SUBMISSION ON CANDIDATES FOR THE POSITION OF CHIEF JUSTICE

TO BE INTERVIEWED BY THE JSC

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 DGRU conducts applied research with a particular focus on the judiciary and has been monitoring the appointment of judges since 2009. This period encompasses the appointment of two Chief Justices – Chief Justice Sandile Ngcobo in 2009, and Chief Justice Mogoeng Mogoeng in 2011. We have regularly prepared research reports and submissions on candidates and the appointment process since 2009. Through our Judges Matter project, we aim to provide insight and transparency into the process by which judges are appointed in South Africa.

2. In September 2021, the President invited nominations for the position of Chief Justice and announced the establishment of a panel to evaluate the nominees and shortlist those who met the advertised requirements. After consideration of the panel's report, on 17 November 2021 the President submitted the names of Justice Madlanga, President Maya, Judge President Mlambo and Deputy Chief Justice Zondo to the JSC and leaders of political parties, in terms of section 174(3) of the Constitution, for consideration for appointment as Chief Justice.[1] On 2 December 2021 the JSC announced that the four nominees had accepted their nominations and completed the relevant documentations, and would be interviewed in the first week of February 2022.

3. In this submission, we discuss the criteria we think should inform the JSC's interviews of the candidates. We also provide short profiles of the background and judicial records of the candidates. These profiles are not the comprehensive candidate reports we have compiled in previous reports and are aimed at providing a succinct and accessible summary of key aspects of the candidates' records.

WHAT CRITERIA MAKE A GOOD CHIEF JUSTICE?

4. A potential Chief Justice must possess a wide range of qualities and attributes. They will be required to be an influential leader on several levels, both as the head of the Constitutional Court (the highest court in the country), and the head of the entire judiciary.

Intellectual leadership

5. The Chief Justice must be an intellectual leader. They must be able to lead the Constitutional Court, a court which deals with complex and weighty issues. They must have a strong jurisprudential background and track record, so that they can write high-quality judgments that will be an example for other judicial officers to follow. They must have stature as a lawyer and as a leader and command the respect of judges and lawyers. They must have the intellectual ability to be a jurisprudential thought leader and innovator, to address novel legal questions, and to articulate judgments that break new legal ground. The Chief Justice must also have the capacity for the hard work that the role requires.

[1] Presidency, '*President submits list of candidates for position of Chief Justice to JSC and political parties '* (17 November 2021) https://www.thepresidency.gov.za/press-statements/president-submits-list-candidates-position-chief-justice-judicial-service-commission-and-political-parties

6. The Chief Justice should have the proven capacity to lead the judiciary as a whole and must have a vision for the institution. They must understand the Constitution and how their leadership can assist with judicial reform

Integrity and ethics

7. The Chief Justice must be a person of the highest integrity. They must have a keen understanding of judicial ethics, and they must have conducted themselves, both on and off the bench, in a manner that demonstrates they possess high ethical standards and a strong understanding of the issues underlying judicial ethics. Whilst a sitting judge would have been assessed as a fit and proper person by the JSC when they were appointed, it does not follow that they have inevitably conducted themselves in an ethical way while they have been a judge. How they have conducted themselves as a judge therefore ought to be evaluated. As chair of the JSC (and the Judicial Conduct Committee), the Chief Justice must be able to provide leadership in holding to account judges who fall short of the required ethical standards.

Administrative skill

8. The Chief Justice must be a strong administrator, both as the head of the Constitutional Court and as the head of the judiciary. The past decade has seen a dramatic increase in the scale of the Chief Justice's administrative responsibilities. The Chief Justice therefore must have significant administrative skills, with strong organisational abilities and a keen understanding of the needs and challenges of the judiciary. It might be argued that administrative skills are less important since the Office of the Chief Justice is intended to provide significant administrative support, but at a minimum the Chief Justice must have the administrative skills and understanding to effectively direct how such support is provided.

9. The Chief Justice should also be able to identify and harness leadership qualities in others. It will not be possible for one leader to do everything. They should be self-aware, and able to acknowledge their own weaknesses. There is a human resources component to judicial leadership, and the Chief Justice must be able to maximise human resources and effectiveness.

Strong communication skills

10. As the head of the judiciary, the Chief Justice communicates the views of the judiciary on matters relating to the administration of justice to other branches of government and must therefore be able to navigate this space. The Chief Justice also needs to be able to communicate on behalf of the judiciary with the general public and civil society. This is important for maintaining public confidence in the judiciary. The Chief Justice must also be a diplomat of sorts, capable of representing South Africa in interactions with the judiciaries of other countries, and on international and regional judicial organisations such as the Southern African Chief Justices' Forum, and the Conference of Constitutional Jurisdictions of Africa (chaired by Chief Justice Mogoeng between 2017 and 2019).

Independent mind

11. The Chief Justice must be independent–minded and have a demonstrated commitment to constitutional values and the human rights enshrined in the Constitution. They must show fairness as a leader of both the Constitutional Court and the whole judiciary. They should have

the vision and ability to continue the process of transforming the judiciary, both in terms of its composition and its governance structures. As chair of the JSC, the Chief Justice plays a key role in determining the quality of judges appointed to the judiciary.

12. The Chief Justice should carry out formal commitments such as chairing the Judicial Service Commission and representing the judiciary in external fora with skill and impartiality, and must protect the judiciary from being undermined. They must be authoritative, fearless, and even-handed in dealing with complaints against judges

Temperament

13. The importance of the role means that the Chief Justice can be expected to be subjected to consistent and often intense scrutiny. They must therefore be thick skinned and able to handle pressure and criticism in a way that protects the integrity of the judiciary. In an ever-changing environment where every utterance by public figures is amplified by social media, and in which the judiciary continues to come under fierce (if frequently unsubstantiated) criticism, it is vital that the Chief Justice has a strong personality and is agile in responding to quickly developing challenges confronting the judiciary. The Chief Justice's leadership style and temperament should allow others the space to grow and develop. They should be collegial, be able to build consensus, give decisive leadership and direction when required, whilst allow for dissenting views and debate. Indicators of a suitable temperament include courtesy, politeness, being respectful, open-mindedness, thoughtfulness, and decisiveness.

14. The Chief Justice should have humility and generosity. They should be able to create an enabling and nurturing environment for judges. This includes identifying and nurturing new judges, considering the needs of the judiciary. It is important that they encourage skills transfer. They should be able to provide and facilitate the provision of pastoral care and guidance for judges. To the extent that it is possible, they should be accessible to judges.

Diversity

15. Although it is difficult to factor in diversity fully when one person is being appointed, the Constitution does require that the racial and gender composition of the country is considered when any judicial appointment is being made. An obvious consideration which has already been mooted by some commentators is whether the time has come to appoint a woman to the highest judicial office in the country.[2] All the Chief Justices in South Africa's history, both before and after apartheid, have been men. This should obviously not be the only criterion used to establish a candidate's suitability but should be given serious weight together with the other criteria. Of the candidates to be considered by the JSC, only Justice Maya is a woman.

