SUBMISSION AND RESEARCH REPORT ON THE JUDICIAL RECORDS OF NOMINEES FOR THE JSC SITTING IN APRIL 2021

VOLUME 2: HIGH COURT AND LABOUR COURT

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ADVOCATE NCEBA DUKADA SC

BIOGRAPHICAL DETAILS

Date of birth: 18 January 1958

B Juris, Walter Sisulu University (1983)

LLB, University of Natal (1988)

LLM , University of Natal (Not completed)

CAREER PATH

Acting Judge, Eastern Cape High Court (Mthatha, Grahamstown and Port Elizabeth) and Gauteng High Court.

Department of Justice, Transkei

Practicing Advocate (June 1990)

Assistant Magistrate (June 1984-1985)

Prosecutor (1984)

Clerk (1978 - 1980)

Magistrate, Cala; Centane and Mthatha (1984 - 1986)

Chairperson of Transkei Branch, National Association of Democratic Lawyers (1990 -)

Member, Society of Advocates of Transkei (1990 - 2008)

Member, Society of Advocates of Johannesburg (2009- to date)

Member, Road Accident Fund (June 2000 - October 2003)

Member, National Lotteries Board

Member, One Life Church-Westville

SELECTED JUDGMENTS

PRIVATE LAW

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE PROVINCE V YN OBO EN (3651/15) [2020] ZAECMHC 46 (23 JULY 2020)

Case heard 18 May 2020; Judgment delivered 23 July 2020.

This was an appeal against the judgment of the court *a quo* where the appellant had been found vicariously liable for the negligent care and treatment by nurses in the delivery of a child, and ordered to compensate the respondent for damages that resulted from that negligence. [Paragraph 1] The respondent delivered a child at Sipetu Hospital and the court *a quo* found that the negligence of the medical personnel had resulted in asphyxia leading to the child suffering permanent cerebral palsy. [Paragraph 2]

At the trial, the appellant had denied any negligence, arguing that the child had been born normal and did not suffer the injury whilst at the hospital. [Paragraph 7] However, on appeal the appellant changed its defence, arguing that the child was not born normal and that the injuries had been sudden and unforeseeable. [Paragraph 10]

Dukada AJ evaluated the evidence and held that it was clear and unambiguous that if the nurses had monitored the foetus' heartrate, on the probabilities, there would have been warnings that the foetus was not well long enough before the acute profound damage, for the staff to have taken steps to avert the disaster. [Paragraph 17] All the experts were in agreement that had the fetal heartbeat been monitored as required, its distress would have been established and the proper steps taken. [Paragraph 30]

The court held that the failure of the nurses to monitor the respondent and the foetus as per the Guidelines for Maternity care in South Africa and to take necessary action was overwhelmingly negligent. [Paragraph 26]

In dismissing the appeal, Dukada AJ held that the appeal was flawed in law as the appellant could not raise a new defence on appeal, that they had not raised during the trial. [Paragraph 38]

“I do not find any fault to the approach by the court a quo in this matter. It evaluated the entire evidence presented before it correctly. …. The raising of a defence of acute profound damage for the first time on appeal and in the absence of evidence by the Defendant in the court a quo to support such as defence constitutes a devastating flaw in the entire appeal.” [Paragraph 37]

ADMINISTRATIVE JUSTICE

JENKINS V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA & ANOTHER 1996 (3) SA 1083 (TK SC)

Case heard 14 December 1995; Judgment delivered 18 January 1996

The applicant had been employed by the Transkei Mining Corporation and was provided with a vehicle for her official and private trips as well as a free unfurnished house that was leased by the corporation on her behalf. The corporation was closed down and taken over by the Ministry of Commerce, Industry and Tourism. The applicant continued enjoying the benefits of the car and the house for more than 18 months after the corporation was closed down, and then the benefits were summarily withdrawn. She had obtained a rule *nisi* calling upon the respondents to show cause why they should not return the benefits. The respondents had launched a counter application for an order directing the applicant to return the vehicle. [Page 1084, Paragraph C - D]

Dukada AJ held that a liberal approach should be adopted in the interpretation of s 24*(b)* of the Interim Constitution which provided for the right to fair administrative action, and that "[t]he principle of legitimate expectation is deployed in administrative law to ensure that administrative decisions are fair in all respects." [Page 1093, Paragraph F]

> "The correct interpretation of the meaning of the "the right to procedurally fair administrative action" entrenched in s 24*(b)* of the Constitution must be a "generous" one avoiding what has been called the austerity of tabulated legalism, suitable to give individuals the full measure of the fundamental rights" [Page 1093, Paragraph C - D]

Dukada AJ held that the continued benefits to the applicant for more than 18 months had created a reasonable and genuine expectation that she would be given a hearing were the government to eventually decide to withdraw such benefits. [Paragraphs A - B]

The rule nisi granted was confirmed and the counter application by the respondent was dismissed. [Page 1095, Paragraph C]

CIVIL PROCEDURE

KES V NCX AND ANOTHER (2419/19) [2020] ZAECMHC 43 (21 JULY 2020)

Case heard 26 June 2020; Judgment delivered 21 July 2020

The applicant was the daughter of the late K, and sought orders to evict the first respondent from certain premises. [Paragraph 1] The first respondent opposed the application stating that she had

been the wife of the late K for more than thirty- two years. The applicant contended that the first respondent was only her late father's girlfriend and not his wife. [Paragraph 4]

The first responded raised a plea of *lis alibi pendens*, that the same relief sought by applicant in the current proceedings was identical to the one already claimed by the applicant in the review proceedings which were pending before the same court. [Paragraph 9] The applicant sought to distinguish the two proceedings, averring that in one case, she was litigating in her personal capacity, while in the other she was litigating in her capacity as executrix of the estate of her late father. [Paragraph 12]

Dukada AJ upheld the point *in limine* and dismissed the application, holding that the distinction made by the applicant was artificial and more of form than substance:

> "In these proceedings as well as the review proceedings already pending in this court, the applicant is suing the first respondent for an identical relief i.e to evict the first respondent from the premises in question. …" [Paragraph 12]

The application was dismissed, with costs to be recovered from the estate. [Paragraph 16].

NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS V AL MAWASHI (PTY) LTD AND OTHERS (995/2020) [2020] ZAECGHC 118 (15 OCTOBER 2020)

Case heard 6 August 2020; Judgment delivered 15 October 2020

The applicant was a statutory body, with objectives including prevention of ill-treatment of animals. [Paragraph 1] The applicant sought to interdict the first and second respondents from transporting sheep from East London harbour to any area north of the equator, pending an application seeking a total ban on the practice of transporting live sheep from anywhere in South Africa to anywhere north of equator by anyone on any vessel during any time of the year. [Paragraph 4] The applicants needed to prove prima facie right, a well-grounded apprehension of irreparable harm, a balance of convenience and that they had no other satisfactory remedy to succeed in their application for interim interdict. [Paragraph 8]

Dukada AJ held that the applicants failed to prove their case as they raised incidents that took place in 2019, and there was no evidence presented that what occurred in 2019 would likely occur in 2020:

> "The two occasions when the sheep of the First and Second Respondents were inspected by the regulatory authorities passed muster to transport sheep from East London Harbour to the Equator. Accordingly, there is no evidence before me indicating that what allegedly took place during 2019 is likely to recur in 2020. This is so especially when the regulatory authorities insist

> that the First and Second Respondents adhere to the OIE standards, to which the NSPCA seem not to attach any weight." [Paragraph 18]

The balance of convenience was in favour of the first and second respondent as they "had already suffered substantial damages for the delay in transporting the sheep." [Paragraph 21].

JUDGE JOHANNES DAFFUE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 25 June 1957.

BProc, University of the Free State (1979)

LLB, UNISA (1981)

LLM, UNISA (1998)

MBA, Buckinghamshire Chilterns University College (2002)

CAREER PATH

Acting Deputy Judge President, Free State High Court (3rd term 2018, 4th term 2019, 1st term & part of 4th term 2020).

President, Lesotho Court Martial Appeal Court (2016 – to date)

Judge, Free State High Court (2012 – to date)

Acting Judge, Free State High Court (May – June 2010, August – September 2010, July – September 2011)

Advocate (1989 – 2011)

Appointed senior counsel (2009)

Partner, Rood Schoeman & Molenaar & Griffiths (1988 – 1989)

Partner, Van Deventer Daffue & Maree (1980 – 1988)

Articled clerk, Van Deventer Daffue & Maree (1977 – 1980)

Member, South African Chapter of the International Association of Women Judges (2018 – to date)

University of the Free State

External examiner, LLB (2010 -) and LLM (2019 -)

Board member, Law Faculty (2019 –)

Part – time lecturer, conveyancing (1989 – 1995)

Member, Free State Society of Advocates (1989 – 2011)

Chairperson (2010/2011, 2011/2012)

Member of Bar Council (2003 – 2011)

Member, Free State Law Society (1977 – 1989)

Member, Baptist Church (2018 – to date)

SELECTED JUDGMENTS

COMMERCIAL LAW

EX PARTE SNOOKE 2014 (5) SA 426 (FB)

Case heard 24 April 2014, Judgment delivered 27 June 2014.

The applicant sought rehabilitation under the Insolvency Act. There had previously been a voluntary surrender of the estate. No claims were proved against the estate. [Paragraph 8].

Daffue J detailed numerous concerns about the costs incurred in the matter, noting that the bill of costs was taxed in an amount more than double the total amount of sequestration and administration costs. The taxed costs amounted to 62% of the total estate, with other costs relating to the administration of the estate still to be added. Daffue J found the reasons advanced to justify the costs "unacceptable", and held that it must have been apparent when the affidavits in the voluntary surrender application were deposed to, that "the costs would be enormous and much higher than usually taxed out in unopposed applications." Had the court hearing the voluntary surrender application been made aware of the amounts to be claimed as sequestration costs, the application might well not have been granted. [Paragraphs 18 – 20].

> "I am concerned about the excessive legal fees charged. It appears that the attorney is guilty of overreaching notwithstanding the fact that the bill of costs has been taxed and approved. The attorney has pulled wool over the court's eyes. An abuse of the process of voluntary surrender has taken place. Applicant received relief which would probably not have been granted if the true facts were placed before the court. The Law Society of the Free State should investigate the matter. The explanations in the supplementary affidavits filed at my request in this application did not impress me at all. Matters like this have the public at large and politicians up in arms and why the legislature considers measures all the time to curb legal costs as is, inter alia, apparent from the Legal Practice Bill. …" [Paragraph 22].

Daffue J noted further that:

> "Judges are not informed whether the dividend that was held up to creditors in the application was in fact realised. I decided some time ago, when having to consider rehabilitation applications, to arrange for perusal of the applicable applications for voluntary surrender or sequestration to obtain personal knowledge of the allegations made under oath, and have no hesitation to state that the averments under oath in so-called friendly sequestration and voluntary surrender applications in order to prove advantage to creditors are far from the truth in many instances. ..." [Paragraph 25].

Daffue J held that in future, no trustee could consent to the taxation of an attorney's bill of costs in such applications if it appeared that the costs to be taxed would be more than the costs relied on in the application." [Paragraph 26]. The application was postponed to allow the trustee to hold a special meeting of creditors. [Paragraph 54]. Daffue J ordered that a copy of the judgment be forward to the Law Society of the Free State, to investigate and take appropriate action against the applicant's attorney. [Paragraph 55].

Zuené Taljaard and Alistair Smith, "Sequestration abuse snookered: Ex parte Snooke 2014 5 SA 426 (FB) 2016(79) *THRHR* 522 describe the judgment as having "important consequences for the theory and practice of insolvency law. It illustrates a recent tendency to abuse voluntary surrender

applications, possibly because friendly sequestrations have long been excoriated and desperate debtors have thus turned to another means of obtaining the sequestration orders they crave." [Page 532].

ADMINISTRATIVE JUSTICE

LAWRENCE v MAGISTRATES COMMISSION AND OTHERS 2020 (2) SA 526 (FB)

Case heard 12 December 2019, Judgment delivered 12 December 2019

Applicant, an acting magistrate and head of office of the Petrusburg Magistrate's Court, sought an order to set aside the shortlisting proceedings in respect of vacant and advertised magisterial posts for the districts of Bloemfontein, Botshabelo and Petrusburg. Despite positive reports regarding his abilities, the applicant had not been shortlisted for any of these posts as he did not meet the criteria of section 174(2) of the Constitution. [Paragraphs 14 – 16, 21].

Daffue ADJP (Molitsoane J concurring) found that, despite following an approach that was "argumentative in the extreme", "offensive" and "deplorable" [paragraph 22], the applicant had raised the following challenges: that the Appointments Committee of the first respondent had not been quorate when considering the Bloemfontein vacancies; that the Committee had "selectively applied" section 174(2) of the Constitution by making race an "overarching and sole consideration" and disregarding white candidates; and that by eliminating the applicant from consideration before the factors in regulation 5 of the Magistrates Act were considered, the Committee had misapplied s 174(2) of the Constitution. [Paragraph 23].

After dismissing a challenge of non-joinder [paragraphs 24 – 28], Daffue ADJP dealt with the argument relating to quorum. Respondent argued that whilst s 5(2), read with s 6(7) of the Magistrates Act provided that a quorum was constituted by a majority of the members of the Committee, s 5(4) read with s 6(7) provided that the chairperson could decide during the meeting that a decision may validly be taken by a minority of members. [Paragraph 36] Daffue ADJP found that subsections 5(2) and 5(4) were contradictory and

> "can with the best will in the world not be married to arrive at the conclusion reached by the second respondent, who was clearly and incorrectly influenced by the Committee's secretary … The two subsections do not make sense if read together and as submitted on behalf of respondents. Respondents' interpretation will lead to illogical, insensible and unbusinesslike consequences." [Paragraph 37]

The Committee's meeting in respect of the Bloemfontein shortlisting was therefore not quorate. [Paragraph 40]. Daffue ADJP then dealt with the arguments relating to s 174(2) of the Constitution and quoted several extracts from the transcripts of the shortlisting meetings "to show that the Committee had a total disregard for the legislation, reg 5, its own shortlisting process and the rights of whites to at least be considered during the shortlisting process". [Paragraphs 47 – 50]. Daffue ADJP found that the Committee had been prepared "to shortlist people who had never acted before as magistrates on the basis that if they were appointed, the other magistrates could train them" but had failed to adhere to its own policy "in that it did not consider the candidature of all applicants whose applications were compliant. White people and applicant in particular were not considered at all." [Paragraph 51]. Daffue ADJP held that, by not interviewing white candidates, the Committee had:

> "lost the opportunity to duly consider whether applicant was not perhaps such an excellent candidate that he should be recommended for appointment, notwithstanding the obligation to ensure that s 174(2) is diligently applied." [Paragraph 53].

The application was granted, and the impugned shortlisting proceedings were found to be unlawful and unconstitutional, and together with the recommendations of the Committee and the appointment of magistrates to the relevant positions, were reviewed and set aside. [Paragraph 55].

CIVIL PROCEDURE

MBD SECURITISATION (PTY) LTD v BOOI 2015 (5) SA 450 (FB)

Case heard 1 June 2015, Judgment delivered 2 July 2015.

