate and review jurisdiction over district and regional courts within its geographical area without exercising original jurisdiction over the extended four kilometre area. The appellate and review jurisdiction that provincial divisions exercise over lower courts ... relate essentially to the supervisory function that provincial divisions exercise over lower courts that operate within their geographical area of jurisdiction. Such jurisdiction is unrelated to and different from the territorial jurisdiction over offences that are committed within the geographical area of a provincial division ... There is therefore no anomaly...” [Paragraph 11]

“Turning to the high court's other example of an "anomaly", that a high court may entertain a committal from a regional court for sentence but not exercise original jurisdiction over the same offence, it is apparent that Parliament ... was concerned to limit the penal jurisdiction of the regional court to a maximum of 15 years' imprisonment. It was not concerned with the territorial jurisdiction of the high court. I am therefore unable to agree that it is anomalous for a high court to entertain a committal from a regional court for sentence, but not exercise original jurisdiction over the same offence.” [Paragraph 12]

“The second reason advanced by the high court for assuming jurisdiction over this matter was for “practical considerations”. These relate to the proximity of the Court to the scene of the crimes, its accessibility to the accused and also members of the victims bereaved family and the interest of the local community in the matter. Taking such considerations into account the high court concluded that it was in the interests of justice for it to assume jurisdiction over the matter. No authority was cited to support an

assumption of jurisdiction on this, or any other basis. Such authority as does exist is explicitly against any such assumption of jurisdiction." [Paragraph 13]

"... Once the NDPP had exercised its discretion not to remove the trial from the jurisdiction of the Pretoria High Court, that was the end of the matter. The high court, had no discretion, as it thought it had, to assume jurisdiction over the matter. It was obliged, as mentioned above, to adjourn the proceedings to a court having jurisdiction." [Paragraph 14]

S V MOIPOLAI 2005 (1) SACR 580 (B)

Case heard 11 June 2004, Judgment delivered 20 August 2004

Appellant was convicted of rape by a regional court, and sentenced to ten years imprisonment. He appealed against his conviction and sentence. Mogoeng JP noted the following facts, *inter alia*, as being common cause or undisputed:

- At the time of the incident, the appellant and the complainant had two children together, and the complainant was eight months pregnant with their third child;
- The complainant was present at the appellant's parental home at the instance of the appellant;
- The complainant "had already been beaten up" when intercourse took place. [Paragraph 2].

Mogoeng JP analysed the accounts given by the appellant and the complainant:
"Appellant then had intercourse with the complainant. He denied that he raped her. His reason for this denial was basically that the complainant is the mother of his children and he cannot, therefore, be said to have raped her. I understood this to mean that the nature of their relationship is such that it renders their intercourse incapable of being legally categorised as rape." [Paragraph 7]

"It is correct that the complainant did not at any stage express her opposition to the intercourse ... She neither said no nor did she offer any physical resistance to the intercourse after the appellant had manifested his intention to have intercourse with her. How then could her boyfriend ... have known that she was in fact opposed to the intercourse? Whether one finds that there was or there was no consent ... would depend on whether it is the State's or the defence's version which is found to be probable, since each version points to a different conclusion." [Paragraph 10]

"The defence's version was, however, rejected by the court *a quo* for good reason." [Paragraph 12]
"I find it to be improbable that after manifesting such intense hatred for Matron [a woman who was present in the bed when the rape took place], this eight months' pregnant complainant, who had just been injured by Matron, would be the one to open the door for her and to invite her on to her bed with the appellant (the father of her children). It is highly improbable that the complainant, who was apparently sober, would have wanted to make love to the appellant in the presence of another person. ... [T]his version defies logic and was, therefore, correctly rejected by the court *a quo* ..." [Paragraph 13]

Mogoeng JP thus upheld the conviction, and proceeded to consider the sentence:

"An effective term of ten years' imprisonment was imposed on the appellant. This was done in an attempt to show mercy but on the mistaken belief that the law enjoined the Court to impose a term of 15 years' imprisonment." [Paragraph 17]