[2] See for example: Mail & Guardian, *'Why the next Chief Justice should be a woman'* (13 Nov 2021) https://mg.co.za/opinion/2021-11-13-why-the-next-chief-justice-should-be-a-woman/

THE POOL OF CANDIDATES

16. It is not our intention to advocate expressly or implicitly for the selection of any of the candidates. There are however some consequences that would flow from the appointment of some of the candidates which we feel are important to be factored into the decision-making process.

17. One of the candidates (Justice Zondo) is the current Deputy Chief Justice. Whilst an incumbent Deputy Chief Justice would naturally rank highly among the candidates for elevation to the position of Chief Justice, there is no customary practice or rule of seniority in South Africa of the Deputy automatically succeeding the Chief Justice. The non-appointment of Justice Moseneke to the position is a recent (and controversial) example.

18. Appointing a Deputy Chief Justice would have obvious appeal in terms of continuity. If the Deputy were not chosen, then it would be logical to expect the appointment to be made from among other judges of the Constitutional Court. Justice Madlanga is the only other candidate who is currently a member of that court. Justice Maya has previously acted on the court in 2012, but it was for a relatively short space of time and a long time ago; the institution is likely to have changed significantly in the intervening period.

19. However, it is important to highlight the role of term limits if an appointment is made from among current Constitutional Court judges. At the commencement of our constitutional democracy, the position of Chief Justice was held by the head of the Supreme Court of Appeal (the former Appellate Division). When the position of Chief Justice was moved to the head of the Constitutional Court, it had the consequence of bringing the position within the ambit of the term limits applicable to Constitutional Court judges (12 or 15 years, depending on the length of the judge's active service).[3]

20. We therefore suggest that one of the factors that needs to be weighed up in selecting the next Chief Justice is how important it is to have a Chief Justice who will remain in office for a relatively long time, or whether a candidates' attributes are so outstanding that they are worth appointing, even if only for a relatively a short period. Both current Constitutional Court justices among the candidates retire in the short to medium term, with Deputy Chief Justice Zondo due to retire in August 2024 and Justice Madlanga in July 2025.[4]

21. As discussed above, we think that strong administrative skills are an important criterion for the Chief Justice to possess. This leads to consideration of whether candidates with experience of running other busy and important superior courts (specifically President Maya and Judge President Mlambo) are well placed to serve as Chief Justice.

22. Appointing a Chief Justice who is not currently a member of the Constitutional Court would have a somewhat curious legal effect in that by appointing the Chief Justice under section 174(3) of the Constitution, the President would in effect also be appointing a judge of the

[3] Section 176(1) of the Constitution read with section 4(1) of the Judges' Remuneration and Conditions of Employment Act 47 of 2001.

[4] We base our calculation of the remainder of Justice Madlanga's tenure on the assumption that his stint as a judge between 1996 – 2001 counts towards his years of active service as per section 4(1) of the Judges' Remuneration and Conditions of Employment Act.

Constitutional Court without following the procedure set out in section 174(4) of the Constitution. This may seem anomalous, but in our view, it is consistent with the Constitution. The use of the words "other judges of the Constitutional Court" in section 174(4) clearly contemplates a process of appointment for judges other than the Chief Justice. The drafters of the section may have had in mind that the Chief Justice would inevitably be appointed from among judges of the Constitutional Court, but they did not in our view prohibit the appointment being made from another court.

23. Therefore, we are of the view that even though the appointment of Justice Maya or Judge President Mlambo might not follow the process set out in section 174(4), this would nonetheless be constitutionally permissible. It might be argued in any event that the requirements of section 174(4) are in fact substantively met, since the JSC will in all likelihood by sending four names to the President (3 more than the number of vacancies), the President will be consulting with leaders of parties represented in the National Assembly, and it is not possible to consult with the Chief Justice since there is currently no Chief Justice.

24. The remainder of this submission provides brief profiles of the four candidates.

ACKNOWLEDGMENTS

25. This submission was made possible by the generous support of the Raith Foundation and the Millennium Trust.

DGRU

10 JANUARY 2022

JUSTICE MBUYISELI MADLANGA

BACKGROUND

Born 27 March 1962

BJuris, University of the Transkei (1984)

Prosecutor (1984)

Additional Magistrate (1984, 1987

LLB, Rhodes University (1986)

Additional Magistrate (1987)

Lecturer, University of Transkei (1987 – 1989)

LLM, University of Notre Dame (USA) (1990)

Advocate (1991 – 1996)

Judge, Eastern Cape High Court (1996 – 2001)

Acting Justice, Supreme Court of Appeal (1998 – 1999)

Acting Justice, Constitutional Court (2000 – 2001)

Advocate (2001 – 2013)

Justice, Constitutional Court (2013 – to date)

Member, Black Lawyers' Association (1988 – 1990)

Member, National Association of Democratic Lawyers (1991 – 1996)

Member, Advocates for Transformation (2001 – 2013), member of executive committee (2010 – 2013)

Society of Advocates of Transkei (Member 1991 – 1996, 2001 – 2013; Chairperson 2005 – 2006)

SELECTED JUDGMENTS

HELEN SUZMAN FOUNDATION v JUDICIAL SERVICE COMMISSION 2018 (4) SA 1 (CC)

Case heard 24 April 2018, Judgment delivered 24 April 2018

The issue in this case was whether the private deliberations of the JSC, in the execution of its mandate to advise the President on the appointment of judges, could be disclosed under rule 53(1)*(b)* of the Uniform Rules of Court as part of the record of its proceedings. The High Court held that they could not. On appeal, the SCA held that while they were not necessarily excluded from the record, in the circumstances of this case they should not be included in the record.

Writing for the majority of the Constitutional Court, Madlanga J (Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J and Theron J concurring) held that there were no reasons to exclude deliberations, as a class of information, from the rule 53 record.

Madlanga J found that the JSC's deliberations must be relevant to the decisions they preceded, and the JSC's own practice of distilling reasons for a decision from the deliberations was "indication enough that JSC deliberations are of relevance to the decisions", and "clearly bear on the lawfulness, rationality and procedural fairness of the decisions." [Paragraph 24].

As to whether there was a legal basis on which the deliberations could be excluded from a rule 53 record, Madlanga J found that the JSC's concerns about confidentiality were overstated and did not entitle it to refuse to disclose the recordings of the deliberations:

> "I do not think it is expecting too much to adopt the stance that JSC members worth their salt ought to be in a position to stand publicly by views they have expressed in private deliberations. I would find it odd that JSC members would be such 'timorous fainthearts' that they would clam up at the prospect that views they express during deliberations could be divulged. I readily conceive of members being apprehensive at the prospect of disclosure if — during deliberations — they make inappropriate comments. Is that worthy of shielding? I think not. Debating with candour and robustness does not equate to the expression of impropriety." [Paragraph 38]

Madlanga J held further that the values of openness and transparency were "of singular importance in South Africa, coming — as we do — from a past where governance and administration were shrouded in secrecy." This required constitutional institutions to "espouse, promote and respect these values." Madlanga J found that the JSC's argument for blanket secrecy was "at odds with this imperative." [Paragraph 65].

The appeal was upheld. Jafta J dissented, holding that the word 'record' in rule 53 did not incorporate the JSCs deliberations. Kollapen AJ (Zondi AJ concurring) also dissented, holding that maintaining the confidentiality of JSC deliberations was not only constitutionally sustainable, but also necessary to protect the interests of the candidates, members of the JSC, and the JSC as an institution.