This was an appeal against a decision of a magistrate to rescind a judgment granted by the clerk of the court and directing that all benefit from the judgment be void *ab initio*, with restitution to take place. [Paragraph 4]. Respondent had signed a document when approached at work despite not recalling entering an agreement with the appellant and not having received a statement of account. The documentation contained a consent to the jurisdiction of the Hennenman Magistrate's Court, despite the respondent residing in the Eastern Cape and the appellant being based in Johannesburg. An emoluments attachment order was issued against the respondent by the clerk of the court. [Paragraphs 8 – 14].

Daffue J (Williams AJ concurring) found that the judgment was not appealable, as it had been granted by default. The appellant would have to apply for the recission of the judgment. [Paragraph 21]. In case that conclusion was incorrect, Daffue J proceeded to consider the relevant legal authorities, and found that the Hennenman Magistrate's Court had "never had any jurisdiction over the person of respondent", and nor had the cause of action arisen in the jurisdiction of the court. [Paragraph 31]. Furthermore, even if the respondent had validly consented to jurisdiction, that consent could only have been given in respect of instituting proceedings in that court. An emoluments attachment order could only be issued by the court of the district where the employer of the judgment debtor resides, carries on business or is employed. [Paragraph 35]. Furthermore, the appellant had not consented to the jurisdiction of the Henneman Magistrate's Court [paragraph 44], nor did provisions of the National Credit Act provide a basis for jurisdiction. [Paragraph 46].

The appeal was dismissed and Daffue J confirmed the court *a quo*'s award of costs on an attorney and client scale:

> "The appellant … must blame itself for the predicament. It should never have followed the procedure it did and it should never have instituted action in the Hennenman Magistrates' Court. A serious abuse of process has occurred and there is no reason to find fault with the punitive costs order." [Paragraph 47].

Regarding abuse of process, Daffue J remarked:

> "The claim is for an amount of just over R4000. The cause of action is unknown, but we know that appellant did not sell any goods to respondent as alleged. The attorney and client costs, claimed to be incurred before action was instituted, is alleged to be R2452,92. ... Instead of issuing summons in Alice where respondent works and resides, or where the whole cause of action had arisen … a Johannesburg company, instructed a Nelspruit attorney some 400 kilometres, away who elected to approach the Hennenman Magistrates' Court for judgment

> based on a dubious procedure. The Hennenman court is some 600 kilometres away from Nelspruit and a second set of attorneys had to be instructed to act as correspondents. This caused respondent to instruct local attorneys in East London who also had to appoint correspondents in Hennenman for the rescission application. When appellant decided to appeal it instructed its Johannesburg attorneys, who instructed Bloemfontein attorneys as correspondents, and the East London attorneys had to do the same. The legal costs must be over R250 000 by now ... There is no explanation why the Hennenman Magistrates' Court was elected. Two possible reasons come to mind, ie (i) the personnel of that court deliver services of professional and high quality standard in an efficient manner, ensuring thereby that court processes are dealt with swiftly and in accordance with the rules. The other reason is too ghastly to contemplate. …" [Paragraph 48].

Daffue J ordered that copies of the judgment be sent to the Law Society, Minister of Justice and Constitutional Development, and the National Credit Regulator.

CRIMINAL JUSTICE

S v FREDERIKSEN 2018 (1) SACR 29 (FB)

Case heard 14 September 2017, Judgment delivered 14 September 2017.

The accused was charged with 58 counts, including rape, child pornography, violations of the National Health Act, fraud, violations of the Firearms Control Act, and conspiracy to commit murder. At the close of the state's case, the accused applied for a discharge on the counts relating to the alleged violations of the Health Act, conspiracy to commit murder, and violation of the Riotous Assemblies Act. [Paragraph 2]. The charges under the Health Act were that the accused had removed human tissue from living persons without their written consent and outside a hospital or an authorised institution, under s 58 of the Act, and that the accused had removed human tissue without written consent and that the removal was not done in accordance with the prescribed manner and procedures, in terms of s 55 read with s 56 of the Act. [Paragraph 5].

Daffue J examined the provisions of the Health Act, and found that:

> "I accept that the legislature inserted legal and moral norms, but no criminal offences were created in either of the above sections [55, 56 and 58], unlike, for example, in ss 53 and 60. However, criminal offences are created in s 89 … but none thereof relate to transgressions of ss 55 and 58." [Paragraph 10]

> "The Human Tissue Act 65 of 1983 was repealed by the Health Act, some sections thereof earlier than others. … Unlike the Health Act, the repealed Human Tissue Act created offences and penalties in respect of the acquiring, using, supplying or removal of any tissue from the body of a living person for any purpose other than permitted in the Act. ... For an unknown reason, the legislature, supposedly being well aware of the offences created in the former Act, failed to create criminal offences in the Health Act for similar transgressions." [Paragraph 11].

Daffue J considered case law relating to the Constitutional right to a fair trial, principles of statutory interpretation, and the principle of legality, and concluded that:

> "If I consider the clear and unambiguous language of the legislature, together with the context in which the Health Act was drafted and eventually promulgated, as well as the background circumstances, I have no doubt that I cannot interpret the Act to the extent that criminal

> offences have been created for transgressing the provisions of ss 55 and 58. This court cannot venture into the arena of the legislature by creating criminal offences merely because it might be of the view that a casus omissus has occurred. The legislature must consider this judgment and decide how to approach this thorny issue. …" [Paragraph 16].

The application for discharge on counts relating to violations of the Health Act therefore succeeded. The application for discharge relating to the conspiracy counts was dismissed.

Bonnie Venter and Magda Slabbert, "S *v Frederiksen* (33/2016) ZAFSHC 161; SACR 29 (FB) (14 September 2017): Human tissue in a freezer: A crime or not?" *De Jure* 52(1) (2019) argue that the prosecution and the judge should have had regard to regulations promulgated under the Act:

> "If the prosecution or the judge consulted the regulations of the Act, they would have realised that crimes are indeed created concerning sections 55 and 58 of the NHA." [Page 112].

MEDIA COVERAGE

Quoted commenting on the Legal Practice Act at the 2018 annual meeting of the Free State Law Society:

"Speaking about the Legal Practice Act … (LPA), Judge of the Free State High Court Division, Johann Daffue, noted that it took many years of negotiations for the LPA to be enacted. Judge Daffue said the LPA deals with issues affecting the running of the legal profession so that the profession can best serve government and the public. He cautioned against resistance to the LPA and advised legal practitioners to not be afraid of change."

- **Mapula Sedutla, "Legal practitioners should not be afraid of change", *De Rebus* 1 February 2019, available at** http://www.derebus.org.za/legal-practitioners-should-not-be-afraid-of-change/.

Quoted as commending the efforts of the ANC women's league in the Free State to highlight the plight of women in respect of gender-based violence:

"He says the women's league must continue with their good work. This follows after scores of women - led by the provincial chairperson of the ANC - Olly Mlamleli, picketed outside the court and demanded justice against perpetrators of gender-based violence (GBV).

He says the court will specifically turn its focus to matters which were brought to the fore by the women's league, and that they will be properly dealt with.

Daffue adds that his record when dealing with murderers and rapists of women speaks for itself."

- **Lucky Nkuyane, "FS High Court to speed up #GBV cases", *OFM* 28 November 2020, available at** https://www.ofm.co.za/article/centralsa/299575/fs-high-court-to-speed-up-gbv-cases-

JUDGE MARTHA MBHELE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 3 September 1973

BProc, University of the North (1995)

Certificate Programme in Leadership Development, Wits University Business School (2009)

CAREER PATH

Acting Deputy Judge President, Free State High Court (April – June, July – September 2020)

Acting Judge, High Court of Lesotho (2016)

Judge, Free State High Court (2016 - to date)

Acting Judge, Free State High Court (April – June, July – September 2014; April – May, July – August, November – December 2015)

Partner, Mhlambi Attorneys & Director, Mhlambi Inc (2012 – 2015)

Legal Aid South Africa

- Regional Operations Executive (2009 – 2012)
- Justice Centre Executive (2005 – 2009)
- Supervising Professional Assistant (2004 – 2005)
- Professional Assistant (2002 – 2004)

Professional Assistant and branch office manager, Peete Mosese Inc (2001 – 2002)

Part time lecturer, Free State Technikon (1999 – 2002)

Co-ordinator, Thusanang Advice Centre (2000 – 2001)

Candidate Attorney, TP Mosese Attorneys (1998)

Candidate Attorney, Kabushi Molemela Attorneys (1996 – 1998)

Member, South African Chapter of the International Association of Women Judges (2016 – to date)

Black Lawyers' Association

- National Treasurer (2011 – 2013)
- Chairperson, Free State (2006 – 2010) (2 terms)
- Deputy Chairperson, Free State (2004 – 2006)
- Secretary, Free State (2002 – 2004)

Member (1996 – 2015)

Deputy President, Free State, South African Women Lawyers' Association (2007 – 2009; 2014 – 2015).

Trustee, Black Lawyers' Association Legal Education Trust (2007 – to date)

Member, Baalperazim Bible Church (2018 – to date)

SELECTED JUDGMENTS

CIVIL PROCEDURE

ELDARO TRADING (PTY) LTD V MERAKA LESOTHO (PTY) LTD (1092/2016) [2016] ZAFSHC 78 (19 MAY 2016)

Respondent sought an order to reconsider and set aside an order previously granted by a judge of the High Court to attach respondent's property to confirm jurisdiction and granting leave to the Applicant to serve summons on the Respondent at its principal offices in Lesotho. [Paragraph 1]. It was common cause that the property attached was not owned by the respondent, and had been substituted with an amount of R650 000, which was being held in Trust. [Paragraphs 11 – 12].

Mbhele J emphasised the importance of full disclosure of material facts in *ex parte* applications. In this case the applicant had not disclose that it applied for the liquidation of the respondent in the Lesotho High Court, which would have resulted in liquidators taking over the respondent's assets. [Paragraphs 15 – 16]. Mbhele J found that it had been incumbent on the Applicant to disclose to the judge that liquidation proceedings were pending in the Lesotho High Court and expressed doubt the order would have been granted had this information been disclosed. [Paragraph 19].

Mbhele J held that the order granted "was incapable of being given effect to." [Paragraph 28]. The order was thus reconsidered at set aside.

APOSTOLIC FAITH MISSION OF SOUTH AFRICA AND ANOTHER V MOLOI AND OTHERS (4702/2013) [2014] ZAFSHC 151

Case heard 19 June 2014, Judgment delivered 11 September 2014

This was an application in terms of Rule 28 (4) for an amendment of a Notice of Motion, a rule nisi having been granted at the instance of the first applicant to prevent the respondents from disrupting church services of the applicant. The case dealt with the requirements and the procedures to be followed when amending a pleading.

Mbhele AJ held:

"The observation in all cases supra is that amendment will only be refused if allowing it would cause prejudice to the other party. The attitude of the Courts is not to close the door in the face of a litigant whose additional information may assist the court to come to a just decision." [Paragraph 11]

"An interim order is a court issued proclamation that is meant to be effective only until a court has had a chance to hear a complete case and has entered a final order." [Paragraph 13]

"The proposed amendment does not seek to strike out the existing interim order nor does it alter the same in the absence of a specific order directed at the interim order. The Notice of Motion as amended will be adjudicated upon by the court for the purpose of a final order. Allowing the amendment will in my view not affect the existing interim order." [Paragraph 14]

"The amendment sought by the second applicant seeks to narrow down the prayers as set out in the notice of motion to a specific future event." [Paragraph 19]

"Disruption of church services is an undesirable phenomenon at any given time. I do not see how the respondents will be prejudiced by the proposed amendment." [Paragraph 20]

Leave to amend the notice of motion was granted, with each party to pay their own costs.

CRIMINAL JUSTICE

S v MAKHETHA 2020 (2) SACR 410 (FB)

Case heard 14 May 2020, Judgment delivered 14 May 2020

Four accused had pleaded guilty to contravening the Immigration Act. Accused number 1 was sentenced to a fine of R2000 or 60 days' imprisonment, half of which was suspended on condition the accused was not convicted of contravening the Act. The senior magistrate referred the matter to the High Court on special review, querying whether the condition imposed was too wide. [Paragraphs 1 – 4].

Mbhele ADJP (Molitsoane J concurring) held that:

> "Any condition imposed must be closely related to the crime and it should be stated with such precision that it does not leave doubt in the mind of the accused as to which conduct is prohibited during the period of suspension. If the condition is too wide and not precise it confuses and poses challenges to the court that may have to consider the alleged violation of the condition imposed." [Paragraph 6].

Mbhele ADJP held that it was also necessary to consider reasonableness, and that conditions should be devised so that "they do not subject the accused to future unfairness", and they should not be overly onerous. Compliance with the conditions should be within the control of the accused and should be reasonably possible. [Paragraph 7].

Mbhele ADJP held that the conditions set in this case were too wide and failed to meet the requirements identified. [Paragraph 8]. The sentence was amended and replaced with a fine of R2000 or 60 days' imprisonment, half of which was suspended for three years on condition that the accused was not convicted of contravening s 49(1)*(a)* of the Immigration Act, committed during the period of suspension.

S v JN 2020 (2) SACR 412 (FB)

Case heard 4 November 2019, Judgment delivered 29 November 2019

The accused was convicted following a plea of guilty, of raping a 9-year-old complainant, and was sentenced to life imprisonment by the Regional Court. This was an automatic appeal against the sentence. [Paragraph 1]. At issue was whether the trial court had erred in concluding that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence. [Paragraph 4].

Mbhele J (Musi JP concurring) found that the offence was "undoubtedly a serious one", as the appellant was a friend of complainant's grandfather, and took advantage of the trust of the complainant. [Paragraph 10]. Mbhele J emphasised that the Constitution gave "paramount importance" to a child's best interests, was "the single most important factor to be considered" when balancing competing interests in respect of children. [Paragraph 11].

Mbhele J held that, on weighing the mitigating and aggravating factors and the interest of community, the sentence should be overturned. [Paragraph 16]. Mbhele J identified the substantial and compelling circumstances justifying a departure from the minimum sentence as:

> "The appellant is a first offender; he was 71 years old and the sole breadwinner of his family. He committed the offence while under the influence of alcohol and showed remorse by pleading guilty. The chances of him recidivating are slim. …" [Paragraph 17].

The appeal was upheld, and the sentence of life imprisonment was replaced with one of 10 years' imprisonment.

S v MOTLADILE 2019 (1) SACR 415 (FB)

Case heard 21 September 2018, Judgment delivered 21 September 2018.

The accused, who was unrepresented, pleaded guilty and was convicted of a contravention of the Drugs and Drug Trafficking Act. The presiding magistrate did not question the accused in terms of s 112 of the Criminal Procedure Act, to establish whether the accused appreciated the consequences of his plea and admitted all the elements of the offence. The senior magistrate requested the court to set aside the conviction and sentence on special review. [Paragraphs 1 – 4].

Mbhele J (Molitsoane J concurring) agreed with the senior magistrate that the proceedings had not been in accordance with justice:

> "The accused, unrepresented as he was, was confronted with legal phrases and statutory definitions which were beyond his purview. With the accused not asked to explain his personal knowledge of the substance he was being charged with, it follows that there was no proof that the substance allegedly found in the accused's possession was an undesirable dependence-producing substance. The accused did not receive a fair trial in this respect." [Paragraph 5].