"The learned magistrate has, with respect, misdirected himself with regard to the application of the provisions of the Criminal Law Amendment Act ... The assumption that s 51(2)*(a)*(i) applies to this case was clearly incorrect ... The rape of the nature committed by the appellant is the one referred to in Part III of Schedule 2. The minimum sentence prescribed ... for such a rape, committed by a first offender, is imprisonment for a period of not less than ten years. The court *a quo* erred in its application of the provisions of the Act. It sought to reduce what it assumed to be the prescribed sentence for a first offender by five years. ... Ten years is the prescribed minimum sentence and its imposition did not, therefore, amount to the reduction of sentence." [Paragraph 18]

"These [the Magistrate's reasons for imposing sentence] are factors worthy of consideration. It was indeed highly insensitive of the appellant, firstly, to punch an eight months' pregnant woman, secondly, to punch her so hard that he caused her to fall, and, thirdly, to punch her because her sense of decency and privacy did not allow her to share the same bed with the father of her children and another woman. It also heightens his moral blameworthiness for him to have had intercourse with her in the presence of another woman shortly after having been beaten up. It must have been humiliating. These factors, though admittedly aggravating, were, however, overemphasised at the expense of equally strong mitigating factors." [Paragraph 22]

"Some of the important mitigating factors to which no attention was paid were that the appellant was a first offender, and that the appellant and the complainant were no strangers to one another. They were lovers (virtually husband and wife) for a period of seven years. They had two children together and the complainant was expecting their third child when the rape took place. But for the presence of Matron, the appellant and the complainant would probably, just as they did many times before, have had consensual intercourse. In all likelihood the reason why the appellant had asked the complainant to come over to his parental home that night, was so that they could have intercourse together. In fact, when the prosecutor asked the appellant whether he had asked the complainant to spend the night with him so that they could have intercourse together, the appellant's response was that that was not the only reason. Meaning that it was one of the reasons why he wanted to spend the night with her. Similarly, the complainant must have come knowing that this was either likely to happen or was going to happen for sure and she was, given the nature of their relationship, willing to take part in the intercourse." [Paragraph 23]

"This rape should, therefore, be treated differently from the rape of one stranger by another between whom consensual intercourse was almost unthinkable."
Mogoeng JP considered the judgment of the former Appellate Division in *S v N 1988 (3) SA 450 (A)*, and continued:
"If this could be said of mere friends in circumstances where the assailant had exposed the victim to the danger of having to flee to the highway in the early hours of the morning, after she had pleaded with him more than once to please leave her alone, then the relationship between the appellant and the complainant in this matter should serve as a much stronger mitigation." [Paragraph 24]

"It is also a very important mitigating factor that theirs was not an abusive relationship. According to the complainant herself, the appellant had never before beaten her up. The violence on the day in question was in fact a single aberration in their otherwise peaceful relationship. ... I say this alive to the rationale behind the provisions of the Act insofar as they relate to rape and to the reality that we live in a society where physical and sexual abuse of women by boyfriends, husbands and other male persons is rife. ..." [Paragraph 25]

"The assailant in *S v N* was sentenced to undergo five years' imprisonment. The Appellate Division suspended half of the sentence. On the strength of this authority, I am satisfied that a sentence which is less than the prescribed sentence of an effective term of ten years' imprisonment is justified in this matter. That lesser sentence can only be imposed if the requirements of s 51(3)*(a)* are met. That section enjoins even a Court of Appeal to impose a lesser sentence than the sentence prescribed ... only if it is satisfied that substantial and compelling circumstances exist and to record those circumstances. ... [T]he learned magistrate found that substantial and compelling circumstances do not exist. This finding is, with respect, incorrect. ..." [Paragraph 26]

The conviction was thus upheld, but the sentence substituted for a sentence of ten years imprisonment, half of which was suspended for a period of five years.