DE v RH 2015 (5) SA 83 (CC)

This was an appeal against a decision of the SCA which had found that the delictual action for adultery could no longer be sustained. Writing for a unanimous court, Madlanga J found that the origins of the claim were "deeply rooted in patriarchy" [paragraph 14], and that the claim was especially inimical to the right to privacy. [Paragraph 54]. Madlanga J held that the potential infringement of the non-adulterous spouse's right to dignity "must be weighed against the infringement of the fundamental rights of the adulterous spouse and the third party to privacy, freedom of association and freedom and security of the person." These rights required protection from state intervention "in the intimate choices of, and relationships between, people." National and international trends and attitudes towards adultery "demonstrate a repugnance towards state interference in the intimate personal affairs of individuals." [Paragraph 62].

Madlanga J concluded that the act of adultery by a third party lacked delictual wrongfulness, and that it was not reasonable to attach delictual liability to it. [Paragraph 63]. The appeal was accordingly dismissed.

GAERTNER AND OTHERS V MINISTER OF FINANCE AND OTHERS 2014 (1) SA 442 (CC).

The case concerned the constitutionality of provisions of the Customs and Excise Act 91 of 1964 which allowed for warrantless searches. In a unanimous judgment, Madlanga J held that several provisions of the Act, relating to the search of premises, were unconstitutional.

Madlanga J found that the provisions were so broad that they covered:

> "not only the places of business and homes of people who are players in the customs and excise industry, but also the homes of their clients, associates, service providers, and employees and their relatives. Quite conceivably, the premises — business or home — of any person who, somehow, may be linked to a player in the customs and excise industry may be the subject of a search …" [Paragraph 38]

Furthermore, the sections said nothing about the need for searches to be motivated by a suspiscion. [Paragraph 39]. Madlanga J held that the impugned sections limited the right to privacy [paragraph 43], and that this limitation ould not be justified under section 36 of the Constitution. [Paragraph 74].

Madlanga J held that the order of invalidity should not be made retrospective, as to do so would render all searches since the Constitution came into force, invalid. [Paragraph 76]. Furthermore, the declaration of invalidity was suspended "as, without the suspension, SARS will not be able to conduct even regulatory searches and a lacuna will be created." [Paragraph 78]

The declaration of constitutional invalidity made by the high court was confirmed.

S v STEYN 2001 (1) SA 1146 (CC)

Madlanga AJ, writing for a unanimous court, found that sections 309B and 309C of the Criminal Procedure Act, which required leave to appeal against a criminal conviction in the Magistrates' Court to be obtained, to be unconstitutional. The sections were held to be inconsistent with the right to a fair trial, specifically the right to appeal to or review by a higher court. Previously, there had been an unconditional right of appeal on the full trial record with full oral argument.

Madlanga AJ found that the situation of an accused person seeking to appeal a magistrate's decision was "very much less favourable than one who seeks to appeal against a conviction or sentence in a High Court.", as "the task of presenting a properly formulated application … for leave under section 309B will probably prove insurmountable", and drafting a petition for leave to appeal to the High Court was an "even more formidable barrier". The situation was exacerbated by the likelihood that the petition would be considered without the record. Madlanga AJ found that there was "too great a risk under this procedure that a genuine miscarriage of justice will not be picked up." [Paragraph 12]

Madlanga AJ held that differences in "human and material resources, participation by legal representatives and other relevant considerations" meant that the context in which the procedure in the courts has to be judged was different, and whilst the leave to appeal and petition procedures met the test for fairness in respect of the High Courts, this was not the case at the Magistrates' Court level. [Paragraph 14]

Madlanga AJ held further that a highly restrictive form of appeal was not appropriate in the Magistrates' Courts, as it did not allow for adequate reappraisal and the making of an informed decision. [Paragraph 25]. Madlanga AJ ordered that sections 309B and 309C, and the words "subject

to section 309B" in section 309(1), of the Act were inconsistent with the Constitution and declared invalid and that these orders were suspended for six months.

PREMIER, EASTERN CAPE, AND OTHERS v CEKESHE AND OTHERS 1999 (3) SA 56 (TK)

This was an appeal against decision setting aside a proclamation issued by first appellant and setting aside the termination of the respondents' employment. It was argued that the court *a quo* had erred in considering the passing of the proclamation to be administrative action, and in holding that the proclamation was an administrative act which had to comply with s33 of the Interim Constitution. It was also argued that as original legislation, the proclamation was not subject to judicial review.

Locke J wrote a judgement, and Madlanga J a separate concurring judgement. Somyalo JP concurred with both, but found "more consonance" with the reasoning of Madlanga J.

In the course of his judgment, Madlanga J considered authority from the former Appellate Division on the classification of administrative acts as "quasi judicial" and "purely administrative", and the application of the *audi alteram partem* principle to such acts. Madlanga J held that he was entitled not to follow an earlier Appellate Division judgment which pre-dated the Constitution, "and thus did not consider the possible impact of a Bill of Rights on the right to be heard where there is certain prejudice to one's right to property." Madlanga J found that he was "bound more by the Constitution than by pre-Constitution Appellate Division judgments which obviously did not take into account the "democratic values of human dignity, equality and freedom" that underlie our Constitution". [Pages 103-104]

Madlanga J commented further on the impact of the Bill of Rights:

> "The Bill of Rights is so pervasive that it permeates virtually every facet of our lives and gives added content and substance to legal rights ... In so saying, I am not suggesting that practitioners and courts should be busybodies bent on invalidating any and every form of government action in the name of the Bill of Rights. What I am saying is that practitioners and courts should forever be alive to the potency of the Bill of Rights and, wherever applicable, invoke it and come to the rescue of an individual who is at the receiving end of unconstitutional government action." [Page 104]

Madlanga J then considered the applicability of the *audi alteram partem* rule to the case and discussed the meaning of administrative action in s33 of the Interim Constitution, finding that "it would be a retrograde step in the development of our administrative law to insist … that before reliance can be placed on section 33 of the Constitution there must be a finding that the action in issue … is an administrative action." Madlanga J held that "it would be inequitable and at variance with the spirit of the Constitution" to say that whilst administrative law had come to require procedural fairness in respect of subordinate legislative action, section 33 did not require such procedural fairness in respect of legislative acts. [Page 107]

The appeal was dismissed.

BANGINDAWO AND OTHERS v HEAD OF THE NYANDA REGIONAL AUTHORITY AND ANOTHER; HLANTLALALA v HEAD OF THE WESTERN TEMBULAND REGIONAL AUTHORITY AND OTHERS 1998 (3) SA 262 (TK)

Case heard 13 February 1998, Judgement delivered 13 February 1998

The applicants in the first application had been convicted by a regional authority court and sentenced to three years' imprisonment, and the applicant in the second application was the defendant in a civil action before a regional authority court. The applicants challenged the constitutionality of various sections of the Regional Authority Courts Act 13 of 1982 (Tk). The courts established in terms of the Act had concurrent jurisdiction with the magistrates' courts within the regional authority area.