Mbhele J held further that the magistrate had failed to advise the accused of a defect in the charge sheet relating to the element of possession. The accused had therefore pleaded guilty to a defective charge, and the magistrate's failure to ensure that the charge was put to the accused with sufficient detail constituted "a serious violation of the accused's right to a fair trial." [Paragraph 7]. Mbhele J held that the court had "a duty to assist and give guidance to an unrepresented accused who lacks the sophistication to understand complex court proceedings." [Paragraph 8].

The conviction and sentence were set aside.

CUSTOMARY LAW

ROYAL FAMILY OF AMADLOMO AND ANOTHER V PREMIER OF THE EASTERN CAPE AND OTHERS (1944/2020) [2020] ZAECMHC 29 (23 JULY 2020)

Case heard 16 July 2020, Judgment delivered 23 July 2020.

This was an urgent application to set aside decisions by the first respondent, whereby *inter alia* the second applicant's tenure as Acting Kind of the AbaThembu nation was terminated, and he was evicted from his home without an order of court. The third applicant was to renew his duties as King.

[Paragraph 1]. The third applicant had been the reigning King of the AbaThembu nation but was convicted and imprisoned in 2015. [Paragraph 2].

Mbhele J first considered two points *in limine.* First, it was held that the first applicant had failed to show that it had the authority to institute the proceedings. [Paragraph 9.1]. Second, Mbhele J held that the President of South Africa should have been joined to proceedings, as the third respondent's certificate of recognition as the King of AbaThembu had been issued by the President. [Paragraphs 9.2 – 12].

Mbhele J then proceeded to consider the law relating to the removal of a King and noted that the applicants recognised that "the King has not been removed in terms of the prescribed law and yet they want the acting stint of the second applicant to persist." Mbhele J held that allegations of a lack of fitness were "of no consequence if the prescribed procedure has not been followed." [Paragraph 13]. Mbhele J rejected an argument that the third respondent could not continue as King because he was a parolee:

> "The third respondent was released on parole with no conditions attached. It is incumbent upon the society to receive him and regard him as one of their own. Nothing disqualifies him form partaking in activities that all other members of the society are partaking in, including kingship unless removed therefrom by due process." [Paragraph 15].

The application was dismissed with costs.

JUDGE SOMA NAIDOO

BIOGRAPHICAL INFORMATION

Date of birth: 6 February 1957

BA, University of Durban Westville (1977)

LLB, University of Durban Westville (1979)

CAREER PATH

Acting Deputy Judge President, Free State High Court (January – March 2018; April – June, July – September 2019; October – November 2020).

Judge, Free State High Court (2014 – to date)

Acting Judge

Free State High Court (October 2011 – March 2012, October – December 2013)

Gauteng High Court (July – August, August – September 2013)

KwaZulu Natal High Court (August – September 2005, July – September 2006, July – August 2008, September 2008, April – May 2009, March 2010, April – June 2013)

Magistrate, Durban District Court (1998 – 2014)

Deputy Head of Office (2011 – 2013)

Head of criminal division (January – July 2011)

Head of Family Court division (2005 – 2010)

Prosecutor (1992 – 1998)

Soma Naidoo Attorney (1988 – 1992)

Legal Advisor, Small Business Development Corporation (1985 – 1988)

Partner, Norman Machritchie & Partners (1983 – 1985)

Partner, Smithers & Co (1982 – 1983)

Articled Clerk, Goldberg & Tobias (1980 – 1982)

South African Chapter, International Association of Women Judges

Member (2004 – to date)

Deputy President (2010 – 2014)

National Secretary (2009 – 2010)

Vice President, Programmes (2007 – 2009)

Vice President, Publications (2004 – 2007)

Judicial Officers Association of South Africa (JOASA)

Treasurer, KwaZulu-Natal (2001 – 2004)

Member (2008 – 2019)

Faculty Board Member, University of the Free State (2019 – to date)

Life member, Shree Siva Soobramoney Temple (1990 – to date)

Member, Tongaat Child Welfare Society (1988 – to date)

SELECTED JUDGMENTS

PRIVATE LAW

CANTON TRADING 17 (PTY) LTD V HATTINGH NO (1293/2018) [2019] ZAFSHC 250 (10 DECEMBER 2019)

Case heard 9 September 2019, Judgment delivered 10 December 2019.

Respondent had sought an order that the appellant submit to the arbitration of certain disputes in terms of an arbitration agreement. |The underlying dispute related to the performance of the appellant's obligations in terms of a building contract. The court *a quo* granted the application subject to an amendment. On appeal, it was argued that the court *a quo* had "entered the arena of conflict between the parties", had unjustifiably rejected the appellant's version, and had misdirected itself on various issues, including the onus. [Paragraph 3].

Naidoo ADJP (Daffue and Reinders JJ concurring) identified the source of the dispute between the parties as being the meaning of the definition of "arbitration agreement" in the Arbitration Act. [Paragraph 9]. Naidoo ADJP found that the court *a quo's* finding that the appellant's denial of the existence of the agreement was clearly untrue and not credible could not be faulted. [Paragraph 15]. Naidoo ADJP found that the court *a quo* had not misdirected itself in finding that there was no genuine dispute of fact between the parties as to whether the agreement had come into existence. Having done so, the court was then entitled to refer the dispute to arbitration [Paragraphs 16 – 17].

Regarding the third ground of review, Naidoo ADJP found that:

> "The dispute arose only after the pre-arbitration meeting, and it seems that the court *a quo* considered this to be a contrived and opportunistic dispute, and rejected it accordingly. I cannot fault the reasoning of the court below in accepting (although it did not say so in such words) that the respondent had proved the terms of contract and that the parties had acted in accordance with such contract." [Paragraph 19].

The appeal was dismissed with costs.

ADMINISTRATIVE JUSTICE

HENDRICKS V CHURCH OF THE PROVINCE OF SOUTHERN AFRICA, DIOCESE OF FREE STATE (2886/2019) [2020] ZAFSHC 108 (17 JUNE 2020)

Case heard 25 May 2020, Judgment delivered 17 June 2020.

Applicant, an ordained priest, sought an order reviewing and setting aside the decision of the respondent to revoke the applicant's license to act as a priest, and that the applicant be reinstated as a priest. The Bishop in charge of the applicant's Diocese had sought to move several priests, including the applicant, to different churches. After disputing the proposed move, applicant was notified that his license was being revoked. Applicant argued that the regulatory prescripts of the Church were not followed, and due process was not followed before his licence was revoked. [Paragraph 7].

Naidoo J (Chesiwe J concurring) considered the provisions of the Constitution relating to administrative justice, and the definition of administrative action in the Promotion of Administrative Justice Act (PAJA). Naidoo J identified the core issue as being whether the respondent's actions constituted administrative action as defined in PAJA, i.e. whether the respondent had "exercised a

public power or performed a public action which adversely affected the rights of the applicant and which had a direct, external legal effect". [Paragraph 15]. After considering South African and English case law, Naidoo J held that PAJA was not applicable:

> "The respondent … is a religious body … It is a voluntary association, unconnected to the State, privately funded and does not enjoy statutory recognition. Its actions and decisions lack the necessary "governmental" element. …" [Paragraph 17]

However, the common law and "the precepts of natural justice" would come into play where conduct was procedurally flawed and resulted in unfairness and prejudice to the applicant. Naidoo J noted, however, that:

> "The courts are … generally hesitant to involve themselves in church-related matters, and where they do, such intervention is limited to the process and procedures governing or relevant to the process. The courts are accordingly very reluctant to become involved in disputes regarding internal rules or doctrines of the church." [Paragraph 17].

Naidoo J then considered the respondent's argument that appellant had failed to challenge a decision by an Archbishop, rejecting applicant's internal appeal and upholding the removal of his license. [Paragraph 18 ff] After considering case law, Naidoo J held that:

> "Apart from criticising and disagreeing with the decision of the Archbishop, the applicant did not deal at all with the reasons for his disagreement, neither did he place on record how or why the Archbishop erred, and most importantly did not ask for that decision to also be reviewed and set aside. ... I find that it would be futile to review the decision of the Bishop in this matter as it would indeed be moot, given that the decision of the Archbishop in dismissing the applicant's appeal, still stands." [Paragraph 24].

The application was dismissed with costs.

CIVIL PROCEDURE

ESKOM HOLDINGS SOC LIMITED V MALUTI-A-PHOFUNG MUNICIPALITY AND OTHERS; IN RE: MALUTI-A-PHOFUNG MUNICIPALITY V ESKOM HOLDINGS SOC LIMITED AND OTHERS (4723/2014) [2015] ZAFSHC 203 (10 SEPTEMBER 2015)

Case heard 4 June 2015, Judgment delivered 10 September 2015.

This was an application for condonation of the first respondent's non-compliance with an earlier court order. First respondent had sought an order interdicting Eskom from terminating their electricity supply.

Naidoo J considered the explanations advanced for the on-compliance [paragraphs 7 – 8], and considered a submission that the legal representatives of the first respondent had been acting without instructions when negotiating the agreement which led to the court order in question:

> "This would mean that they [the legal representatives] took no steps to advise their client (MAP) … that they acted without instructions, and that they agreed to a court order which places a heavy burden on the client. It would also mean that they took instructions for, drafted and settled the application papers … without advising their client of the existence and import of the October court order. I find this incredible, and in my view this could well be a matter that merits the attention of the Law Society and/or the Bar Council." [Paragraph 9].

Naidoo J found that the conduct and explanations of the Municipal Manager was "indicative of someone who has a lackadaisical attitude to his position and the great responsibilities that come with such a position. [Paragraph 10]. Naidoo J concluded that the first respondent owed "a phenomenal amount of money", and that it appeared that this was "due to incompetence and mismanagement on the part of the functionaries of the municipality." Whilst the explanations by the Municipal Manager for the default were "thin and unconvincing", Naidoo J noted that if the situation was due to laxity by the Municipal Manager combined with a failure by his legal representatives to act properly, the community served by the municipality would bear the consequences if the court did not grant condonation. While Eskom was also suffering prejudice, it was necessary to balance "the financial interests of a corporate entity with those of a community placed in a precarious position through no wrongdoing on its part, a community that is faced with disconnection of a basic and essential service." [Paragraph 11].

The application for condonation was granted, with the Municipality being ordered to pay Eskom's costs on an attorney and client scale. The Registrar of the court was directed to bring the judgment to the attention of the Law Society and the Bar Council. [Paragraph 12].

CRIMINAL JUSTICE

HLOJANE V S (A241/2018) [2019] ZAFSHC 66 (30 MAY 2019)

Case heard 11 March 2019, 30 May 2019

The appellant was convicted on one count of rape in the Bloemfontein Regional Court, and sentenced to 26 years' imprisonment. The complainant was a nine year old girl. The appeal was against conviction and sentence.

Naidoo J (Molitsoane J concurring) held:

"The court *a quo* … undertook a comprehensive analysis of the evidence as a whole. I pause to mention that the magistrate's manner of delivering her judgment is somewhat strange. She addressed herself to the appellant personally, and often pronounced herself at a personal level in respect of how she conducts herself in relation to other similar matters. It is perhaps advisable for the magistrate to reconsider this method of delivering her judgments and adopt a more general and less personal approach, lest the impression be created that she is not objective. It should also be borne in mind that the judgment is not exclusively for the accused person. The prosecution, members of the public, whether present at the proceedings or not, students, academics and the appeal court are all part of the audience that the court should seek to address. …" [Paragraph 7].

Naidoo J held that the court *a quo* had analysed the evidence extensively, "albeit in a most unconventional fashion", and had given proper consideration to discrepancies in the evidence of the complainant and had applied the necessary caution in dealing with the evidence of the complainant. Naidoo J noted that case law provided warnings about the need "to be cautious in dealing with the evidence of a single witness and particularly that of a young child", and that section 208 the Criminal Procedure Act permitted conviction based on the evidence of a single witness. [Paragraph 8].

After considering case law on section 208, Naidoo J found that the court *a quo* "took proper account of the age of the complainant, the manner in which she testified, and correctly concluded that … the complainant was raped … The discrepancies or contradictions were correctly treated by the trial court as being of such a nature that they do not cast doubt on whether the complainant was raped by the

appellant I am unable to fault the reasoning of the magistrate in respect of the guilt of the appellant in this matter, and accordingly find no reason to interfere with the conviction in this matter."

The appeal was dismissed.

JUDGE ROLAND SUTHERLAND

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 1 February 1951.

BA, University of Witwatersrand (1972)

LLB, University of Witwatersrand (1975)

Higher Diploma in Tax Law, University of Witwatersrand (1982)

Certificate in Industrial Relations, University of Witwatersrand (1988)

MA (Applied Ethics), University of Witwatersrand (2015)

CAREER PATH

Acting Deputy Judge President, Gauteng High Court, Johannesburg (2019, 2020)

Acting Justice of Appeal, Supreme Court of Appeal (2020)

Judge of Appeal, Labour Appeal Court (2014 – to date)

Judge, Gauteng High Court (2012 – to date)

Acting Judge, High Court (1997 – 2011)

Acting Judge, Labour Court (1998 – 2002)

Commissioner, Hillbrow Small Claims Court (1986 – 2012)

Department of Justice

- State Advocate (1976 – 1977)
- Regional Court Prosecutor (1975 – 1976)
- Special Industrial Court prosecutor (1975)
- District Court Prosecutor (1972 – 1974)
- Clerk of the court (1968 – 1972)

General Council of the Bar

- Chair, Finance Committee (2001 – 2011)
- Vice Chair (1999 – 2001)
- Honorary Secretary (1993 – 1995)

Johannesburg Society of Advocates (1977 – 2011)

- Member, Library Committee (2002 – 2011)

Chair, Bar Archives Committee (2002 – 2011)

Chair, Bar Council (1998 – 1999)

Vice Chair, Bar Council (1997 – 1999)

Member, Bar Council (1991 – 1994)

Honorary Secretary, Bar Council (1989 – 1991)

Alternative Dispute Resolution Association of South Africa

Chairman (1994 – 1995)

Member (1991 – 1996)

Member, arbitrator, mediator – Independent Mediation Service of South Africa (1987 – 1996)

Lawyers for Human Rights (1982)

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

SOUTH AFRICAN HUMAN RIGHTS COMMISSION v KHUMALO 2019 (1) SA 289 (GJ)

Case heard 5 October 2018, Judgment delivered 5 October 2018.