TSHOLO V KGAFELA & OTHERS [2005] JOL 16146 (B)

This was an application for an order restraining the first and second respondents from commencing the private prosecution of the applicant. The applicant was an accused in a case relating to the murder of the first respondent's ex-husband. The basis for the charge was that the first respondent, who was the wife to the deceased in that matter, had hired the applicant to kill her husband. Since the first respondent had tendered an acceptable plea of guilty, the applicant did not testify on the merits. He only testified on sentence. When he did, the court was not informed that he was an accomplice in respect of whom the procedure in terms of section 204 of the Criminal Procedure Act was to be followed. Accordingly the issue of the indemnity of the applicant from prosecution did not arise. The applicant was, therefore, not indemnified from prosecution. First respondent wanted the applicant to be prosecuted for his role in the commission of the murder. Accordingly she approached the Director of Public Prosecutions, who declined to prosecute and issued a certificate to that effect. The first respondent, duly assisted by the second respondent, instituted a private prosecution against the applicant.

Mogoeng, JP held:

"It is necessary to address the question whether the respondent has locus standi to institute private prosecution by virtue of being the deceased's wife or on the same basis as any private person would qualify in terms of section 7(1)(a)." [Paragraph 11]

"In the instant case, the first respondent and her husband (the deceased) were divorced prior to the commission of the murder .... She was no longer his wife. Consequently the automatic presumption of the necessary interest to prosecute does not operate in her favour. The first respondent may well be able to show that as any other private person; she does have the locus standi to institute and conduct a private prosecution." [Paragraph 13]

"In this case, the first respondent hired the applicant to kill her ex-husband. The applicant enlisted the services of Vayi to achieve that goal. The deceased lost his life as a result of this illegal transaction authored and stage-managed by the first respondent herself. Assuming that the first respondent has suffered any injury as a result of the killing of her former husband, what she is now trying to do through the machinery of a private prosecution, is to found a case in criminal law based on her own iniquity. She cannot be heeded for adducing her own infamy. Her conduct in instituting the private prosecution constitutes an abuse of process of the court." [Paragraph 16]

MONTSHIOA AND ANOTHER V MOTSHEGARE [2001] JOL 8348 (B)

In response to an application for an order restraining respondent from interfering with the first applicant in the execution of his duties as chief of a tribe, a *rule nisi* was issued. A counter-application was brought by respondent, for the setting aside of first applicant's designation as chief of the said tribe. The question for determination was whether the appointment of a chief by a MEC where the transfer of the function of traditional affairs to the said MEC had not yet occurred could be validated by the retrospective transfer of that function:

" This is one of those rare instances where an administrative act is so grossly defective that it may properly be said to be null and void *ab initio*. The publication of the proclamation is an essential requirement for the valid transfer of the administration of legislation from one MEC to another MEC. Furthermore, constitutional responsibilities are not to be taken lightly by government officials. (Paragraph 16)

" At the time of the launching of this application they had already been warned by the respondent of the constitutional problems that surround the second applicant's authority to administer the Act. When the constitutional issue was again raised, government should have seriously reconsidered its position and withdrawn the application. The retrospective operation of the proclamation therefore appears to me to be unjustified and somewhat oppressive regard being had to, how it affects the interests of the respondent and the options that government had and still has. (Paragraph 23)

Mogoeng JP accordingly dismissed the application for an interdict and discharged the *rule nisi* set in place.

S V ERIC MATHIBE. UNREPORTED JUDGMENT 8/2001, 1 MARCH 2001.

The matter was brought before the court to review the 2 year sentence of imprisonment imposed by the lower court for grievous bodily harm. The accused had tied the complainant, his girlfriend, to the rear bumper of a vehicle with a wire. He then drove that vehicle on a gravel road at a fairly high speed over a distance of about 50 metres. The objective of this exercise was to drag the complainant and cause her grievous bodily harm. The complainant suffered several abrasions on her stomach, thigh and knees. The accused did not allow her to have medical treatment on the day of the incident, only taking her to consult a doctor the next day. The accused was charged with assault with intent to do grievous bodily harm to which he pleaded guilty and was convicted as charged.