Madlanga J considered the implications for these courts of the provisions of section 96(2) of the Interim Constitution, which required the judiciary to be independent, impartial, and subject to the Constitution and the law:

"Insofar as this approach relates to courts and tribunals which are traditionally of, for lack for a better word, `western' origin, I am in full agreement therewith. However, the position is different when it comes to the African customary law setting. There is a danger in a wholesale transplant of a concept suited to one legal system onto another legal system. For example, African customary law knows of no distinction between the executive, the judicial and the legislative arms of government." [Page 272]

Madlanga J found that "the views and outlook of believers in and adherents of African customary law to the question of independence and impartiality of the judiciary would not be the same as those of non-believers and non-adherents", and that there was 'no reason … for the imposition of the western conception of the notions of judicial impartiality and independence in the African customary law setting." Madlanga J held that "believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial functions", and that the "imposition of anything contrary to this outlook would strike at the very heart of the African customary legal system, especially the judicial facet thereof." [Page 273]

Madlanga J struck down a prohibition against legal representation in respect of civil and criminal proceedings in regional authority courts. [Page 277] Madlanga J found that presiding officers did not have to be legally trained, and that "any disparities stemming from the absence of legal training on the part of the presiding officers are of the nature contemplated in the Constitution in the transitional phase". [Page 279] Madlanga J found that "other advantages" of the regional authority courts compensated for the absence of legal training by presiding officers:

> "Litigants appear before people who are known to them. Their own language is spoken during the conduct of the proceedings and there is, therefore, no danger of a miscarriage of justice occasioned by inaccurate interpretation, something that happens with disturbing frequency in other courts... Therefore, the environment is more conducive to the important perception that justice should be seen to be done." [Page 279]

Madlanga J held that the convictions and sentences of the first applicant could not stand, the civil proceedings against the second applicant fell to be interdicted, and s 7(1) of the Regional Authority Courts Act fell to be struck down in respect of both applications.

SELECTED ARTICLES

'AFRICAN LANGUAGES FOR NON-AFRICAN PRACTITIONERS', CONSULTUS OCTOBER 1993, PAGE 103.

This article discusses "the extent to which justice is miscarried as a result of incorrect and/or imperfect translation of the evidence of the evidence of African witnesses by interpreters."

"… [I]n virtually all trials that I have been involved in or in which I have been part of the audience there is bound to be some incorrect and/or imperfect translation. This is particularly disturbing when one considers that most of the witnesses that appear before our courts, especially in criminal matters, are African and give their evidence in African languages. It is pitiful to observe a witness being required to explain something that he/she is supposed to have said when he/she never said it. On saying that he/she never said such a thing, the witness will be confronted with the record which, of course, will reflect the incorrect English version of the interpreter."

"This state of affairs may have disastrous and far-reaching effects in that the incorrect and/or imperfect translation may relate to the very facts that are crucial for the determination of the case. ..."

"For justice not to be "justice in the air", it is time that all practitioners who do not speak the African languages of the areas where they practice took lessons in such languages so that they themselves may be in a position to hear and understand the evidence of witnesses. …"

"Something also needs to be done about the training of interpreters. Obviously a lot is lacking in the system presently followed in training them. In Transkei where I practice I am not aware of any formal programme of training interpreters. …"

"Considerations of inconvenience to those practitioners … who do not speak the languages of the areas where they practice or intend practising should play a very minor, if any, role … I trust that the concern of all practitioners is to strive for justice and not to sacrifice it at the altar of personal convenience."

PRESIDENT MANDISA MAYA

BACKGROUND

Born: 20 March 1964.

BProc, University of Transkei (1986)

LLB, University of Natal, Durban (1988)

LLM, Duke University, U.S.A. (1990) (Fulbright scholarship)

Assistant Law Advisor, Department of Justice (1991 – 1993)

Lecturer, University of Transkei (1992, 1993, 1995)

Advocate, Transkei Society of Advocates (1994 – 1999)

Acting Judge, Cape Provincial Division, Transkei Division (1999 – 2000)

Judge of the High Court (2000 – 2004)

Acting Justice, Constitutional Court (2012)

Justice of Appeal, Supreme Court of Appeal (2005 – to date)

Deputy President, Supreme Court of Appeal (2015 - 2017)

Acting President, Supreme Court of Appeal (2016 – 2017)

President, Supreme Court of Appeal (2017 – to date)

Chairperson, South African Law Reform Commission (2013 - 2016)

Advisory board member, Walter Sisulu University Law Journal (2005 -)

International Association of Women Judges, South African chapter: founder member (2004 – to date); Deputy President (2008 – 2010); President (2018 – to date).

International Association of Women Judges : Regional Director, West and Southern Africa (2021).

Member, Black Lawyers' Association (1994 – 2000)

Member, NADEL (1995)

SELECTED JUDGMENTS

AFRIFORUM NPC V CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY OF SOUTH AFRICA AND OTHERS (765/2018) [2020] ZASCA 79 (30 JUNE 2020)

Appellant had sought to review and set aside decisions relating to the adoption of a new language policy at UNISA, in terms of which English was adopted as the sole language of learning and tuition. Previously, English and Afrikaans had been the languages of learning and instruction. The High Court dismissed the challenge.

Maya P, for a unanimous court (Petse DP, Leach JA and Koen and Eksteen AJJA concurring) considered the challenge based on section 29(2) of the Constitution, which established a right to receive education in the language of choice where reasonably practicable. Maya P found that UNISA had misunderstood its obligations under section 29(2) [paragraph 34] and had failed to discuss justifications of cost – cutting at the meeting where it was resolved to change the policy. [Paragraph 35] UNISA further failed to provide support for the claim that it was not commercially practicable to continue to provide tuition in Afrikaans. [Paragraphs 36 – 38]

Maya P held further that the statistics on which UNISA had relied to claim a decrease in demand for Afrikaans tuition, and which UNISA claimed formed the basis of the adoption of the new policy, had not been placed before key meetings which resolved to adopt the policy. Accordingly, Maya P found that:

> "It is incomprehensible why the SLC would see no need for the Senate and Council to have recourse to the hard numbers of the students who would be affected by its far-reaching decision, in determining whether it was reasonably practicable to retain Afrikaans as a LOLT. Its stance is entirely insupportable. The omission to place the statistics which founded the recommendation to remove Afrikaans as a LOLT before the Senate and Council breached s 29(2) and rendered the decision to adopt the new language policy unlawful." [Paragraph 41]

Maya P concluded that while there may have been a need for a revision of UNISA's language policy, the adoption of the new policy had not been conducted in a constitutionally compliant manner, in that that "the factual and normative 'reasonably practicable' requirement in s 29(2) of the Constitution" had not been satisfied. [Paragraph 47] The appeal succeeded and the policy was set aside.

The judgment is also significant for being written in isiXhosa and to our knowledge is the first judgment of a South African superior court to have been written in an indigenous African language.

HELEN SUZMAN FOUNDATION V JUDICIAL SERVICE COMMISSION AND OTHERS (145/2015) [2016] ZASCA 161; [2017] 1 ALL SA 58 (SCA); 2017 (1) SA 367 (SCA) (2 NOVEMBER 2016)

At issue was whether the closed deliberations of the JSC formed part of the record of its proceedings in terms of Uniform Rule 53(1)(b). The High Court had held that they did not. Maya DP (Majiedt, Mbha, Dambuza JJA and Fourie AJA concurring) dismissed the appeal.