The main issue in this case was whether various utterances published by the Respondent on social media constituted hate speech. [Paragraphs 1 - 2]

Sutherland J found that it was necessary to consider further whether in light of previous proceedings having been initiated in the Equality Court, it was appropriate for the Respondent to be subject to these proceedings. [Paragraph 3] Sutherland J set out the procedural history of the case [paragraph 4 ff], finding that while the proceedings in the Equality Court exhibited "several irregularities", the order remained standing, no proceedings having been initiated to set it aside. [Paragraphs 24.3, 25] Sutherland J then considered the High Court proceedings, noting that an affidavit filed by the respondent withdrew earlier admissions that the utterances were hate speech, and alleged that it was improper for the High Court proceedings to continue, in light of the Equality Court case. [Paragraph 27]. Sutherland J considered the respondent's explanation for the statements [paragraph 28 ff], including that "he published the utterances in a state of extreme agitation, without reflection." [Paragraph 28]

> "Khumalo sets out an account of growing up under apartheid, in poverty, and experiencing acts of racism. The account is an-all-too familiar one experienced by black South Africans. He describes his political awakening, the optimism engendered by the 1990 – 1994 democratic revolution and the burden of disillusionment in the years thereafter. …" [Paragraph 31]

Sutherland J dealt with the effect of the withdrawal of admissions that the utterances constituted hate speech:

> "If the utterances were not hate speech then they are utterances within the bounds of freedom of expression for which no apology is warranted. It is not logical to recant that it was hate speech and yet apologise. Again, logically, a recantation that he committed hate speech inescapably implies a tacit withdrawal of the substantive apology. ... No doubt he regrets the publicity and the criticism visited upon him and its attendant humiliation, but this is to be distinguished from an apology for wrongdoing." [Paragraph 43]

Sutherland J then considered whether the Human Rights Commission's complaint should not be heard because of the Equality Court proceedings. Sutherland J considered whether the principle of *res judicata* or issue estoppel was applicable. Sutherland J noted that the respondent did not rely on issue estoppel but argued that the two impugned statements were in reality one, and that a full apology has been given and the matter dealt with by the Equality Court. [Paragraph 65] Sutherland J agreed that the two utterances were in effect one:

> "Indeed, the second utterance is fully comprehensible only when read together with the first utterance. The vitriol is in the same vein with the imagery ratcheted up a further degree." [Paragraph 66]

However, the fact that the Equality Court had not dealt with the second utterance was a material fact, as were the "serious flaws" in the Equality Court proceedings. [Paragraph 66] Sutherland J found that there was no abuse of process [paragraph 68], and dismissed the defence of issue estoppel,

particularly because of respondent's repudiation of his acceptance that his utterances constituted hate speech. [Paragraph 73]

Sutherland J then considered whether the utterances constituted hate speech under section 10(10) of the Equality Act, and considered a purposive interpretation of the Act:

> "South African society is, manifestly, a community that exhibits significant social strains which … are marked off and categorised by race and personal appearance. A significant interracial tension exists, derived from several circumstances, not least from inequality and the persistence of some degree of interracial hostility. This unhappy and regrettable condition is our historical legacy. The Constitution has proclaimed that we recognise the fractured character of our community and set about transforming our society towards a goal that unequivocally repudiates interracial hostility so that we may build a nation upon a consensus that every South African deserves dignity and that our whole community, through sharing resources and through respect for one another, can experience social cohesion. …" [Paragraph 86]

Sutherland J found that the statements were prohibited by the Equality Act:

> "The 'othering' of whites or any other racial identity is inconsistent with our constitutional values. These utterances, inasmuch as they, with dramatic allusions to the holocaust, set out a rationale to repudiate whites as unworthy and that they ought deservedly to be hounded out, marginalised, repudiated and subjected to violence in the eyes of a reasonable reader, could indeed be construed to incite the causation of harm in the form of reactions by blacks to endorse those attitudes, reactions by whites to demoralisation, and rachet up the invective by responding in like manner, and thus, by such developments, on a large enough scale, derail the transformation of South African society." [Paragraph 103]

The utterances were thus found to be hate speech.

RIGHT2KNOW CAMPAIGN AND ANOTHER (M & G MEDIA LTD AS *AMICUS CURIAE*) V MINISTER OF POLICE AND ANOTHER [2015] 1 ALL SA 367 (GJ)

A request for access to information to disclose which areas had been declared national key points, as well as bank statements of the Special Account for the Safeguarding of National Key Points, was refused and an internal appeal dismissed. Applicants sought to review and set aside the proceedings. [Paragraphs 1 – 3]

Sutherland J analysed the reasons given for the refusal, and found that they fell short of the test set by the Constitutional Court in *President of the RSA and others v M and G Media Ltd*:

> "In argument, Counsel for the respondents … was driven to concede that there was no *evidential material* disclosed in the papers to support the refusal. He contended that the predicament of the respondents was illustrated by the experiences of that well known gentleman adventurer and upholder of noble causes, James Bond, who, albeit it must be supposed, with his customary charm and grace, declined to disclose a fact to a questioner, because were he to do so, he would have to kill him. This is an interesting submission, which, alas, is spoilt by the absence of such an allegation under oath." [Paragraph 17]

Sutherland J considered the possibility of employing a "judicial peek" at the records in terms of section 80 of the Promotion of Access to Information Act (PAIA) but found that the respondents had not

attempt to justify "the invitation to peek" and had made no allegation of being hamstrung in presenting their case. [Paragraph 19] Sutherland J held that in argument,

> "the suggestion in support of a peek veered towards the peek being used to merely perform the very exercise which the respondents were obliged to undertake; ie to sift through the declarations and decide if there were any key points whose identity, upon good grounds recognised by PAIA, might not be appropriate to disclose. That expectation is inappropriate. …" [Paragraph 20]

Sutherland J found that a "peek" was inappropriate in this case, no attempt has been made to justify the need for it, and "because of the grave policy considerations that attend upon its use, it is never available for the asking, but must be seriously motivated as the only appropriate mechanism to avert a failure of justice." [Paragraph 21]

Sutherland J then turned to examine the National Key Points Act, noting that nothing in the Act provided for the identity of the key points to be kept secret. [Paragraph 25] Sutherland J rejected the respondents' arguments against disclosure:

> "A serious flaw in the efforts to justify non-disclosure is the absence of an argument to support the conclusion that the NKP Act objectives include keeping secret the status of places as key points. … [I]t was incumbent upon the respondents to adduce evidence that, notwithstanding the absence of such an objective … disclosure "could reasonably be expected to endanger" anyone, or was "likely to prejudice or impair" any security measure of a building or a person, or … disclosure "could reasonably be expected to cause prejudice" to the State's security. All the respondents offer are platitudes and a recitation of the provisions of the statutes." [Paragraph 36]

Sutherland J found that it was "inescapable" that the rationale for the refusal failed to meet the threshold set by PAIA. [Paragraph 38] Sutherland J then considered arguments by the applicants that the public interest override in section 46 of PAIA was applicable [paragraph 39] and found that concerns about public expenditure on key points, the lack of a special account, and general public and media concerns, triggered the provisions of section 46.

> "It is wholly unsatisfactory that political office bearers and senior civil servants should have to perform their duties under a cloud of suspicion of incompetence or dishonesty. Transparency about all the facts is necessary to either repair the rot, if any exists, or dispel the lack of confidence which the citizenry will continue to nurse if the facts are concealed." [Paragraph 46]

Finally, Sutherland J agreed with the submission by the *amicus curiae* that "to save the constitutionality of section 10 of the NKP Act, at very least, the key points must be publically known and no lawful reason compatible with the principle of legality can excuse a full disclosure." [Paragraph 52] The application succeeded, and the refusal of the request was set aside.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

AMABHUNGANE CENTRE FOR INVESTIGATIVE JOURNALISM NPC AND ANOTHER v MINISTER OF JUSTICE AND OTHERS 2020 (1) SA 90 (GP)

Case heard 16 September 2019, Judgment delivered 16 September 2019.

This was a challenge to the constitutionality of provisions of the Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA), which permitted the interception of the communications of any person by authorised state officials subject to prescribed conditions. There was a further challenge to the admitted practice of conducting bulk interceptions of telecommunications traffic. [Paragraphs 1 – 3]

After dismissing preliminary objections [paragraphs 7 – 23], Sutherland J then dealt with the arguments relating to the unconstitutionality of RICA. [Paragraphs 27 ff] Sutherland J noted that the "intrusive nature" of interception powers were recognised, and "a model of safeguards" was built into the statute. [Paragraph 30] Sutherland J considered a challenge to the absence of a right to be notified of being the subject of surveillance, finding that this was a practice followed in other democratic societies, and that it was "indeed a mechanism that serves to ameliorate the intrusions into the privacy of persons because it affords redress by a court, if an abuse occurs." [Paragraph 48] Sutherland J held that sections of RICA were therefore unconstitutional and invalid to the extent that they did not prescribe a procedure for notifying the subject of an interception. The declaration of invalidity was suspended for two years to allow Parliament to cure the defect. [Paragraph 53]

Sutherland J then considered a challenge to the provisions dealing with the designated judge, which was based on two grounds: that the independence of the designated judge was compromised by the selection process and de facto unlimited duration of appointment; and the absence of an adversarial process, which was said to compromise the efficacy of the judicial role. [Paragraph 61] Regarding the independence argument, Sutherland J held that the full relief sought, which included the designated judge being appointed by the JSC, was not appropriate:

> "The policy choice to have the Judicial Service Commission appoint the designated judges is ostensibly a viable and sensible option, but ought to enjoy a greater degree of reflection in order that a process to govern it be put in place. That is highly problematic as an interim measure. …" [Paragraph 70]

Sutherland J ordered that the provisions of RICA relating to the definition of designated judge were unconstitutional and invalid to the extent that they failed to prescribe an appointment mechanism and terms which ensure the designated judge's independence, and that the Minister "should, in the interim, continue to appoint the designated judges; however, the appointees should be nominated by the Chief Justice and the Minister should be obliged to accept the nominations." [Paragraph 69, 71]

Sutherland J then considered a challenge to the absence of a prescribed procedure for evaluating the information placed before the designated judge, which argued for the creation of a "public advocate" to represent the interests of the person adversely affected by the authorisation. [Paragraph 72] Sutherland J excluded reference to a public advocate from the order but found the impugned sections to be unconstitutional due to a lack of appropriate safeguards to deal with the orders being granted ex parte. [Paragraphs 81 – 83]

Sutherland J rejected a challenge to the length of time archived data of past communications was retained for (3 years) [paragraphs 93 – 97] but found that the oversight regime in RICA as to how the archived data was managed, used and accessed was "extremely light" and "notable for its generality",

with a lack of judicial oversight. [Paragraph 106] The relevant provisions of RICA were declared to be unconstitutional for failing to prescribe proper procedures to be followed in dealing with data obtained from interceptions. [Paragraph 108]

Sutherland J then dealt with an argument relating to the position of lawyers and journalists, who were obliged to protect the confidentiality of communications with clients and sources. [Paragraphs 109 – 110] Sutherland J upheld an argument that RICA was deficient for not catering for the peculiar position of journalists [paragraph 136], and granted an order declaring the relevant provisions unconstitutional, and reading in a requirement that an application relating to a lawyer or journalist required disclosure of that identity to the designated judge. [Paragraphs 109, 142]

Regarding the challenge to bulk interceptions, Sutherland J considered whether there was a law authorising the practice. Respondents argued that the National Strategic Intelligence Act (NSIA) provided such authorisation. It was common cause that RICA did not provide authorisation. [Paragraph 147] Sutherland J found that no lawful authority for the practice had been shown:

> "[E]ven were it to be assumed … that bulk interceptions per se, or subject to certain conditions, are a good idea, or even a practice that any sovereign state cannot do without, despite its distaste for the practice, the least that can be required is a law that says intelligibly that the state can do so. The NSIA does not do so. Our law demands such clarity, especially when the claimed power is so demonstrably at odds with the constitutional norm that guarantees privacy." [Paragraph 163]

Several provisions of RICA were therefore declared to be unconstitutional, with no order being made as to costs. The Constitutional Court substantially upheld the decision, amending only the costs order: ***AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others*** **(CCT 278/19; CCT 279/19) [2021] ZACC 3 (4 February 2021).**

CIVIL PROCEDURE

INCUBETA HOLDINGS (PTY) LTD AND ANOTHER v ELLIS AND ANOTHER 2014 (3) SA 189 (GJ)

Case heard 5 October 2013, Judgment delivered 16 October 2013.

The first applicant had obtained a final interdict against the first respondent to prevent him from breaching a restraint of trade agreement. First respondent then noted an application for leave to appeal. This was an application for leave to bring the order into operation pending the appeal process. [Paragraphs 1 – 5]

Sutherland J noted that the respondents argued that section 18 of the newly introduced Superior Courts Act introduced a new test for leave to put into operation and execute an order pending the appeal processes and that judicial authority predating the section was thereby replaced. [Paragraph 10] Sutherland J held that the "critical component" of the previous case law was "a judicial discretion, derived from the inherent jurisdiction of the court, to rule in accordance with the equities present in the given case." [Paragraph 12] Sutherland J held that a "new dimension" had been introduced to the test by the section 18. The test was first whether "exceptional circumstances" existed, and second, the applicant was required to prove on the balance of probabilities that there would be irreparable harm to the applicant (the successful party in the underlying case), and an absence of irreparable harm to the respondent (the unsuccessful party). [Paragraph 16]

Sutherland J then considered the meaning of "exceptional circumstances", and identified the context to section 18 of the Act as:

> "[A] set of considerations pertinent to a threshold test to deviate from a default position, ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision in case the last court decides differently — the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons to rest on the same footing." [Paragraph 21]

Sutherland J held that whether exceptional circumstances were present "must be derived from the actual predicaments in which the given litigants find themselves." [Paragraph 22] Regarding the requirement of irreparable harm, Sutherland J held:

> "[I]f the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created ... Two distinct findings of fact must now be made, rather than a weighing-up to discern a 'preponderance of equities'… What remains intriguing, however, is the extent to which even a finding of fact as to irreparable harm is a qualitative decision admitting of some scope for reasonable people to disagree about the presence of the so-called 'fact' of 'irreparability'." [Paragraph 24]

Sutherland J concluded that the applicant would suffer harm if the order was not put into operation, whereas the first respondent would not suffer irreparable harm. [Paragraphs 27 – 29] The application was granted.

SELECTED ARTICLES

A DEFENCE OF THE STANDARD CONCEPTION OF ADVERSARY ADVOCACY, 2016 (http://wiredspace.wits.ac.za/jspui/bitstream/10539/20736/2/ROLAND%20SUTHERLAND%20380175%20AEP%20%20RESEARCH%20REPORT%20pdf%20VERSION%202016%2006%2001%20%20.pdf)

This thesis discusses the adversary advocacy system used in litigation in Commonwealth jurisdictions. The thesis defends the relationship between client and counsel under this system. [Page 7] It discusses criticisms of the standard conception of adversarial advocacy [page 18 ff], as well as defences of that conception. [Page 34 ff] The thesis also draws parallels between the relationship between counsel and their client and counsel and the court:

"The arguments heard from counsel offer rival viewpoints from which the judge may draw heavily or not at all. The disparities that the rival contentions may manifest are understood by the judge to be aimed at the best construction of each adversary's case that the imagination of counsel can produce. Provided they are plausible, they contribute to the judicial thinking, if only to clarify the issues in dispute and possible outcomes. What the judge does not require, still less want, is to rely on the sincerity of counsel who advances the submissions; all that is of concern is the plausibility of the

arguments. The notion that a judge is swayed because counsel's personal opinion endorses a view is an anathema." [Page 54]

"The short and brutal answer is that 'truth' is greatly overrated in the litigation process. The morality of keeping material information from a judge on the grounds of client confidentiality has be assessed in this context. This is a terrain that is uncomfortable to traverse for the moral person, and no less for the moral judge and the moral counsel. But cherished as the value of truth may be, the pursuit of truth is a secondary concern of the litigation process, and remains of instrumental value only. When justice is accomplished because the truth is really revealed, such an outcome is a welcomed by-product. … " [Page 55]

The thesis argues that "non-disclosures based on counsel/client confidentiality by counsel are not morally compromised. They are justified on utilitarian, deontological and human rights grounds." [Page 63] The thesis then further considers whether "uncommitted or insincere argument" by counsel served the judicial decision – making function.