Mogoeng J held:

"In my view, the imposition of an effective term of two years imprisonment in circumstances where the accused is a first offender, who pleaded guilty and thereby showed remorse, who was provoked by the complainant and the complainant did not sustain serious injuries, cannot be in accordance with justice. It is too harsh by any standards." [Paragraph 5]

"The accused should have been given an option of a fine and half of the sentence should at least have been suspended. I think that a fine of R4 000.00 should have been fixed. It is sufficient, for a person of the accused's financial means, to demonstrate the serious light in which the court views the offence and still offers the accused an opportunity to secure his freedom at great expense. The effect of suspending half of the sentence would be to have it hang over the head of the accused as a constant reminder that violence will land him in trouble." [Paragraph 6]

"I will, therefore, confirm the conviction and set aside the sentence" [Paragraph 7]

Mogoeng J thus confirmed the conviction and set aside the sentence, substituting it for a sentence of a R4 000 fine or two years in prison, of which half was conditionally suspended for five years.

S V RELELA AND ANOTHER [2000] JOL 6499 (B)

Case heard 16/3/2000, Judgment delivered 16/3/2000

This was a review matter dealing with two cases where the accused had been declared to be incapable of understanding the proceedings so as to make a proper defence; to have committed the acts in question but to lack criminal capacity; and therefore not to be guilty. Before the commencement of trial each accused was referred to Hospital for mental observation. The doctor who observed them compiled psychiatric reports which concluded that the accused was not capable of understanding court proceedings and was not able to make a proper defence. The magistrates directed that the accused be detained at Bophelong Hospital pending the signification of a judge in chambers in terms of section 78(6) of the Criminal Procedure Act.

Mogoeng, J held:

"It appears to me that the provisions of sections 77(6) and 78(6) of the code have been widely misunderstood. That confusion stems from the perceived meaning of the phrase 'pending the signification of the decision of a judge in chambers' in both sections. Many court officials seem to interpret this phrase to mean that the findings and order made by a magistrate in terms of the above sections is something of a temporary measure intended to close the gap between the receipt of a psychiatric report and the decision by a judge in chambers. In other words, the thinking seems to be that the decision of a magistrate to commit an accused to prison or mental hospital in terms of either section 77(6) or 78(6) is not complete or good enough on its own. Such a decision, according to the perception, will only be good in law after a judge in chambers has either signified his approval of it or confirmed it. Therefore, these officials believe that a judge's stamp of approval must invariably be sought and obtained in cases of this nature, hence these papers now before me." [Page 2-3]

"If the aforegoing perception were correct, then it would mean that even the trial judge's finding and order in terms of section 77(6) or 78(6) would have to be validated by another judge in chambers. It is

evident from the above discussion that the above phrase only becomes relevant when a judge has to act in terms of section 29 of the Mental Health Act." [Page 4]

"The other reason why there is nothing I can do in this matter is that a decision made by the magistrate is not reviewable in terms of section 304 of the code. The question whether a conviction or sentence is in accordance with justice simply does not arise since the accused were not convicted let alone sentenced. There is, therefore, nothing to review" [Page 4]

"The magistrates in this matter have made the correct findings coupled with an appropriate order." [Page 5]

LESAPO V NORTH WEST AGRICULTURAL BANK [1999] JOL 5319 (B)

Applicant, a farmer, had approached court alleging that his right of access to court had been infringed by respondent's attaching of applicant's farming equipment due to applicant falling into arrears on debt owed to respondent. Respondent claimed it was entitled to do so in terms of s38 (1) of the North West Agricultural Bank Act 14 of 1981.