Maya DP found difficultly with the appellant's argument that non-disclosure was inimical to the notions of open justice and public accountability and that protecting the confidentiality of the deliberations would undermine the public's trust in the JSC and its processes:

> "The nature of the JSC's constitutional mandate requires it to engage in a rigorous, intense judicial selection process. To that end, it must be accepted that during the course of the deliberations adverse remarks will be made, which although not necessarily actionable in law, may yet be hurtful to a candidate and cause reputational damage harmful to his or her professional career. This would apply with greater force to a sitting judge who applies for a higher position on the Bench with the potential of eroding public esteem in the judiciary upon which the ultimate power of the courts rests. The JSC and its members may also be exposed to possible actionable claims for delictual damages arising from utterances made during the deliberations which a candidate may consider defamatory. It should not be overlooked too that the legal practitioners in the JSC will, in future, appear before the appointed judge who may harbour ill feelings against them if they expressed adverse views against her or his appointment in the deliberations. This may potentially inhibit the practitioners and even the judges sitting on the JSC from freely and frankly expressing themselves on the suitability of the candidates." [Paragraph 28]

Maya DP accordingly held that protecting the confidentiality of the deliberations "clearly serve[ed] legitimate public interests", and that whilst the JSC could not assert a general right to privacy, "the privacy and dignity of judicial candidates, who are assured by the JSC Act and its regulations that the deliberations concerning their suitability will be confidential, must be protected in the judicial interviewing and selection process." Maya DP held further that non-disclosure "likely encourages applicants who might otherwise not make themselves available for judicial appointment for fear of embarrassment were the JSC members' frank opinions on their competence or otherwise be made open to the public." The efficiency of the judicial selection process would otherwise be compromised. Confidentiality further enhanced the judicial appointments process "by allowing the members to robustly and candidly state facts and exchange views in discussing the suitability or otherwise of the candidates based on their skills, characters, weaknesses and strengths." [Paragraph 29]

The decision was overturned by a majority of the Constitutional Court in **HELEN SUZMAN FOUNDATION v JUDICIAL SERVICE COMMISSION 2018 (4) SA 1 (CC).** (See summary at pages 6 - 7 of this report).

THE STATE V MUDAU (631/2013) [2014] ZASCA 190 (27 November 2014)

The issue in this case was whether the regional court had jurisdiction to impose sentences of life imprisonment in light of s 53A of the Criminal Law Amendment Act. Respondents had been convicted of rape, indecent assault and robbery with aggravating circumstances by the regional court, which sentenced them to life imprisonment, 12 months' imprisonment and 15 years imprisonment respectively. On appeal, the high court held that the sentences were incompetent as, at the time the regional court imposed them, it lacked jurisdiction and should have referred the case to the high court for sentencing.

Maya JA (Wallis JA and Dambuza AJA concurring) held that from the date of commencement of the Criminal Law (Sentencing) Amendment Act, jurisdiction was conferred on a regional court to impose sentences of life imprisonment for scheduled offences, "including rape of the nature for which the appellants were convicted." It had thus been within the regional magistrate's powers to have sentenced the respondent as he had done, and the high court had erred in finding that the magistrate's invocation of section 53A of the Act was improper and in setting the sentences aside. [Paragraph 4].

Maya JA held further that the high court should not have granted leave to appeal to the SCA against the convictions and sentences:

> "This court's appellate jurisdiction to hear criminal appeals is not an inherent jurisdiction. It has no jurisdiction to hear appeals against convictions and sentences of lower courts. And the high court is not authorised to grant leave to appeal directly to this court against convictions and sentences imposed by the regional court. Such convictions and sentences can only be appealed against in this court when an appeal against them has failed in the high court." [Paragraph 5]

Maya JA therefore held that the high court was required to deal with the appeal originally placed before it. The appeal was upheld, and the case referred back to the high court. [Paragraphs 5 - 6].

DEPARTMENT OF CORRECTIONAL SERVICES AND ANOTHER v POPCRU AND OTHERS 2013 (4) SA 176 (SCA)

This was an appeal against a judgment of the Labour Appeal Court, which had upheld the Labour Court's finding that the Department's dismissal of certain correctional services officers, for their refusal to cut their dreadlocks, to be unfair. The Labour Court found the dismissals to be automatically unfair on the ground of gender discrimination. The Labour Appeal Court found that, in addition, the grounds of religion and culture were impacted. The officers were all male, and all wore dreadlocks, for various reasons.

Maya JA (Nugent and Pillay JJA and Plasket and Mbha AJJA concurring) held that the appeal should be dismissed, finding that, but for their religious and cultural beliefs, the respondents would not have worn dreadlocks, and "but for that fact and their male gender, they would not have been dismissed." The disparate treatment constituted discrimination. Appellants' motives and objectives of the dress code were "entirely irrelevant for this finding." [Paragraphs 18 – 19]

Maya JA held that:

> "Without question, a policy that effectively punishes the practice of a religion and culture degrades and devalues the followers of that religion and culture in society; it is a palpable invasion of their dignity which says their religion or culture is not worthy of protection. The impact of the limitation is profound. That impact here was devastating because the respondents' refusal to yield to an instruction at odds with their sincerely held beliefs cost them their employment." [Paragraph 22]

Maya JA found that no evidence had been provided which showed that the respondents' hair, which had been worn for many years before being ordered to shave it, detracted from their performance, or made them vulnerable to manipulation or corruption. Therefore, it has not been shown that short hair, not worn in dreadlocks, was an inherent requirement of the respondents' jobs:

> "A policy is not justified if it restricts a practice of religious belief — and, by necessary extension, a cultural belief — that does not affect an employee's ability to perform his duties, nor jeopardise the safety of the public or other employees, nor cause undue hardship to the employer in a practical sense." [Paragraph 25]

MINISTER OF SAFTEY AND SECURITY V F 2011 (3) SA 487 (SCA)

This case concerned whether the state could be held vicariously liable for the rape of the respondent (F) by a Mr Van Wyk, a policeman who was off duty but on "standby duty" when he committed the rape. The majority of the SCA (Nugent JA, with Snyders JA and R Pillay AJA concurring) held that there was no vicarious liability. Maya JA (Bosielo JA concurring) dissented, holding that while the rape "had nothing whatsoever to do" with Van Wyk's performance of his duties as police officer, it was necessary to establish whether, despite Van Wyk's conduct being "totally self-serving, there nevertheless was a sufficiently close link between his acts for his own personal gratification and the State's business." [Paragraph 67] Maya JA held that it was pertinent that F had been aware that Van Wyk was a police officer when she accepted an offer to take her home, and that this knowledge has influenced F's decision to accept the offer of a lift. [Paragraphs 70 – 71]

> "... [B]y offering to rescue and take home in a police vehicle a lone, vulnerable child stranded on a dark, deserted riverside in the dead of night in those circumstances, Van Wyk subjectively placed himself on duty and acted in his capacity as a police officer. ... In my opinion he placed himself on duty as he was empowered to do by law. And once he did, he assumed the status and obligations of an on-duty police officer. For that reason, I would find the Minister vicariously liable." [Paragraph 73]

On appeal, the majority decision was reversed by the Constitutional Court (per Mogoeng J, Moseneke DCJ, Cameron, Khampepe, Nkabinde, Skweyiya and Van Der Westhuizen JJ concurring; Froneman J in a separate concurrence finding direct liability; Yacoob J, with Jafta J concurring, dissenting. F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC).