"What is demanded of counsel by a judge is to put up what it is feasible to argue. … [O]ften the case of a litigant is weak, but what is required is the best weak argument possible. It is the desire to avoid an injustice that requires a judge to demand of counsel to advance whatever can be said on behalf of a weak case." [Pages 63 – 64]

"[T]he judge cannot be expected to think of everything, and more especially the judge cannot be expected to know all the law. In the adversary system the dependence of judges on counsel is real, and the reliance of judges to have points of importance drawn to their attention cannot be exaggerated." [Page 64]

"I contend that counsel's role ought to usefully be defined as a licensed fiduciary intermediary in the litigation process. 'Licensed' because admission to the profession is rigorously regulated both as to academic credentials and as to character. 'Fidiciary' because of the responsibility counsel assumes to care for a dependent client. 'Intermediary' because that is the systemic or functional location of the representative role. Indeed, the role of counsel is created to serve the litigation process. …" [Pages 65 – 66]

MEDIA AND OTHER COVERAGE

Remarks quoted at an event for candidate legal practitioners:

"Judge Sutherland added that legal practitioners exist to help other people solve their problems. He told the candidate legal practitioners that if they will not be the kind of legal practitioners that want to help people, they are going to be unhappy legal practitioners. He said that candidate legal practitioners need to engage with other people, as there is not much in life one can achieve on their own, even in the legal profession. Judge Sutherland told the candidate legal practitioners that they need to develop themselves in a relationship with magistrates and judges. He said magistrates and judges are consumers of a legal practitioner's services and the customer is always right, he added that if legal practitioners understand what the customer needs, they can adapt themselves to be more effective."

- **Kgomotso Ramotsho, "Candidate legal practitioners get advice from High Court judges", *De Rebus* 8 May 2020 (Available at http://www.derebus.org.za/candidate-legal-practitioners-get-advice-from-high-court-judges/)**

ADVOCATE ALLYSON CRUTCHFIELD SC

BIOGRAPHICAL DETAILS

Date of birth: 27 August 1965

Bachelor of Arts, University of the Witwatersrand (1986)

Bachelor of Laws, University of the Witwatersrand (1998)

Higher Diploma in Taxation, University of Johannesburg (1996)

LLM, University of the Witwatersrand (2006 – 2007) [coursework credits obtained; thesis outstanding)

Advanced Programme in Insolvency Litigation and Administration Practice, University of Pretoria (2014)

LLM, Tax law, University of the Witwatersrand (2016 - 2017) [course work credits obtained; thesis outstanding]

Postgraduate courses in Cyberlaw and Competition Law, University of the Witwatersrand (2018)

Postgraduate Attendance courses in Pension Law I and II- University of the Witwatersrand 2019

CAREER PATH

Acting Judge, Gauteng High Court, Johannesburg Local Division (January – February, August – September 2016; March, June, December 2017; March, April – May 2018; January – February, July – August 2019; March, April, June, November - December 2020)

Advocate (December 1989 - to date)

Member, Johannesburg Society of Advocates (December 1989 -to date)

Senior counsel (2018 -)

SELECTED JUDGMENTS

COMMERCIAL LAW

ANABELLA RESOURCES CC V GENERIC INSURANCE COMPANY LTD (A5025/2019) [2020] ZAGPJHC 163 (2 July 2020)

Case heard 1 June 2020, Judgment delivered 2 July 2020.

At issue in this case was the definition of an indemnifiable event as provided for in an insurance policy. The appellant dealt in gold, cash and diamonds, which were stored in a safe on the business premise. To open the safe, the appellant's Financial Manager would give instructions to the manager, including through text messages. The Financial Manager was kidnapped by armed robbers, and at gunpoint, forced to give authorization through WhatsApp to instruct the Manager to give the money to armed robbers in the parking lot. The manager was unsuspecting and did as was instructed and only later, after the Financial Manager had been released, did it become apparent that the money had been taken unlawfully. [Paragraph 7]

The court *a quo* held that the definition of the theft and hijacking in terms of the contract required that violence be directed towards an employee in "actual control" of the seized property. [Paragraph 18]. The court held that the violence or threats of violence had to be perpetrated at the premises where the property was removed. [Paragraph 20] As the violence was directed to the Financial Manager, remotely, the court held that the acts did not constitute armed robbery.

Crutchfield AJ (Lamont and Maier-Frawley JJ concurring) overturned the Court *a quo,* and held that the common law definition of robbery was not place specific. As the contract did not define "armed robbery", Crutchfield AJ used the common law to define armed robbery, and held that the violence and threats thereof did not have to be perpetrated at the premises from which the property was removed. [Paragraphs 24-27]

> "The force applied to the victim need not be applied in the same place as the place where the taking of property occurs. What is required is only the link between the application of the force and the taking to be established. The property taken during a robbery need not be uplifted from the person of the victim of the violence, or, even in the presence of the victim" [Paragraph 27]

Crutchfield AJ held that events constituted armed robbery, theft and hijacking. Crutchfield AJ thus found the defendant liable to indemnify the plaintiff, [Paragraph 30] and held that it was the obligation of the insurer to give certainty to the risks it wishes to exclude from the cover, and in the case of

uncertainty, the provisions would be interpreted in accordance with the *contra proferentum* rule. [Paragraph 52]

A commentary has criticized the court's reliance on the *contra proferentum* rule. The author argued that the court did not specify which words were ambiguous, as it had been argued in the trial court that the wording of the contract was clear and unambiguous. The author argued that the rule "*should not be relied on to create ambiguity where there is none."* [Donald Dinnie **"**Insurance policy interpretation contra proferentum – armed robbery, theft and hijacking" 5 October 2020, available at

https://www.financialinstitutionslegalsnapshot.com/2020/10/insurance-policy-interpretation-contra-proferentum-armed-robbery-theft-and-hijacking/]

LOGICHEM CONTROL (PTY) LTD V REINACH VAN NIEUWENHUIZEN, UNREPORTED JUDGMENT,CASE NO. A5006/18, GAUTENG LOCAL DIVISION, JOHANNESBURG

Case heard 28 January 2019; Judgement delivered 7 May 2019.

The appeal arose from an application for summary judgment. The Court *a quo* granted summary judgment and refused leave to appeal which was subsequently granted by the Supreme Court of Appeal. [Paragraph 1] The respondent had sought summary judgment for 5% of the issued shares in the defendant. The claim arose from an employment contract between the respondent and the appellant which provided, *inter alia*, that the plaintiff would receive 5% of the issued shares in the defendant after 36 months of service. [Paragraph 7] In order to resist the summary judgment, the appellant needed to raise a bona fide defence that was good in law. [Paragraph 15]

Crutchfield AJ (Adams J and Mdalana AJ concurring) applied provisions of the Companies Act of 2008, and the rules of interpretation of contracts, and found that all the defences raised by the appellant failed. A defence of non-joinder of other shareholders was rejected on the basis that the Companies Act provided for the Board to effectively increase the shareholding and that such issue to the plaintiff would not affect the other shareholders.[Paragraphs 30-35] The appellant further argued that their intention was to issue the 5% shareholding to employees who continued in their employment. [Paragraph 39] Crutchfield AJ held that this intention was not supported by the wording of the contract:

> "The plain meaning of the words of the contract is unequivocal and unambiguous. The language of the contract considered in the light of the ordinary rules of grammar and syntax

> does not support the intention or the evidence thereof, contended for by the defendant." [Paragraph 43]

The appeal was dismissed with costs.

ADMINISTRATIVE JUSTICE

TIAAN LOMBARD V THE BODY CORPORATE OF KITTY HWAK & OTHERS, UNREPORTED JUDGMENT, CASE NO. 69194/2016, GAUTENG LOCAL DIVISION, JOHANNESBURG

Case heard 20 April 2018; Judgment delivered 17 June 2018.

This was a review application in terms of the common law. The applicant, a member of the first respondent, a Body Corporate of the Sectional Title Scheme know as Kitty Hawk, sought to review and set aside decisions made by the first respondent and the other respondents. The decisions included the decision of the trustees not to take disciplinary actions against one of its employees on an alleged assault, decision to unlawfully pursue Kitty Hawk Development Programme, and a decision to levy an additional amount on the sale of electricity. [Paragraph 1]

Crutchfield AJ held that the alleged decisions were not factually established, as there was no evidence to support them and the evidence relied on by the applicant was in a number of cases, unreliable. For example, the applicant relied on unsigned minutes which were unreliable in various aspects. [Paragraph 22] Furthermore, the applicant did not clearly articulate the grounds on which]

The application was dismissed, and the applicant ordered to pay the costs of the first, third and fourth respondents on the scale as between attorney and client. Crutchfield AJ found the application to be ill founded and prejudicial to the respondents, who had not been given sufficient time to defend themselves on some of the grounds.

> " It was wholly unreasonable for the applicant to issue the application in respect of the fourth respondent without allowing the fourth respondent a reasonable period of time to deal with the first respondent. In the circumstances …. the fourth respondent should never have been put to the inconvenience and cost of opposing this application." [Paragraphs 69-70]
>
> "I agree with the first respondent that it was obliged to oppose the application in the interest of the first respondent and that there was no reason why the members of the first respondent

should have to contribute towards the costs incurred in opposing this application." [Paragraph 95]

MR DARIO DOSIO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 24 January 1966

BA, University of Witwatersrand (1988)

LLB, University of Witwatersrand (1993)

Higher Diploma in Taxation Law, University of Witwatersrand (1994)

CAREER PATH

Acting Judge, Gauteng High Court (April, May – June 2013; May – June 2014; April – July 2015; April – June, June – July, August – September 2016; April – June, July 2017; January – April, July 2018; April – June 2019; April – June 2020)

Acting Judge, Labour Court (pro bono) (2012)

Regional Magistrate

Johannesburg Magistrates' Court (2012 – to date)

Soweto Magistrates' Court (2000 – 2012)

Acting regional magistrate (1998 – 2000)

District magistrate (1996 – 1998)

Admitted as an attorney (1996)

Regional public prosecutor and control public prosecutor, Benoni Magistrates' Court (1994 – 1996)

Admitted as state advocate (1994)

Public Prosecutor (1991 – 1994)

JOASA

National President (2008 – 2010)

National chairperson, security committee (2007 -)

Chairperson, Gauteng (2007 – 2008)

National Treasurer (2005 – 2008)

Member (1996 -)

Member, ARMSA (2000 – 2008)

Member, Commonwealth Magistrates and Judges Association (2000 – 2008)

Member, International Association of Judges (2010 -)

Member, South Africa Chapter, International Association of Women Judges (2015 -)

SELECTED JUDGEMENTS

PRIVATE LAW

BALVEST CC T/A FOURWAYS GARDEN SHOPPING CENTRE V RAINBOW PEPPER TRADING 76 (PTY) LTD AND OTHERS (30502/2017) [2019] ZAGPJHC 327 (2 SEPTEMBER 2019)

Case heard 29 May 2019, 2 September 2019.

This was an application to have an acknowledgement of debt agreement made an order of court. Applicant was the owner of a shopping centre, and the second respondent leased two stores in the centre. The acknowledgement of debt was entered into between the applicant and the second respondent, represented by the third respondent, and related to unpaid rental. [Paragraphs 5 – 12]. Respondents' case was that the applicant had advised them of plans to provide security of tenure for the tenants of the shopping centre by purchasing the portion of land, which fell over the parking bays of the centre, from the local council. Respondents alleged that they had been assured that a ten year lease had been obtained to safeguard security of tenure over the car park, and that the third respondent had been induced to sign the acknowledgement of debt on the strength of these assurances. [Paragraph 13]. Respondents argued that despite the assurances, they subsequently became aware that the council was planning to widen a road to the extent that it would cut through the parking spaces. The third respondent argued that, had he been aware of this, he would not have signed the acknowledgement of debt or related documents. [Paragraphs 15 – 16].

Dosio AJ held that the initial lease agreement, signed by the third respondent, attached plans showing a setback for future widening of the road. [Paragraphs 34 -35]. There was also correspondence which meant that the third respondent must have been aware of the situation:

> "The number of parking bays had not changed since the Spar lease agreement was signed in 2009. These parking issues were realised as far back as 2012. The acknowledgement of debt was signed on the 15th of March 2016 which was four years after the issue of the parking bays came to the knowledge of the respondents. I fail to see, how this can now constitute a misrepresentation in 2016. The respondents cannot say they have been induced into concluding an acknowledgment of debt agreement when they were fully aware of the state of the property when they leased the Spar and Tops premises. Accordingly a reliance on a purported misrepresentation cannot be of assistance to the respondents many years later." [Paragraph 38].

Dosio AJ found that the respondents entered into the lease agreements with full knowledge of the number of parking bays. [Paragraph 41]. Dosio AJ found that there was nothing on the papers to suggest that the applicant intended to mislead or defraud the respondents. Dosio AJ found that there were no grounds to suggest that the acknowledgment of debt was void. [Paragraph 49]. The acknowledgement of debt was thus made an order of court.

ADMINISTRATIVE JUSTICE

DDP VALUERS (PTY) V MAKHADO MUNICIPALITY AND OTHERS (0924/2014) [2014] ZAGPPHC 538 (25 JULY 2014)

This case involved an application for the decision of the first respondent to award a tender to Siyabuselela Trading, the second respondent, to be reviewed and set aside. The grounds for review were first, the respondent took irrelevant considerations into account and failed to consider relevant considerations [paragraphs 24-32]; Second, that the tender was obtained fraudulently in that the signature on the municipal valuer affidavit was found to be fraudulent [paragraphs 33-34]; Third, that the tender was granted contrary to the recommendations of the bid evaluation committee ad party to whom it was granted had nominated a person who did not have the requisite experience as a municipal valuer [paragraphs 35-37]; Finally, that the applicant (an unsuccessful tender) was not given reasons by the first respondent for its decision [paragraphs 38-42].

After a consideration of the relevant case law and legislation, the decision was declared unlawful and unfair and set aside on the second, third and final grounds set out above. These, Dosio AJ found, rendered the tender process unfair and the decision unlawful.

"These irregularities have stripped the tender process of an essential element of fairness, namely, the equal evaluation of tenders. … These are consequential flaws. This is not an acceptable tender as defined in the Procurement Act. … In the presence of irregularities the inescapable conclusion must be that either the First Respondent failed to consider material information, because it was not all before it, or if in the unlikely event that it was before it, that it wrongly disregarded it." [{Paragraphs 73 – 75].

However, Dosio AJ declined to substitute a new decision on the basis that the respondent's conduct was not biased to such a degree that it would be unfair to require the applicant to the decision-making process. Dosio AJ elected instead to direct the matter back to the first respondent to for reconsideration.

"Had the First Respondent continued to show lack of insight into its conduct, then it would be clear that referring this matter back to the First respondent would be fruitless. However, that is not the case. The settlement agreement indicates to this court that the First Respondent has understood that it did not act in an appropriate manner. … Accordingly, this court cannot come to the conclusion that the First Respondent has exhibited bias to such a degree that it would be unfair to require the Applicant to submit to the same jurisdiction." [Paragraphs 85 – 86].

CRIMINAL JUSTICE

S V SEROBA 2015 (2) SACR 429 (GP)

The accused in this case was charged with two counts of murder in respect of killing his wife and, later that day, his sister-in-law. The accused pled not guilty, raising the defence of non-pathological incapacity. He argued that at the time of the murders he suffered a mental defect that made him unable to appreciate the wrongfulness of his actions and acting accordingly.