Mogoeng J held:

" These sections (this applies to section 38(2) as well) were indeed enacted for a good reason and in the public interest. The lawmakers were clearly driven by the common good and welfare of the Bank, as well as the farmers who benefit from the services of the Bank, to make this law. The need to protect the Bank's interests is even more pronounced these days since the Bank caters for all farmers across the racial and economic divide." (Page 6)

" The conduct of the Bank which led to this application before me, is a fundamental breach of this rule. The Bank is both plaintiff and judge whenever it relies on section 38(2) as it did. Even if the applicant were given a hearing before the provisions of section 38(2) were invoked, the Bank's interest in the matter would render such a hearing nugatory." (Page 10)

" When the applicant applied the funds advanced to him by the Bank to purchase farming implements, he acquired rights in respect of this property. Under normal circumstances, he would only be deprived of these proprietary rights after the intervention of an independent, impartial and competent court, tribunal or forum. Section 38(2) has taken away his entitlement to these forums, which would under normal circumstances, be a prerequisite to the loss of his proprietary rights by way of attachment and sale in execution." (Page 13)

" Section 38(2) is also… not merely a limitation on the applicant's free access to court, but rather a peculiar equivalent of an ouster clause… The Bank may institute action in court if it wants to, in which event the debtor's right of access to court would be observed. But if it decides to give instructions to the messenger without recourse to a court of law, then obviously the court's jurisdiction would be effectively ousted. There is therefore no real difference between section 38(2) and the usual ouster clauses as we have come to know them." (Page 14)

" What is even more disturbing is that the Bank, in acting in terms of section 38(2), assumes both the role of a plaintiff and presiding officer. It has the power to grant itself a summary judgment sui generis. There can be no fairness, objectivity and impartiality in such a situation where arbitrariness of this kind is allowed." (Page 17)

Having found that s 38 (2) of the Act could not be limited in terms of s 36 of the Constitution, Mogoeng J found the section unconstitutional and referred the matter to the Constitutional Court for confirmation. The Constitutional Court upheld the decision: **2000 (1) SA 409 (CC).**

HOTEL SLOTS V PREMIER NORTH WEST [1999] JOL 5120 (B)

Applicants sought a declarator that an agreement had been entered into with respondents to operate gambling machines for a period of 6 months without a permit. Agreement had been on the basis of a letter by the Chief State Law Advisor of the North West Province, N Jagga. Jagga had also informed him that he would be able, in his official capacity as an employee of the respondent, to secure a permit or agreement in terms of which the second applicant would have the exclusive right to operate gaming machines in the North West Province for a period of six months. In the meantime, another representative of the North West Province had written to the applicants informing them that the operation of the unlicensed gambling machines were illegal. Issue was essentially whether an agreement had been entered into.

Mogoeng JP held:

" I am satisfied that no agreement was entered into between the respondent and the applicants on the terms alleged by the applicants or at all. Annexure "APPL3" is a letter which is meant to clarify the position regarding the applicants' concerns... Even if I assume in the applicants' favour that an agreement was in fact entered into between them and Jagga orally or as per "APPL3" or in the event I am wrong in finding that none was concluded, there are serious problems surrounding its enforceability." (Page 12)

" Jagga was, thereafter, negotiating with himself on behalf of government and on behalf of the applicants. He was a double agent. An agreement resulting from such a divided loyalty and allegiance, can be nothing short of a product of corruption. The applicants, knowing that they would thereby compromise Jagga's position, paid him so that he could take a position more favourable to them… Such behaviour can be expected in deals which smack of bribery and corruption." (Page 13)

" The level of corruption in this country dictates that legislation be passed which deals specifically with the question of where the authority, to enter into contracts on behalf of the state, resides. Alternatively, the State Liability Act 20 of 1957 could be accordingly amended." (Page 16)

" Even if "APPL3" [the letter] is the contract entered into, it still does not meet the requirements of a valid contract. Jagga was certainly on a frolic of his own in writing "APPL3". He just happened to have used his office and his official letterheads." (Page 18)