JUDGE PRESIDENT DUNSTAN MLAMBO

BACKGROUND

Born: 18 September 1959.

BProc, University of Limpopo (1983)

LLB, UNISA (1983)

LLD (*honoris causa*), University of Fort Hare (2019)

Legal Assistant, Department of Justice, KaNgwane Government (1984 – 1986)

Fellow, Legal Resources Centre (1987)

Bowman Gilfillan Hayman Godfrey Inc: candidate attorney (1988 – 1989), professional assistant (1990 – 1992), associate partner (1993)

Partner, Mlambo & Modise Attorneys (1994 – 1997)

Judge, Labour Court (1997 – 1999)

Judge, Gauteng Local Division of the High Court (2000 – 2005)

Justice of Appeal, Supreme Court of Appeal (2005 – 2010)

Judge President, Labour Court and Labour Appeal Court (2010 – 2012)

Judge President, Gauteng Division of the High Court (2012 – to date)

Chairperson, Legal Aid South Africa (2002 – 2019)

Trustee, Legal Resources Trust (2003 – 2021)

Trustee, Africa Legal Aid (2008 – 2011)

International Association of Refugee and Migration Judges (IARMJ): Member (2012 – to date); Council member, Africa chapter (2016 – to date); Member, Global Executive Council (2020 – to date); President, Africa chapter (2020 – to date).

SELECTED JUDGMENTS

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA V OFFICE OF THE PUBLIC PROTECTOR AND OTHERS (ECONOMIC FREEDOM FIGHTERS AND OTHERS INTERVENING) (79808/16) [2017] ZAGPPHC 748; [2018] 1 ALL SA 576 (GP) (13 DECEMBER 2017)

The issue in this case was whether former President Zuma should bear the costs of an application to interdict the finalisation and release of the Public Protector's "State Capture" report. The application had been withdrawn shortly before it was due to be heard with a tender of costs on an attorney and client scale. Intervening parties hen argued that the President be ordered to pay the legal costs personally, on the basis that the application had been to protect his personal interests and was not related to his official responsibilities, and that the President had conducted the litigation in an unreasonable manner.

Mlambo JP held that whilst the President had not been aware that the report had been finalised, it subsequently became clear that the investigation had been finalised and the report signed. Mlambo JP held that it was "completely unreasonable for the President to have persisted with his stance that the finalised status of the report remained unresolved", and that "it was also unreasonable of him not to seek early clarification of the status quo *in* view of the fact that everyone involved in the litigation held a contrary view to his." [Paragraph 39]

Mlambo JP held that on all possible interpretations of the relief sought by the President, "the report had to be released and with that went the basis for the application." Mlambo JP held that the President must have realised that there was no basis to persist with the litigation, and hence the application had been withdrawn with a tender of costs. [Paragraph 44] Mlambo JP found that the conclusion was "unavoidable" that the President had been "grossly remiss in ignoring all indications … that the previous Public Protector had finalised her investigation and signed the report." [Paragraph 45] The President's "persistence with the litigation; in the face of the finality of the investigation and report, as well as his own unequivocal statement regarding that finality" constituted "objectionable conduct by a litigant and amounts to clear abuse of the judicial process." [Paragraph 46]

Mlambo JP held that a simple punitive costs order was not appropriate:

> "I say this because that would make the tax payer liable for the costs. This is a case where this Court would be justified in finding that this is an unwarranted instance for the tax payer to carry that burden. The conduct of the President, and the context of the litigation he initiated, requires a sterner rebuke. There is not the slightest doubt that … the President had no acceptable basis in law and in fact to have persisted with this litigation. In fact, the President's conduct amounts to an attempt to stymie the fulfilment of a constitutional obligation by the Office of the Public Protector." [Paragraph 47]

The President was ordered to personally pay the costs incurred after the date when the report had been signed by the Public Protector.

ENGELBRECHT v KHUMALO 2016 (4) SA 564 (GP)

Applicant sought the consent of the Judge President to issue a third part notice against the respondent, a judge. Applicant and the judge had, prior to the judge's appointment to the judiciary, been co-directors of a company and entered into a lease with a landlord, in terms of which the applicant was a surety for the company's obligations. Applicant subsequently sold his shares in the company to the judge and resigned his directorship. In the sale agreement the judge indemnified the applicant from claims arising from the company's obligations. The landlord later sued the applicant under the suretyship for the company's unpaid rent.

Mlambo JP found that the applicable legislation played "a gatekeeping function" and did not provide a "complete bar" against the institution of legal proceedings against judges. [Paragraph 7]. Mlambo JP identified the applicable test for the granting of consent as whether, on the facts before the court, an "arguable case calling for an answer by the judge" had been made out, and whether it was "fair, just and equitable between the parties to grant or refuse consent." In essence, the question was whether the proceedings in respect of which consent was sought contained a justiciable issue. [Paragraph 8]

Mlambo JP held that the equities required "a proper ventilation of all the facts surrounding the suretyship agreement, the alleged breach of the lease agreement, as well as the impact of the

indemnity contained in the sale-of-shares agreement." [Paragraph 13] Mlambo JP rejected an argument that there was at that stage no *lis* between the applicant and the judge [paragraph 14], and held that it was fair, just and equitable that consent be granted, the applicant having made out "an arguable case requiring an answer from the judge about her own liability in the main application." [Paragraph 15]

MULTICHOICE (PTY) LTD AND OTHERS v NATIONAL PROSECUTING AUTHORITY AND ANOTHER: IN RE S v PISTORIUS; MEDIA 24 LTD AND OTHERS v DIRECTOR OF PUBLIC PROSECUTIONS, NORTH GAUTENG AND OTHERS 2014 (1) SACR 589 (GP)

This was an application to live broadcast the proceedings in the Oscar Pistorius trial. Mlambo JP identified the central issue to be determined as the balance between the rights of freedom of expression and open justice asserted by the media, and the fair trial rights of Pistorius.