After analysing the evidence, and the various legal principles applicable to pathological incapacity and criminal responsibility, Dosio AJ held that the guilt of the accused had been proved beyond reasonable doubt. [Paragaph 101]. After considering the facts and the respective evidence of the psychiatrists, Dosio AJ concluded that the accused, being still able to exercise self-control, had acted willfully and

with the intention (*dolus directus*) to shoot his wife and sister-in-law. Dosio AJ held further that, even if it was wrong to find that the accused was not suffering from a delusional disorder, there was still the further test for insanity, which required asking whether the mental illness had the effect of impairing the accused's capacity for insight into the wrongfulness of his act, or the capacity to control his actions. Dosio AJ found that the accused's "capacity for insight into the wrongfulness of his act or the capacity to control his actions in accordance with this insight was not impaired. He did have insight and self-control." [Paragraph 93]

Dosio AJ thus concluded that "The evidence does not show that he lacked criminal responsibility, or that he was incapable of appreciating the wrongfulness of his acts, or that he was unable to act in accordance with an appreciation of the wrongfulness of his acts." [Paragraph 104].

The accused was convicted on two counts of murder.

SKHOSANA V S 2016 (2) SACR 456 (GJ)

Case heard 7 June 2016, Judgment delivered 7 June 2016

The appellant appealed against conviction for housebreaking with the intent to steal and theft. He argued that his rights had not been explained to him in terms of section 35 of the Constitution before a security officer took a photograph of him on his cellphone upon his arrest. He argued that the evidence was inadmissible and thus the court a quo erred in convicting him.

In assessing whether the photograph was admissible, Dosio AJ (Weiner J concurring) considered whether (1) the image had any bearing on the issue before the court; (2) whether it was a true image; (3) whether it had been edited (4) that it should be presented to the court to be viewed; and (5) that the device on which it was captured was reliable. [Paragraph 12] Dosio AJ held that all of these factors were present, and thus the court a quo was correct to admit the photograph as evidence. Section 37(1)(d) of the Criminal Procedure Act allows for a police officer to take a photograph of an arrested person. Although the photograph was taken by a security officer, and not a police officer, it had probative value in that it helped the state witnesses in the explanation of their testimony and substantiated their testimony. Furthermore, the admissibility of the photograph was not disputed in the court a quo. [Paragraph 30].

Dosio AJ held further that the magistrate had not committed an irregularity in questioning the appellant's co-accused although Dosio AJ saw sit to issue a "salutary warning that presiding officers should always exercise the utmost patience and respect when questioning any witness or accused in a trial. Words or phrases which are used with the intention of rudeness or disrespect could in certain instances amount to an irregularity, thereby vitiating the proceedings." [Paragraph 26].

The appeal was dismissed.

S V MOGARAMEDI 2015 (1) SACR 427 (GP)

Judgment delivered 15 August 2014

This was an appeal to a full bench against a sentencing decision in which the court *a quo* had found the accused guilty of murder and sentenced him to life imprisonment. The appellant, who had been practicing as a sangoma for ten years prior to the case, had killed his sister and removed her genital organs as part of his final initiation. [Paragraph 4]. The appellant had pleaded guilty. The appellant

argued that compelling and substantial circumstances existed to justify a lesser sentence than the prescribed minimum sentence of life imprisonment. These circumstances were (1) his age and the fact that he was a first time offender; (2) the killing was motivated by a deep rooted religious belief and was a necessary part of his initiation to become a sangoma and (3) that he has suffered emotional hardship after committing the offence. He therefore argued that a life-sentence should not have been imposed.

Dosio AJ (Kollapen J and Thobane AJ concurring) engaged in the balancing of two rights in the Bill of Rights namely the right to life (section 11) and the right to cultural and religious practices (section 31) [paragraphs 16 - 19]. Dosio AJ held that:

"The appellant's religious beliefs and convictions cannot supersede the deceased's right to life. Although everyone has a right to practise their belief, as soon as this belief leads to an action which falls within the bounds of illegality, for instance, a murder to obtain body parts, then in terms of s 31(2) of the Bill of Rights it can no longer be condoned or protected merely because it is based on a religious or cultural belief. Cultural and religious beliefs must respect life and must be practised in line with the Bill of Rights." [Paragraph 24].

Regarding sentence, Dosio AJ held that the case was one of "exceptional seriousness", and that the circumstances, "cumulatively regarded" showed that a sentence of life imprisonment was just. The appeal was dismissed.

SELECTED ARTICLES

"CONSTRUCTING HOPE: A MULTI-AGENCY PROGRAMME MODEL FOR YOUNG SEX OFFENDERS LIVING WITH HIV/AIDS IN SOUTH AFRICA" SEXUAL OFFENDER TREATMENT, VOLUME 2 (2007), ISSUE 2. [CO-AUTHORED WITH DOUGLAS P. BOER]

This article considers the implications of the prevalence of HIV/AIDS among young sex offenders in South Africa and argues that this issue "both complicates and underlines the importance of delivering effective multi-agency sex offender programmes to these individuals." The article emphasises the importance of reducing reoffending rates as a way of limiting the spread of HIV to new victims. The article proposes "an integrative programme that incorporates proven models of sex offender treatment in combination with medical, educational and family support systems to facilitate community reintegration of young sex offenders living with HIV/AIDS."

The article reviews various multi-agency programmes [pages 2 – 3], and identifies common features among them [Page 3]. The proposed programme would focus on HIV/AIDS illness management and HIV/AIDS infection reduction, "which coincides with offence prevention." [Page 4].

- **Article available at https://researchcommons.waikato.ac.nz/bitstream/handle/10289/6304/Constructing%20Hope.pdf?sequence=1&isAllowed=y**

MEDIA AND OTHER COVERAGE

Comments reported at Helen Suzman foundation symposium "Delivering Justice: the judiciary and the Criminal Justice System", 28 October 2010 (https://admin.hsf.org.za/publications/justice-symposium-series/Justice%20Symposium2%20web.pdf)

"[Regarding sentencing] I think it is high time that government should look at forensic psychiatrists and involve them more in the system. Having sat in the regional court for more than 10 years; I think it is very important to understand what actually causes these criminals to act. It is quite correct … that it is not poverty that triggers these criminals to act. There are many factors and I think government should invest in looking at what these factors are, looking at the triggers. If we can actually assess what these triggers are, I think we can help enable our society to keep a good lookout for potential criminals and also to assist those that are on the wrong path to look at the various deterrents. …

Judges should have the knowledge of both civil and criminal matters. We have a great base of potential regional magistrates who have a good knowledge of criminal matters and we should actually invest in those magistrates. …" [Page 25].

ADVOCATE NIEL DE VILLIERS SC

BIOGRAPHICAL INFORMATION

Date of birth: 14 July 1961

BComm, University of Stellenbosch (1982 – 1984)

LLB, University of Stellenbosch (1985 – 1986)

Advanced Aspirant Judges Course, South African Judicial Education Institute (2020)

CAREER PATH

Acting Judge, North Gauteng High Court, Pretoria and South Gauteng High Court, Johannesburg,

(2016 – 2020)

Advocate (1994 – to date)

Appointed as senior counsel (2018)

Attorney, Tonkin, Clacey Anderson & Moore (1992 – 1994)

Attorney, Livesey De Villers (1991 – 1992)

Attorney, EFK Tucker Inc (1989 – 1991)

Candidate Attorney, EFK Tucker Inc (1987 – 1989)

Administrative Assistant, Department of Justice (1979 – 1986)

Ad hoc Acting Prosecutor (1984 – 1986)

Member, Legal Practice Council (2020 –)

Member, Johannesburg Society of Advocates (1994 – 2020)

Member, Bar Council (2007 – 2008, 2008 – 2009, 2009 – 2010, 2015/2016)

Management structures, Group 444 and Island Group of Advocates.

Member, The Law Society of (then known as) Transvaal (1989 – 1993)

Leader deacon of student congregation, Dutch Reformed Church (1982 – 1986)

SELECTED JUDGMENTS

PRIVATE LAW

MUHANELWA V GCINGCA, UNREPORTED JUDGMENT, CASE NO. 4713/2017, GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

Case heard 20 February 2018, Judgment delivered 27 February 2018

This was an application for leave to appeal. The applicant, a property owner, hired the respondent, a builder, to complete building work. [Paragraph1]. The applicant then vacated the property, and the builder took control and occupied the property. The owner then wrongfully deprived the builder of control and occupation of the home, which led the builder to successfully apply to the court *a quo* for a *mandament van spolie* for control and occupation of the home to return to the builder [Paragraph 2].

The applicant sought to appeal the judgment on three grounds that were not initially pleaded [Paragraph 5]. In deciding whether to address the new grounds raised in the appeal process, De Villers AJ held that:

> "I am mindful that the test of appeal should not be applied so strictly that the important and necessary procedural safeguard against judicial error is not rendered nugatory." [Paragraph 15]

In its first ground of appeal, the applicant claimed that De Villiers AJ had erred in granting relief to the respondent under the *mandament van spolie* as opposed to granting the applicant relief under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act ("PIE Act") [Paragraphs 5, 17, 18, 25]. However, De Villiers AJ held that the PIE Act was designed to protect unlawful occupiers from unlawful eviction. The owner could not claim relief under the PIE Act as he was not an unlawful occupant of the property in terms of the Act [Paragraph 19]. De Villiers AJ held further that the *mandament van spolie* was not a permanent dispossession of property, but rather an opportunity for one to retain occupation of property until the correct legal ownership can be established [Paragraph 31]. Furthermore, the owner was not occupying his home at the time that the application was made, thus the PIE Act could not apply to him [Paragraphs 25 - 26].

In its second ground of appeal, the applicant claimed that the respondent sought relief beyond mere spoliatory relief, which "in effect forced an investigation of the issues relevant to the further relief claimed" and "based on the answers given to that claim, [De Villiers AJ] should have refused to restore the *status quo ante*." [Paragraph 36] De Villiers AJ held that the builder's additional prayers dealt with the urgency and costs in terms of the spoliatory relief sought, but that these prayers did not expand the application beyond the spoliatory relief [Paragraphs 42 – 43].

The third ground of appeal was that the respondent was no longer entitled to the remedy, which was a "speedy remedy" as the applicant had successfully insisted that the matter been struck off the urgent roll. [Paragraph 45]. De Villiers AJ found that the respondent should not be penalized for the delay in hearing the matter as that issue pertained to the capacity of the courts, and that he had been correct in making a finding on the facts of the case in the prior judgment [Paragraphs 47 - 49]. De Villiers AJ held further that his findings in the *court a quo* were of practical value [Paragraph 49].

De Villiers AJ concluded that the application for leave to appeal the judgment must fail on all three grounds as the owner had not show that the appeal would have a reasonable prospect of success or that a compelling reason existed for the appeal to be heard [Paragraphs 12, 50].

An appeal to the Constitutional Court was dismissed in ***Muhanelwa v Gcingca [2019] ZACC 21***. The Constitutional Court agreed with the finding that the PIE Act did not apply to the owner as unlawful occupier [Paragraph 5]. The Constitutional Court dismissed the appeal on jurisdictional grounds, as a constitutional issue did not exist to be decided by the court, nor was it in the interests of justice to grant leave to appeal. [Paragraphs 5 – 6].

COMMERCIAL LAW

TEQUILA CUERVO SA DE CV V FABRICATION AND LIGHT ENGINEERING CC [2017] ZAGPPHC 10

Case heard 22 November 2016, Judgment delivered 20 January 2017

This was a dispute between the applicant and the respondent over the use of the names of their respective alcoholic beverages. The respondent had applied to trademark their wine beverage as 'IL CORVO' and the applicant had an existing trademark for its tequila beverage named 'JOSE CUERVO' or simply 'CUERVO' tequila. [Paragraphs 1 – 4]. The applicant argued that there was "confusing similarity" between the proposed 'IL CORVO' trademark and the JOSE CUERVO' or 'CUERVO' trademarks in terms of sections 10(12), 10(14) and 10(17) of the Trade Marks Act. Thus, the applicant averred that this constituted a trademark infringement on behalf of the respondent [Paragraphs 6 – 7].

Making a value judgment based on the imagery of the trademarks, the differences in the alcoholic beverages and the difference between the pronunciation of the words contained in the marks [Paragraphs 8-9], De Villiers AJ dismissed the appeal on the grounds that the trademarks were sufficiently different and that the two trademarks would not confuse an ordinary consumer [Paragraphs 11 and 14]. De Villiers AJ found that "the contesting marks, in my view, have clear distinctive dominant components. The differences are stark …" [Paragraph 14.1.2]. De Villiers AJ held further that "without confusing similarity, none of the three grounds relied upon by the applicant as the basis for its objection can be sustained" [Paragraph 15]. Thus, no trademark infringement occurred [Paragraph 15].

An appeal was dismissed by a full bench of the High Court (Hughes J, Potterill J and Mpahlele J concurring) in ***Tequila Cuervo SA De CV v Fabrication and Light Engineering CC [2018] ZAGPPHC 72***.

CHRISAL INVESTMENTS (PTY) LTD AND OTHERS V MUNICIPAL EMPLOYEES PENSION FUND AND OTHERS, UNREPORTED JUDGMENT, CASE NO. (2018/14155), GAUTENG HIGH COURT, PRETORIA

Judgment delivered 19 February 2019

In this case, three contracts were signed between the first three applicants and the first respondent for the sale of undivided shares of 55% to the respondents for immovable property [Paragraph 6.1]. The first contract constituted the sale agreement that created a letting enterprise, the second contract constituted a co-ownership agreement of a property, and the third contract constituted a property management contract [Paragraph 7]. The applicant requested for their shares of the property to be

liquidated under the common law remedy of the *actio communi dividundo* and for the proceeds to be divided between the owners [Paragraph 6.5]. The respondents argued that the use of the common law was impermissible in these circumstances as the three alleged elements of the *actio communi dividundo* did not apply [Paragraph 6.6].

The respondents argued that the three grounds for the *actio communi dividundo* to apply were as follows. First, the application must be *bona fide*. [Paragraph 27.1]. Second, the applicants had to show that they had endeavoured to agree to a method of division under the *actio communi dividundo* before approaching the court. [Paragraph 27.2]. Finally, the applicants had to show how accounting would take place for profits enjoyed or expenses incurred in connection with the co-owned property, and a court had to make findings on the adjustment between the parties in the same proceedings where it brings the co-ownership to an end. [Paragraph 27.3]. The respondents argued that the agreement should be terminated in terms of a pre-existing contractual clause which tacitly excluded the *actio communi dividundo* [Paragraphs 45 – 48].

De Villiers AJ found, first, that "a co-owner is not obliged to remain a co-owner against his/her will" and may seek to dissolve the relationship at his/her election. Second, "a co-owner must seek agreement from the other co-owner", but where there is a failure to reach an agreement, the co-owner seeking relief may approach the court for an order of dissolution. Third, De Villiers AJ held that the court had a wide discretion in granting relief under the *actio communi dividundo*, and that an all-inclusive order must be made. Thus, De Villiers AJ had to decide whether a commercial property co-ownership agreement between two parties could be liquidated in favour of the applicant under the *actio communi dividundo*.