" I would be failing in my duty if I were not to remark that Jagga did not emerge from this whole episode with his reputation or integrity unblemished or intact. His ill-considered actions are potentially embarrassing not only to him but to other key stakeholders as well. It ill-behooves a public servant…" (Page 25)

" This case strikes me as the worst imaginable abuse of due process, characterised by the employment of any conceivable loophole, technicality or legal stratagem. The objective apparently intended to be realised being to prolong the applicants' unlawful operations for as long as there exists some legal mechanism to make this possible. Consequently, this application has been on the roll for no less than fifteen months. This behaviour, whomsoever its author is, must be discouraged." (Page 27)

Due to the lack of animus contrahendi, the Court held that there was no contract. The application was accordingly dismissed with costs.

DVB BEHUISING V NORTH WEST PROVINCIAL GOVERNMENT AND ANOTHER [1999] JOL 5119 (B)

Applicant applied to court seeking order declaring that the power of the North West Provincial Government to repeal Regulation for the Administration and Control of Townships in Black Areas, Proclamation R293/1962, chapter 1, chapter 2, chapter 3 and chapter 9, arguing that such power was *ultra vires* due to provisions being within exclusive national competence, and not provincial. These provisions enabled registration of property rights of black persons in TBVC states. No alternative mechanism had been put in place for applicant's business (development and sale of property in former TVBC states) to continue registering newly-sold properties, effectively putting applicant out of business.

" The legislative authority of the national sphere of government is vested in Parliament... A provincial legislature, on the other hand, has a clearly defined and very limited legislative authority. (Page 7)

" I think that in order for a province to establish a township, designate a piece of land as a portion of a township or to abolish a township, some national ministry, eg Land, must intervene. Similarly, in order for government land to be set apart as a trading zone, for example, both the Ministries of Land and Trade would in all likelihood have to be involved." (Page 9)

" …The President declared the Deeds Registries Act 47 of 1937 applicable to the whole national territory of the Republic of South Africa. He also amended chapters 1 and 9 of Proclamation R293 of 1962 so as to extend the scope of application of the Deeds Registries Act to the townships…" (Page 9)

" It is of utmost importance to bear in mind that these amendments were effected after slightly more than two years and seven months of the assignment of Proclamation R293 of 1962 to the North West Province. This means that the President knew that he did not assign deeds registration to the North West Province on 17 June 1994, when he assigned Proclamation R293 of 1962. Had he done so, he would have left the amendments he effected to this proclamation, on 31 January 1997, to the North West legislature…" (Page 10)

Mogoeng J therefore declared that the power of the North West Provincial Legislature was *ultra vires* and invalid. While noting that the situation could be rectified by Parliament, Mogoeng J referred the order to the Constitutional Court for confirmation. The Constitutional Court confirmed the decision in part: **2001 (1) SA 500 (CC)**

S V KGASWANE [1999] JOL 5421 (B)

This was an automatic review where the accused was charged and convicted of escaping from lawful custody in contravention of section 39 of the Bophuthatswana Prisons Act. The two year sentence was set aside and substituted for sentence of eight months' imprisonment.

Mogoeng J held:

"I queried the apparent conviction of the accused of contravention of section 51(1) of the Code. I also asked, albeit in subtle terms, whether it is not perhaps section 48 of the Correctional Services Act ... that

applies in this case. In response, the magistrate informed me that the Bophuthatswana Prisons Act has not been repealed and that this he has confirmed with his colleagues. He also referred me to the charge sheet to make the point that the accused was not convicted of contravention of section 51 of the Code but rather of the correct Act being section 39 of the Bophuthatswana Prisons Act." [Page 2]

"The learned magistrate is, with due respect, mistaken in asserting that the foregoing Act still applies. That Act ceased to apply about four years ago ... These proclamations extended the scope of application of the Correctional Services Act ... to Bophuthatswana, Ciskei, KwaZulu, Transkei and Venda and repealed the pre-existing equivalent of Act 8 of 1959 in those territories. It is therefore incorrect to suggest that the Bophuthatswana Act still applies." [Page 2]