Mlambo JP accepted the applicants' argument that acceding to Pistorius' objections to the live audiovisual coverage of the trial:

> "will perpetuate the situation that only a small segment of the community is able to be kept informed about what happens in courtrooms, because of this minority's access to tools such as Twitter. Acceding to that argument will also perpetuate the reality that the community at large remains dependent, for news on what happens in the courtroom, on the summarised versions of the journalists and reporters who follow these proceedings. These summarised versions or accounts have, in my view, been correctly categorised as second-hand, liable to be inaccurate, as they also depend on the understanding and views of the reporter or journalist covering the proceedings." [Paragraph 21]

Mlambo JP held further that the principle of open justice meant that "a stance that seeks to entrench the workings of the justice system away from the public domain" could not be supported, as "[c]ourt proceedings are in fact public, and this objective must be recognised." [Paragraph 22] Mlambo JP held that that audiovisual or televising and still photography of Pistorius and his witnesses when they testify would be disallowed, since this has the potential to deprive him of a fair trial, but that radio coverage would be permitted. [Paragraphs 25 – 26]

Mlambo JP concluded that it was in the public interest that the trial be covered " to ensure that a greater number of persons in the community who have an interest in the matter, but who are unable to attend these proceedings due to geographical constraints .. are able to follow the proceedings wherever they may be." Mlambo JP held further that:

"in a country like ours where democracy is still somewhat young and the perceptions that continue to persist in the larger section of South African society, particularly those who are poor and who have found it difficult G to access the justice system, that they should have a first-hand account of the proceedings involving a local and international icon. I have taken judicial notice of the fact that part of the perception that I allude to is the fact that the justice system is still perceived as treating the rich and famous with kid gloves, whilst being harsh on the poor and vulnerable. Enabling a larger South African society to follow first-hand the criminal proceedings which involve a celebrity, … will go a long way to dispelling these negative and unfounded perceptions about the justice system, and will inform and educate society regarding the conduct of criminal proceedings." [Paragraph 27]

Applicants were granted permission to set up equipment in accordance with various specifications to obtain video and audio recording and/or transmission of the permitted portions of the trial.

SA POLICE SERVICE V SOLIDARITY ON BEHALF OF BARNARD (POLICE & PRISONS CIVIL RIGHTS UNION AS AMICUS CURIAE) (2013) 34 ILJ 590 (LAC)

That Labour Court had ordered the appellant to promote Barnard, a white woman, to a post of superintendent. The central issue was whether the appellant had unfairly discriminated against Barnard on the basis of race by not appointing a white female to the post even though she had been rated as the best candidate in the interviews.

Mlambo JP (Davis JA and Sandi AJA concurring) held that the case did not concern the legitimacy of affirmative action, but "whether the implementation of equity orientated measures should be stifled in the event that such implementation will adversely affect persons from non-designated groups." [Paragraph 20] Mlambo JP held that:

> "Any debate about the right to equality and the implementation of restitutionary measures is bound to achieve very little, if anything, without a contextual consideration of that right and the need for restitution." [Paragraph 24]

Mlambo JP found that it was incorrect to "render the implementation of restitutionary measures subject to the right of an individual to equality", as this would defeat the purpose of having restitutionary measures "as such implementation will always fall short, due to the reality that there will always be adverse effects on persons from non-designated groups." [Paragraph 26] Mlambo JP held that the appointment of Barnard "would not have advanced the quest for representativity in the appellant's workforce" at the level of the post in question, and found that "[discriminating against Barnard in the circumstances of this case was clearly justifiable." [Paragraph 42]

Mlambo JP concluded that the Labour Court had "clearly misconstrued the purpose of the employment equity orientated measures" by finding that their implementation was subject to an individual's right to equality and dignity. [Paragraph 47] The appeal was upheld. The judgment was overturned by the Supreme Court of Appeal in **Solidarity on behalf of Barnard v SA Police Service (Vereniging van Regslui vir Afrikaans as amicus curiae) (2014) 35 ILJ 416 (SCA)** but was substantially upheld on further appeal by the Constitutional Court in **SA Police Service v Solidarity on behalf of Barnard (Police & Prisons Civil Rights Union as Amicus Curiae) (2014) 35 ILJ 2981 (CC).**

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

Case heard 21 November 2007, Judgment delivered 20 March 2008

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

Writing for the majority, Navsa JA (Brand and Ponnan JJA and Malan AJA concurring) overturned the murder and attempted murder convictions, but found that on his own version, the accused fell to be convicted of culpable homicide.

Mlambo JA dissented, finding that the evidence supported the State's eyewitness' version that there were five employees on the scene, including the deceased, and no baboons. Mlambo JA held that "[o]bjectively speaking" humans could be "effortlessly distinguished from baboons", and that the presence of the deceased's body at the location, "having succumbed to a bullet fired by the appellant," strengthened the State's version that the deceased was one of the employees shot at by the appellant. [Paragraphs 117 – 119] Furthermore, the appellant and the eyewitnesses had at different times pointed out the same location where the shooting took place, further supporting the eyewitness account. [Paragraph 124]

Mlambo JA held that the eyewitness' account of the appellant having "behaved like a complete lunatic in shooting at the five employees at point blank without provocation and in full view of witnesses" was not improbable, as:

> "We have no evidence from the appellant, other than his claim - which strikes me as equally absurd - that he shot blindly to scare off baboons, to suggest that the situation is not as described by the eyewitnesses. It is not open to us sitting on appeal to reject first-hand evidence, without controverting evidence, but simply because we think people in the heat of the moment, could not have behaved in a certain manner. ..." [Paragraph 125]

Mlambo JA held further that the discovery of the deceased's body by the appellant suggested the overwhelming probability "that the appellant knew that he had shot someone there and had gone back to assess the situation." [Paragraph 127] Mlambo JA held that the fact that the State had breached its duty to disclose did not necessarily mean that the appellant had not received a fair trial. Mlambo JA found that the appellant had "provided a version from the time he reported the incident to the police ... and persisted therein right through the trial", and therefore that impact of the non-disclosure "was minimal if anything." The prosecution had not been aware of the existence of the missing statement and its case was a "not based on the missing statements but on statements it had provided to the defence." Mlambo JA therefore found that the prosecution's case had not been advantaged by the missing statements, and nor could the appellant claim to have been ambushed. [Paragraphs 133 – 134]

Ponnan JA (Navsa and Brand JJA and Malan AJA concurring) wrote a separate judgment concurring in the judgment of Navsa JA.

DEPUTY CHIEF JUSTICE RAYMOND ZONDO

BACKGROUND

Born : 4 May 1960.

BJuris, University of Zululand (1983)

LLB, University of Natal (Durban) (1986)

2 x LLM, UNISA (2005)

LLM, UNISA (2012)

Fellow, Legal Resources Centre (1984 – 1985)

Articled clerk, V.N. Mxenge & Co attorneys (1985)

Articled clerk, Michael Mthembu & Co attorneys (1985 – 1986)

Articled clerk, Chennells Albertyn attorneys (1986 – 1988)

Clerk, SS Mathe & Co (1988 – 1989)

Director, SS Mathe & Zondo & Co attorneys (1989 – 1997)

Judge, Labour Court (1997)

Judge, North Gauteng High Court (1999 – 2012)

Judge President, Labour Appeal Court (2000 – 2010)

Acting Justice of the Constitutional Court (2011 – 2012)

Justice of the Constitutional Court (2012 – to date)

Deputy Chief Justice (2017 – to date)

Chairperson, Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (2018 – to date)

SELECTED JUDGMENTS

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS v PRINCE AND OTHERS 2018 (6) SA 393 (CC)

The High Court had declared sections of the Drugs and Drug Trafficking Act) and of the Medicines and Related Substances Control Act inconsistent with the constitutional right to privacy to the extent that they prohibited the use of cannabis by an adult in private dwellings where the possession, purchase or cultivation of cannabis was for personal consumption by an adult. In confirmation proceedings before the Constitutional Court, the issue was whether the provisions did limit the right to privacy and if so, whether the limitation was reasonable and justifiable.