De Villiers AJ found that the *actio communi dividundo*, being a common law remedy, formed part of the *naturalia* of the contract [Paragraph 61.4]. Thus, in interpreting the clauses of the co-ownership agreement, De Villiers AJ found that the use of the common law *actio communi dividundo* in terminating the relationship was permissible [Paragraphs 61 and 71 – 73]. De Villiers AJ found in favour of the applicants that the co-ownership agreement should be dissolved [Paragraph 90.1]. De Villiers AJ held:

> "my order sought to give the parties time to come to common sense arrangements, and to interfere as little as possible in their rights as co-owners. My attempts to formulate an order are constrained by the absence of input by the respondents on the terms of an appropriate order. I believe that both camps have as their aim to protect the value of their investment and will act reasonably after the receipt of my order. I endeavoured to provide for input in modifying my order by agreement in a manner that would serve their interests better than what I can." [Paragraph 88].

De Villiers AJ found that the termination of the co-ownership agreement had to be commercially sensible [paragraph 66] and consider the appropriate options of relief in the division of the immovable property. [Paragraph 75]. De Villiers AJ found that the shares should be liquidated on a *pro rata* basis [Paragraph 75.9]. Additionally, De Villiers AJ appointed a liquidator nominated by the applicant to carry out the liquidation of the common property [Paragraph 90.2].

The decision was overturned by the Supreme Court of Appeal in ***Municipal Employees' Pension Fund and Others v Chrisal Investments (Pty) Ltd and Others* (792/19) [2020] ZASCA 116**. Wallis JA (Cachalia and Mbha JJA and Eksteen and Weiner AJJA concurring) found that De Villiers AJ had erred in finding that the *actio communi dividundo* formed part of the *naturalia* of the co-ownership agreement. [Paragraphs 17 – 18]. The SCA found that treating the co-ownership agreement as the only agreement

was incorrect as there was a pre-existing and extrinsic relationship in the sale agreement that created the Letting Enterprise [Paragraphs 50, 55]. This resulted in a bound co-ownership which precluded the use of the *actio communi dividundo* as an applicable remedy to liquidate the shares owned by the parties to the agreement. [Paragraphs 48 – 50, 55].

CIVIL PROCEDURE

BOTES V THE ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO. 0348/2015, GAUTENG HIGH COURT, JOHANNESBURG

Date heard 8 May 2020, Judgment delivered on 24 July 2020, Judgment revised on 14 September 2020

In this case, De Villiers AJ was called upon to decide whether a claim for past medical expenses valued at R420.00, was due to the plaintiff seven years after a road accident occurred in 2013 [Paragraphs 1 – 2]. In 2018, prior to the institution of the claim, the plaintiff had successfully claimed expenses for future loss of income and future medical expenses from the RAF in a settlement agreement. [Paragraph 11]. The only issue that remained was a claim for past medical expenses worth R2 685.79 [Paragraph 13]. In 2020, ambulance costs fell away from the past medical expenses claim, which left the plaintiff with a claim of R420.00 [Paragraph 15]. However, the documentary evidence proving this claim of past medical expenses was found to be inadequate [Paragraphs 18, 20, 20 – 23]. Notwithstanding the inability of the attorneys to prove that the past medical expenses cost R420.00, De Villiers AJ noted that there was an issue not with the claim against the RAF, but the pursuit of litigation and the costs attached thereto.

De Villiers AJ took issue with the fees charged by the attorneys and suggested that the attorneys may have sought litigation to profit from taxable fees [Paragraph 30]. De Villiers AJ found that the fee agreement between the plaintiff's legal representatives and the plaintiff was impermissible on two grounds. First:

> "The recovery of legal costs on taxation is exactly that, the recovery of legal costs. It is an exercise to indemnify the successful party. It is not a shakedown in terms of a court order of the party to pay legal costs. It is then a matter of logic that an attorney cannot be limited to a fee … by The Contingency Fees Act … and still seek to recover thousands of Rands more from the RAF on taxation, as the indemnification of purported fees they are not allowed to charge their client." [Paragraph 36]

Therefore, in terms of the indemnification principle, the costs were impermissible [Paragraphs 43 – 44].

Second, De Villiers AJ found that the contingency fee agreement between the plaintiff and his attorneys exceeded the statutorily accepted amount according to sections 2(1) and (2) of the Contingency Fees Act. [Paragraphs 56 – 57]. Therefore, the agreed upon fee was found to be impermissible.

De Villiers AJ held that the plaintiff should pay the costs of the hearing and ordered the attorneys to show cause as to why they should not be ordered to pay the costs jointly and severally with the plaintiff [Paragraph 59.2 – 59.3]. De Villiers AJ dealt with the attorney's reasons in an Addendum to the judgment. The plaintiff's attorneys averred that they had furnished the RAF with the requisite medical bill; and although this bill was not put before counsel for the RAF to corroborate, De Villiers

AJ accepted the averment for the purposes of the judgment [Paragraph 3.1]. The attorneys submitted further that the matter had been certified as trial ready by a judge, who had no qualms with the amount, as the RAF failed to instruct its attorneys regarding the claim for R420.00 [Paragraph 3.2]. The attorneys further averred that the plaintiff had written to the RAF to settle the matter against the payment of the R420.00 medical expenses including High Court costs [Paragraph 3.3]. The plaintiff attempted to postpone the matter when it was before De Villiers AJ, but the request was declined [Paragraph 3.3]. De Villiers AJ accepted these averments, but held that these reasons did not materially impact the findings that the plaintiff only furnished sufficient proof of his medical expenses at the last minute [Paragraph 4]. De Villiers AJ found that the attorneys had erred in litigating for a miniscule amount and ordered the attorneys to pay the costs of the litigation [Paragraph 60].

> "Having considered the matter again … I cannot in this matter order the plaintiff to bear the costs of the matter… I repeat, I fully accept that the attorneys did not act dishonestly. Still the facts are so stark that the attorneys must bear the costs. It is an order that I do not make lightly, legal practice is hard enough as it is, without such orders added thereto." [Paragraph 9 of Addendum to the judgment].

CRIMINAL JUSTICE

SIBANDA V THE STATE, UNREPORTED JUDGMENT, CASE NO. A114/2019, GAUTENG HIGH COURT, JOHANNESBURG

Case heard 8 June 2020, Judgment delivered 22 June 2020

On the 29th of June 2017, the appellant was convicted on two charges of rape and one kidnapping charge by the Johannesburg Regional Court [Paragraph 1]. The appellant challenged his conviction on the two charges of rape and the one charge of kidnapping [Paragraphs 1 and 12]. The *court a quo* had been dissatisfied with the appellant's heads of argument and requested the appellant to furnish supplementary heads of argument [Paragraph 13]. De Villiers AJ remarked that:

> "ordinarily, one would look at the appellant's heads of argument to determine the issues on appeal. In this case, one could not do so. Apart from quotations of cases, and innocuous references to a very brief chronology of the trial, the *court a quo* was asked to overturn a conviction on these terse submissions" [Paragraph 12].

Thereafter, the appellant furnished the *court a quo* with the requested supplementary heads of argument denying that there was clinical evidence to support part of the complainant's case [Paragraph 14]. The appellant alleged further that the complainant did not attempt to escape or inform anyone of the rape [Paragraph 14]. De Villiers AJ (Mdalana-Mayisela J concurring) held that:

> "the complainant is not on trial for how quickly she reacted in reporting the crimes to others and the police. Her ordeal must have been emotionally painful and frightening. Her conduct is consistent with what one would encounter when a frightened, raped woman, vulnerable to exploitation would have reacted" [Paragraph 15.3]

De Villiers AJ, in accounting for the fear of the complainant and her proximity to the appellant's home, held that it was reasonable for the complainant to hesitate in seeking help and effectively leaving the appellant [Paragraphs 15.2 - 15.3]. De Villiers AJ accepted the complainant's version of events and found them to be reasonably possibly true by taking into account the medical evidence as well as the

socio-economic standing of the complainant [Paragraphs 15 and 18]. Finding that there were no inherent improbabilities or reasons to disbelieve the complainant, De Villiers AJ found that the state's evidence was so convincing as to exclude the reasonable possibility of the appellant's innocence. [Paragraphs 18 - 19]. The appeal was thus dismissed.

JUDGE NELISA MALI

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 11 February 1969.

Diploma Iuris, Walter Sisulu University (19889)

B. Iuris, Walter Sisulu University (1992)

LLB, Walter Sisulu University (1994)

LLM, University of Cape Town (1996)

CAREER PATH

Judge

Acting Deputy Judge President, Mpumalanga High Court (August – September 2019)

Mpumalanga High Court (2019 – to date)

Gauteng High Court (2016 – 2019)

Director, Nelisa Mali Attorneys (2008 – 2015)

Lecturer, UNISA (2008 – 2009)

Director, Rooth & Wessels Attorneys (2007 – 2008)

Director, Langa Attorneys (2007)

Founder and Director, Mali Attorneys (2007)

South African Revenue Services (1999 – 2006)

Regional Manager, Gauteng North, Special Investigations Unit (2001 – 2003)

Assistant Branch Manager, Special Investigations Unit (2001)

Junior tax consultant, Deloittes (1999)

Part-time lecturer, Eastern Cape Technikon (1997 – 1998)

Candidate Attorney, Blakeway and Leppan Incorporated (1996 – 1999)

Part-time lecturer, University of Transkei (1996 – 1998)

Public Prosecutor, Department of Justice (1988 – 1995)

Member, International Association of Women Judges (2016 – to date)

South African Women Lawyers' Association

Secretary, Eastern Cape (2011 – 2013)

Member (2006 – 2015)

Law Society of the Northern Provinces

Councillor (2014 – 2015)

Member (2006 – 2015)

Member, Black Lawyers' Association (1993 – 20154)

Member, Global Care Ministries (2012 – 2015)

SELECTED JUDGMENTS

PRIVATE LAW

AUGUSTINE AND OTHERS V MINISTER OF POLICE (19296/10) [2014] ZAGPPHC 969 (8 DECEMBER 2014)

Case heard 29 August 2014, Judgment delivered 8 December 2014

Plaintiffs sought damages arising from unlawful entry, search, humiliation, intimidation and assault by the members of the South Africa Police Service (SAPS). Medical evidence suggested that the plaintiffs were suffering from post traumatic stress. [Paragraph 12]. The defendant's case was based on the contention that the plaintiffs' house had been pointed out as the house of a suspect in several robberies [Paragraph 17].

Mali AJ held:

> "The defendant's case turns on the alleged consent by the first plaintiff. However it is this jurisdictional fact that the plaintiff has placed under attack. Having considered all the factors and balancing the defendant's evidence against that of the plaintiffs, on a preponderance of probabilities, the plaintiffs version is accepted as reasonably true. In a nutshell, it is found that the policemen did not have permission to search the premises of the plaintiffs." [Paragraph 22]

Mali AJ found that the facts and background to the psychological *sequelae* suffered by the plaintiffs differed significantly from comparable cases. Mali AJ held further that:

> "I am satisfied … that the plaintiffs had suffered psychological *sequelae.* This was a direct consequence of the actions of the members of SAPS as indicated above. However …. [w]hen regard is had to all the circumstances of the case, the amount of R25 000.00 appears to me to be a sufficient amount for damages suffered by the plaintiffs. It is my considered view that the matter should have been brought to the Magistrate's Court." [Paragraphs 28 – 29]

Defendant was ordered to pay the first plaintiff R25 000.00 in general damages and R6 800.00 in past medical expenses; to pay the second, third and fourth plaintiffs R25 000.00 in general damages; and to pay the plaintiff's costs at the Magistrate's Court scale.

COMMERCIAL LAW

XYZ (PTY) LTD V COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE (14189) [2018] ZATC 11 (20 DECEMBER 2018)

Case heard 8 – 12 October 2018, Judgment delivered 20 December 2018.

At issue in this case was whether the receipt of R125 million by the appellant in respect of a lease premium was of a revenue nature (in which case it would be taxable) or of a capital nature (in which case there would be no tax liability). The question turned on whether the appellant had earned the lease premium as a result of the lease agreement. [Paragraph 1]

Mali J found that the starting point of the enquiry was "the intention of formation of the taxpayer." The appellant had been formed to attract investment by utilising the land through rentals. The appellant was never mandated o sell assets. [Paragraph 42]. Mali J held further that:

> "If it is accepted that all the members of the appellant used the term lease agreement loosely, as per D's testimony, it is however baffling that an experienced commercial lawyer … and … Attorneys

> did not see anything wrong in drafting contracts in that fashion. This makes it clear that all other role players knew that they were really dealing with a rental and not the sale of any asset. I am inclined to believe that, this is the reason Mr I or attorney/s involved … were not called to give evidence. It looks like the witnesses are carefully hand-picked. The other parties except for D knew precisely they were dealing with a pure lease agreement and not a sale of asset." [Paragraph 49].

Mali J found that the intention of the appellant had always to enter into a rental agreement, "fully knowing that the receipt flowing therefrom is of a revenue nature." The appellant had "worked around the clock" on the lease agreement, "and in the process crossed the line in an attempt to attain an undue tax benefit." [Paragraph 53].

Mali J found that the reduced understatement penalty of 10% was reasonable, and that the appellant was liable for interest. [Paragraphs 56 - 57] The appeal was dismissed.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

ASSOCIATION OF TEST PUBLISHERS OF SOUTH AFRICA V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (89564/14) [2017] ZAGPPHC 144; [2017] 8 BLLR 850 (GP); (2017) 38 ILJ 2253 (GP) (3 MAY 2017)

Case heard 29 – 30 November 2016, Judgment delivered 11 May 2017.

This was an application to declare null and void a Proclamation bringing the Employment Equity Amendment Act into effect. The amended Act introduced an additional requirement for psychological testing an similar assessments, namely that they had to be certified by the Health Professions Council or an equivalent body. Applicant, a voluntary association representing the providers of tests and assessment tools and services, argued that the decision to put the Amendment Act into operation was irrational and failed the constitutional requirement of legality as there was no framework in place regulating the certification of psychological testing and similar assessments. [Paragraphs 1 – 7, 16]

Mali J emphasised that the exercise of all public power was required to be consistent with the Constitution. [Paragraph 9]. Mali J found that a policy referred to by the respondents related to classification for the purpose of evaluation of psychological testing, not for certification. Mali J found that there was "no classification leading to certification of psychological testing." [Paragraph 28]. Mali J held that:

> "The word used in the EE Amendment Act is clearly *"certify".* It is apparent from the dictionary meaning as indicated above that it does not mean the same thing as *"classify".* Furthermore reading the EE Amendment Act as a whole and the circumstances attendant upon its coming into existence, the apparent purpose to which the provision appears; in the present case even if more than one meaning was possible the legislature could not have intended to use the words classify and certify interchangeable. ..." [Paragraph 34].

Mali J concluded that the decision by the President was irrational and invalid, and set aside the Proclamation. [Paragraphs 37 – 38].

CIVIL PROCEDURE

PANAGIOTOPOULOS V LIBERTY GROUP LTD (3955/2011) [2014] ZAGPPHC 229 (25 APRIL 2014)

Case heard 10 February 2014, Judgment delivered 25 April 2014

This was an application to compel the respondent to provide further and better particulars. In the main action, the respondent (plaintiff) sought the repayment of commissions paid in terms of subsequently non-existent contracts. During the hearing, it emerged that the particulars required by the applicant could be found in a 673-page summary of transactions and policy detail document. Respondent therefore argued that respondent was in possession of the information sought. [Paragraphs 8 – 10]. Applicant argued that he was contractually bound to delete all information relating to the respondent's business on termination of the contract, and that the respondent's particulars were not informative enough. [Paragraphs 11 – 12].