"The accused escaped from lawful custody on 5 February 1999, which is 14 days before the 1998 Act came into operation. Therefore the Correctional Services Act ... was still operative and he could only have been charged and convicted in terms of this Act. I will therefore amend the charge to reflect the correct Act" [Pages 2-3]

"The severity of the sentence was also a subject matter of my query. The magistrate holds the view that the sentence imposed is justified. I disagree. The accused is 25 years old. He is a first offender and he did not attack anybody or damage any property in order to escape. The escape was not even planned. He was being transported in an open bakkie at the time of the escape. He was also unguarded at the back of the bakkie. These undesirable circumstances must have given rise to a temptation to escape and enhanced the prospect of doing so successfully. Given the totality of these facts and circumstances, I am not satisfied that the sentence imposed is in accordance with justice. The prevalence of this offence is no good enough o [sic] justify a sentence which disregards even the somewhat unique circumstances of this case." [Page 3]

SHAW V PROFUND FINANCIAL SERVICES AND ANOTHER [1998] JOL 1921 (B)

Case heard 05/05/1997 26/08/1997, Judgment delivered 18/09/1997

The case was about an application for absolution from the instance brought at the close of the plaintiff's case. The plaintiff's case was based upon an inference which he sought to draw, namely, that because he had uncovered irregularities, the defendants had reason to and did, prevent him from getting employment.

Mogoeng J held:

"In considering the question whether or not the plaintiff has made a prima facie case, a reasonable man or reasonable court would do so on the basis of admissible evidence. The rules of evidence would have to be adhered to even at the stage of applying for absolution from the instance. The mere fact that this is an application for absolution from the instance at the close of the plaintiff's case, the defendants not having closed their case, and that the task of establishing a prima facie case is far less onerous than in all other stages can be no justification whatsoever for the relaxation of the rules of evidence." [Page 6]

"There are far too many gaps in the available evidence to enable and justify a reasonable man to infer, from the proven facts, that a report, favourable or adverse, was made and that the plaintiff's inability to obtain employment is the direct result of the report made by the defendants. On these facts alone there

is no evidence on which a reasonable man might or could find for the plaintiff. In the exercise of his/her discretion a reasonable man would not have any regard to the credibility of the plaintiff at this stage. This is not a case where the plaintiff can be said to be so obviously lying or to have been so palpably broken down that no reasonable man can place reliance on him ... It is rather a case where the plaintiff has given evidence which largely comprises opinions, inferences, conclusions and at times suspicions. Some contradictions exist in his evidence and there are gaps in his evidence which make it difficult to justifiably draw the inference that he contends for. He most certainly did not palpably break under cross-examination. There is no basis to have to consider his credibility. ...” [Page 17]

“It is of course peculiarly within the knowledge of the defendants whether they made a false, biased and/or dishonest report about the plaintiff. But it is most certainly not in their knowledge whether it was as a direct result of their report, if it was made, that the plaintiff did not get employment. It is peculiarly within the knowledge of the recruitment agencies and/or the potential employers. Needless to say, evidence of the latter is the most crucial link required between any conduct on the part of the defendants and the plaintiff's inability to get a job. A reasonable man would not therefore require less evidence from the plaintiff regarding this critical piece of a mosaic in order to create a prima facie case. In any event no evidence at all was led to establish the connection between the defendants and the plaintiff's inability to get a job. The onus is on the plaintiff to establish a prima facie case. ...” [Page 18]

“These other possible inferences are of more or less equal strength as, if not of more strength than, the one contended for by the plaintiff. What is fatal to the plaintiff's case is that he did not lay any basis of the inference that he contends for. The material evidence relied on is inadmissible hearsay. There is no evidence on which a reasonable man might or could find for the plaintiff.” [Page 19-20]