Zondo ACJ, for a unanimous court, adopted the reasoning of the Constitutional Court in the judgment of *Case*, and found that the right to privacy entitled "an adult person to use or cultivate or possess cannabis in private for his or her personal consumption", and that to the extent that the impugned provisions criminalise such cultivation, possession or use of cannabis, they limited the right to privacy. [Paragraph 58]

As to the question of whether the limitation was reasonable and justifiable, Zondo ACJ described the extent of the provisions, which criminalised amongst other things the "possession of cannabis by an adult in private for his or her personal consumption" as "quite invasive." [Paragraph 66] Zondo ACJ found that the South African Central Drug Authority had taken the position that, among alcohol, tobacco and cannabis, alcohol caused the most individual and social harm, and that "the immediate focus should be on decriminalisation." Zondo ACJ further accepted that "there are many democratic societies based on freedom, equality and human dignity that have either legalised or decriminalised possession of cannabis in small quantities for personal consumption." [Paragraphs 78 – 79]

The order of the High Court was confirmed.

DEMOCRATIC ALLIANCE V AFRICAN NATIONAL CONGRESS AND ANOTHER (CCT 76/14) [2015] ZACC 1; 2015 (2) SA 232 (CC); 2015 (3) BCLR 298 (CC) (19 JANUARY 2015)

Prior to the May 2014 national and provincial elections, the applicant political party published a statement by bulk sms to potential voters. The statement, which followed the release of the Public Protector's "Nkandla" report, stated that President Zuma had stolen money "to build his R 264m home." The first respondent took the view that the statement was false and was published with the intention of influencing the election, and thus breached the Electoral Act and/or the electoral Code of Conduct. The Electoral Court agreed, overruling the initial decision of the High Court.

A majority of the Constitutional Court (Cameron , Froneman and Khampepe JJ with Moseneke DCJ and Nkabinde J concurring) upheld the appeal. Van der Westhuizen J (Madlanga J concurring) agreed, but for different reasons. Zondo J (Jafta J and Leeuw AJ concurring) dissented would have dismissed the appeal.

Zondo J held that it was necessary that the interpretation given to section 89(2)(c) of the Electoral Act [prohibiting the publication of false information] was not only consistent with the right to freedom of expression but also with the rights to free and fair elections and to vote in free and fair elections:

> "As this Court said in *New National Party*, the right to vote entrenched in our Constitution is a right to vote in free and fair elections. This means that any conduct that threatens to render an election unfree and unfair is conduct that threatens citizens' rights to vote and to free and

fair elections. To state the obvious, an election that any political party or candidate wins as a result of false statements would be an unfair election." [Paragraph 42]

Zondo J held that insofar as the applicant argued that the SMS was a comment or opinion, the law required that the facts upon which a comment is based had to be stated in the publication unless they were sufficiently notorious that the persons who read or hear the comment would have known those facts.

> "In this case the applicant relies on the conclusions or findings of the Public Protector in the Nkandla Report. ... It did not set out any of those findings or facts in its SMS. There would still have been enough room in the SMS for it to have included at least three or four of the most serious findings of the Public Protector upon which its alleged comment or opinion was based. It did not do so." [Paragraph 79]

MINISTER OF HOME AFFAIRS AND OTHERS v TSEBE AND OTHERS 2012 (5) SA 467 (CC)

Case heard: 23 February 2012; Judgment delivered 27 July 2012.

This was an appeal against a decision of the High Court, which had granted an application to restrain government from extraditing or deporting the respondents to Botswana, absent a written assurance that, if they were convicted of murder, the death penalty would not be imposed or executed.

Zondo AJ (Mogoeng CJ, Jafta J, Khampepe J, Maya AJ and Nkabinde J concurring) dismissed the appeal. Zondo AJ held that:

> "If we as a society or the state hand somebody over to another state where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone."

Zondo AJ further held that the Constitutional Court's decision in the *Mohamed* case that South Africa "will not be party to the killing of any human being as a punishment — no matter who they are and no matter what they are alleged to have done." [Paragraph 68]

Zondo AJ found that in terms of section 7(2) of the Constitution, the government was under an obligation not to deport or extradite the respondent or in any way to transfer him from South Africa to Botswana to stand trial for the alleged murder in the absence of the requisite assurance. Should the government deport or extradite him without the requisite assurance, "it would be acting in breach of its obligations in terms of s 7(2), the values of the Constitution and Mr Phale's right to life, right to human dignity and right not to be subjected to treatment or punishment that is cruel, inhuman or degrading." Zondo AJ concluded that there were no grounds on which the judgment of the high court could be faulted. [Paragraph 74]

Cameron J (Froneman, Skweyiya and Van der Westhuizen JJ concurring), concurred in the judgment, to the exclusion of certain paragraphs he felt to be superfluous. Yacoob ADCJ wrote a separate opinion, finding that leave to appeal should not have been granted.

MAPHANGO AND OTHERS V AENGUS LIFESTYLE PROPERTIES (PTY) LTD CCT 57/11 [2012] ZACC 2

Case heard 3 November 2011, Judgment delivered 13 March 2012

Applicants were tenants of flats in the inner city of Johannesburg. The respondent landlord, having bought and upgraded the building, wanted to increase the rent. At issue was whether the landlord was entitled to exercise the power of termination of the existing leases purely to secure higher rents. For the majority, Cameron J (Moseneke DCJ, Froneman, Nkabinde, Skweyiya, Yacoob and Van Der Westhuizen JJ concurring) held that the High Court which had heard the matter at first instance should have postponed the eviction application in order for a Tribunal to determine whether the termination was an "unfair practice", in terms of the Rental Housing Act (RHA).

Zondo AJ (Mogoeng CJ and Jafta J concurring) dissented, holding that it had not been the applicants' case that the termination of their leases was invalid because it constituted an unfair practice. Rather, the argument was that respondent sought to increase the rent in excess of the maximum amount permitted by the leases, and that the termination of the leases infringed their constitutional right of access to housing. [Paragraphs 102 – 103] Zondo AJ found that the concept of an unfair practice in the RHA "may have derived" from labour law, where it had long been established that "the determination of whether conduct is an unfair labour practice or is unfair is not a question of law but involves the passing of a value judgment." As the point was not a question of law, the rule that a party could raise a point of law at any time did not apply. [Paragraph 106]

Zondo AJ held further that:

> "The concurring judgment sets much store on the fact that MWASA [the Media Workers Association case] was decided before the Constitution came into force. ... [T]he principle it lays down was followed by the Supreme Court of Appeal in a long list of cases after the Constitution had come into operation. The reason is that the Constitution has not changed the principle. The principle has nothing to do with interpreting a statute in accordance with section 39(2) of the Constitution. What the principle does is to define the process of determining whether what has occurred constitutes an unfair labour practice or is unfair. This indisputably involves a consideration of facts and passing a value judgment on the facts, based not on the questions of legality but on one's sense of justice and fairness. The values invoked to pass judgment are now entrenched in the Constitution. The passing of a value judgment is quite different from raising a point of law." [Paragraph 108]

Zondo AJ disagreed with the proposition that the termination of the leases constituted a limitation of the applicants' right of access to adequate housing, "let alone its infringement." Zondo AJ held that the cancellation had done no more than terminate the applicant's legal entitlement to occupy the flats. "It did not, of itself, result in the loss of access to housing. What would have implicated the applicants' housing right is the eviction." [Paragraph 120].