Mali AJ considered an argument by the respondent did not need to obtain further and better particulars of the formulation of the claims, as the information required was "for evidentiary purposes", and dismissed the argument as "reckless." [Paragraph 20] Mali AJ described the voluminous nature of the documentation and the challenges of analysing it, [paragraphs 21 – 22] and held:

> "I find the respondent's argument wanting and not assisting the defendant at all. The voluminous element of the documents utilised to unravel the details could not assist the court in determining the ease with which the applicant is expected to grasp and/or obtain better understanding of the particulars. … " [Paragraph 27]
>
> "… [T]he response to the particulars provided to the applicant is not straight forward. The applicant is still required to look at the minus signs and reconcile the details, an exercise which the respondent seems to be well conversant with. This court anticipates a surprise during the trial which might prejudice the applicant." [Paragraph 32]

Mali AJ found that that the respondent was opportunistically abusing the applicant's expertise and emphasised that the applicant was "not before this court as an insurance expert but as a litigant." [Paragraph 41]. Respondent was ordered to furnish further and better particulars.

CRIMINAL JUSTICE

MOLEFI V S (A887/2014) [2015] ZAGPPHC 484 (4 JUNE 2015)

Case heard 2 June 2015, Judgment delivered 4 June 2015

This was an automatic appeal against conviction and sentence, the accused having been convicted of rape and sentenced to life imprisonment in the regional court.

Mali AJ (Molefe J concurring) held that the court *a quo*, in evaluating the evidence, had taken into consideration "that the complainant is a single witness and was very young at the time of the incident and confirmed that her evidence had to be looked at with caution."

> "The complainant young as she was made it clear that she harboured a desire to tell someone about the rape and when the opportunity presented itself she did not hesitate to report to her aunt. The complainant further testified in a satisfactory manner, she gave a clear account of what happened to her without any contradictions." [Paragraphs 12 – 13].

Mali AJ found that the appellant's version amounted to a bare denial, and that whilst there was no onus on him to prove his innocence, it was not so that there mere denial of the allegations meant that the incidents of rape could not have happened. Mali AJ held that the reasoning and conclusion of the court *a quo* could not be faulted. The cumulative effect of the evidence pointed "relentlessly to the appellant as the person who raped the complainant." The appeal against conviction was dismissed. [Paragraphs 15 – 16].

Regarding sentence, Mali AJ rejected a submission that the court *a quo* had not taken the appellant's personal circumstances into consideration, and found that the appellant was not remorseful;, and was a repeat offender. Mali AJ held that "in the normal circumstances the appellant is expected to also defend the complainant as he would have been regarded as her stepfather." [Paragraphs 17 – 18].

> "It is trite law that rape of a young child such as the complainant is always an extremely serious matter, even in the apparent lack of physical injury to the complainant. With respect any form of rape is a serious violation." [Paragraph 21]

The appeal was dismissed.

ADVOCATE GM MALINDI SC

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 18 July 1960

Bachelor of Arts, University of the Witwatersrand (1983)

Bachelor of Laws, University of the Witwatersrand (1995)

CAREER PATH

Acting Judge

Gauteng High Court (July – August 2011; November – December 2012; January – February 2014; February, August – September 2016; August – September 2017; April – May 2019; August – September, November – December 2020)

Labour Court (October 2011; July – August 2013; November – December 2016)

Advocate (1995 – to date)

Ad hoc chairperson, Advertising Standards Committee and Advertising Industry Tribunal

Ad hoc chairperson, Advertising Regulatory Board

Chairperson, Advertising Standards Committee of the Advertising Standards Committee of the Advertising Standards Authority of South Africa (2005 – 2011)

Pan African Bar Association of South Africa

National Executive Committee: stakeholder engagement (2018 – 2020)

Member (2018 – to date)

National Association of Democratic Lawyers (NADEL)

Public Secretary (2014 – 2016)

President (2008 – 2014)

Acting President (2008)

Deputy President (2006 – 2009)

Member, National Committee (2001 – 2016)

Member, Johannesburg branch executive committee (1998 – 2001)

Member (1998 – to date)

Member and executive committee (Johannesburg), Advocates for Transformation (2001 – to date)

Member, Society of Advocates (Johannesburg) (1995 – 2019)

Member, Black Advocates Forum (1996 – 1998)

African National Congress

National initiator (“prosecutor”) (2011 – 2016)

Gauteng provincial disciplinary matters (2013 – 2016)

Member and chairperson, Johannesburg North branch executive

Member and chairperson, Johannesburg West branch executive committee

SELECTED JUDGMENTS

COMMERCIAL LAW

DENEL SOC LTD V ABSA BANK LTD AND OTHERS (19910/2011) [2013] ZAGPJHC 102; [2013] 3 ALL SA 81 (GSJ) (4 MARCH 2013)

Case heard 3 – 4 December 2012, Judgment delivered 4 March 2013.

Applicant entered into a contractual agreement with the government of India (4th respondent) to supply defence equipment and ammunition. The 4th respondent required various performance guarantees. Applicant, through ABSA bank (1st respondent) requested two Indian banks (the 2nd and 3rd respondents) to provide warranty and performance guarantees. Any disputes under these guarantees were governed by the laws of India. Applicant requested ABSA to provide counter-guarantees to the 2nd and 3rd respondents, governed by South African law. Under these guarantees, the guarantor had to pay immediately upon demand. [Paragraphs 1 – 5].

Applicant obtained an interim interdict to restrain the 1st respondent from making payment in terms of the counter-guarantee, after the 4th respondent had made a demand to the 2nd and 3rd respondents. [Paragraphs 7 – 8]. In these proceedings, applicant sought to interdict the 1st respondent from making payment to the 2nd and 3rd respondents, pending the finalisation of arbitration proceedings in India in respect of the principal guarantees. [Paragraph 9]. Applicant argued that the demands were non-compliant and fraudulent. [Paragraphs 13 – 14].

Malindi AJ held that under South African Law, a principal guarantee and related counter-guarantees were interpreted as independent guarantees, such that a counter-guarantee was "interpreted on its own, irrespective of whether the call under the principal guarantee was proper or not." The exception of fraud applied to counter-guarantees. [Paragraph 29]. Malindi AJ considered academic authority and case law, and found that 2nd and 3rd respondents were not obliged to pay the 4th Respondent on the basis that the applicant had not performed according to the contractual obligations, and nor was the 1st respondent obliged to pay the 2nd and 3rd respondents on that basis. The guarantors were "only obliged to pay in terms of the promise made under the warranty obligations." [Paragraph 47].

Malindi AJ found that regarding demand guarantees, the beneficiary had to meet the conditions specified in the guarantee. The demands made by the 2nd and 3rd respondents to the 1st respondent did not comply, as they

> "were made for a purpose that is too wide than the parties had agreed to, that is, that the Second and Third Respondents would pay the Fourth Respondent in the event that the Applicant fails to meet its performance and warranty guarantees, and that the Second and Third Respondents' demands and the First Respondent would similarly be restricted to those purposes." [Paragraphs 51 – 52]

It was unnecessary to determine the issue of fraud. [Paragraph 61]. The interdict was granted.

On appeal, the Supreme Court of Appeal held that the court had not had jurisdiction over one of the counter-guarantees, which was governed by the laws of India and subject to the exclusive jurisdiction of the courts of India. The SCA also amended the order, which had interdicted Absa from making payment on the counter-guarantees pending the finalisation of arbitration proceedings in respect of those guarantees, whereas the arbitration proceedings related to the counter-guarantees but the principal guarantees to which the counter-guarantees related. The appeal was otherwise dismissed:

State Bank of India and Another v Denel SOC Limited and Others (947/13) [2014] ZASCA 212; [2015] 2 All SA 152 (SCA) (3 December 2014).

LABOUR LAW

OPPERMAN V MINISTER OF DEFENCE AND MILITARY VETERANS (6600/13) [2014] ZAGPPHC 105 (12 MARCH 2014)

Case heard 30 January 2014, Judgment delivered 12 March 2014.

Applicant sought an order declaring that his deprivation of income in terms of an occupation specific dispensation (OSD) constituted an unfair labour practice and was unlawful. [Paragraph 1]. Respondent opposed the application on the basis that the applicant's duties fell outside the scope of the occupation specific dispensation. [Paragraph 8]. Applicant accepted that his post fell outside the OSD scope, but argued that extra remuneration in terms of the OSD was a term of his contract of employment and that to take it away at that stage would amount to a breach of contract and an unfair labour practice. [Paragraph 9]. Respondent contended that the applicant had bene paid due to an administrative error and had failed to follow the prescribed dispute resolution and dispute procedures. [Paragraphs 10 – 11].

Malindi Aj identified the essence of the applicant's claim as being:

> "that he should be afforded OSD benefits although he does not qualify therefor merely on the basis that it's [sic] a contractual term and that to take away a benefit which he does not qualify for would constitute an unfair labour practice as this would be tantamount to taking away a vested right." [Paragraph 13].

Malindi AJ held that on the "ordinary and unambiguous reading of the Regulations", the applicant was entitled to lodge a grievance relating to his promotion, placement or service benefits, and could only take further action to address unresolved grievances once he had exhausted all internal remedies. Malindi AJ found that the applicant had not provided any exceptional circumstances to justify being exempted from exhausting internal remedies, beyond alleging "that it would be a futile exercise since the grievance body would be appointed by the people against whom he would be complaining." Malindi AJ rejected this contention, as the applicant had not alleged any bias or mala fides by the relevant persons. [Paragraphs 17 – 18].

The application was dismissed with no order as to costs.

CRIMINAL JUSTICE

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v BOBROFF AND ANOTHER 2020 (1) SACR 288 (GP)

Case heard 29 – 30 April 2019, Judgment delivered 21 August 2019.

This was an application for civil forfeiture of property in terms of the Prevention of Organised Crime Act (POCA). The order was sought in respect of the credit balances on two accounts which the state alleged represented the proceeds of unlawful activities consisting of fraud, theft and offences under the VAT Act and/or offences relating to the avoidance of income tax in terms of the Income Tax Act. [Paragraphs 1 – 4] A preservation order had previously been granted.

Malindi AJ dealt with a challenge to jurisdiction by the respondents, who argued that property in question was in Israel, and that POCA had no extraterritorial application. [Paragraph 12]. Malindi AJ reviewed a wide range of case law and provisions of the International Co-operation in Criminal Matters Act (ICCMA), and held that:

> "It is apparent in the definitions of 'agreement', 'confiscation order', 'forcing confiscation order', 'foreign state', and 'letter of request' that forfeiture orders under POCA are capable of execution in or by foreign states that have similarly bound themselves to multilateral conventions to which the Republic is a signatory or to which it has acceded, and which has the same effect as an agreement referred to in s 27 of the ICCMA." [Paragraph 40].

Malindi J found that POCA, read with ICCMA, gave South African courts jurisdiction over property situated in a foreign state. Once a South African court had jurisdiction over a forfeiture application, its order was "enforceable or executable in a foreign requested state as envisaged in POCA, read with the ICCMA." [Paragraphs 41 – 42]

On the merits of the application, Malindi AJ held that:

> "where the court finds on a balance of probabilities that the property concerned is the proceeds of unlawful activities, the interest earned, and benefit (such as evasion of tax) which was 'derived, received or retained, directly or indirectly' in connection with or as a result of any unlawful activity as defined, falls to be forfeited to the state … and should not be prosecuted separately. This finding applies to the present case." [Paragraph 59]

The application was granted.

MEDIA AND OTHER COVERAGE

Constitutional Court oral history project: Gcina Malindi Constitutional Court Oral History Project 20th December 2011
(http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AG3368/AG3368-M51-001-jpeg.pdf**):**

"[w]ith Justice Ngcobo, there had been a more visible and proactive drive from his side to put in place mechanisms to ensure that the self-governance of the courts is realised. And I don't know how Justice Mogoeng is going to deal with that situation. Because from the outset the attitude of government has been that you must not let the judiciary too loose because otherwise they will become an arm of government which is so independent that there will be no relationship between it and the other arms of government. And government has therefore been resisting any self regulation by the judiciary. And I think we've now gone a bit far in advancing that objective of self-governance, or self-regulatory powers. And within, of course, the confines of separation of powers, and personally I think self-regulation, or self-administration as in other jurisdictions they call it, is what should happen and that the judiciary's independence will be signified not only by how they adjudicate matters but also by how they govern themselves." [Pages 15 – 16]

"Our observation as NADEL is that there has not been a proper appreciation of what transformation entails. As significant as demographics is in the transformation of the judiciary, we cannot ignore the fact that, that transformation must itself be qualitative. … I believe that the emphasis must be on the content because that's where it matters most for the people who have been oppressed for centuries and decades under the National Party, that in order to realise those rights we must ensure that the judiciary is composed of people who would advance then [sic] the rights within the Constitution

regardless of the race or gender. And that goes to other forms of deployment in government that the emphasis must be to ensure that the changes will be realised rather than the demographics. Then of course that contradicts ... it [sic] fact it doesn't contradict, it must be seen in the same light as equally ... of ensuring that we get the demographics right. And the two are not mutually exclusive. They must be pursued simultaneously. But qualitative transformation must not be compromised by the imperative to achieve demographic transformation as well. And then of course when we say that, we then expose ourselves as NADEL to criticism … that we're making ourselves guilty of perpetuating the notion that whites are superior to blacks ... But I think in principle we remain correct that the two must be looked at, at the same time, and we must not be too simplistic about getting the demographics right, but not getting the purpose and objectives of the Constitution and realisation of the rights entrenched in it compromised. And we must make sure that even amongst the most experienced and suitable of whom the majority will be white, we are able to find the ones who will assist and pursue transformation. And it's not an impossible task, and it's not an impossible task as well to find black and women candidates for the judiciary, that will be suitable, not only in terms of satisfying demographics but in terms of satisfying the need and imperative for transformation." [Page 16]

"[T]he only caution that I always have … is then that the [Constitutional] court should not see itself as...that it is the last refuge in a democracy where there are threats to constitutional rights and so on, but the court has to be cautious that it does not...it is not perceived as the substitute for the executive." [Page 17]

***Mail & Guardian,* "Meet the man who shed a tear for Zuma's spear" (26 May 2012) (**https://mg.co.za/article/2012-05-26-meet-the-soft-spoken-advocate-who-shed-a-tear-for-zumas-spear/**):**

"In the 1980s, when he was accused of treason, Malindi was represented and befriended by George Bizos, Nelson Mandela's lawyer. In his memoir, Bizos recalls another moment when Malindi was reduced to tears in court.

On trial, Malindi was describing the impact of apartheid on black families. His father could not get permission to live and work in the city where his family lived in a shack, only allowed to visit his family for 72 hours at a time. Malindi, wiping away tears with his hand, recalled on the witness stand that when he was nine years old, he once tried to save his father from arrest by denying he knew who he was.

"I know him well," Bizos said in an interview Friday. "He's a friend. I am the godfather of his eldest daughter. He's a sensitive man.

"I wonder whether what happened to him in the witness stand came to mind" in court on Thursday, Bizos said.

Malindi told reporters after he had regained his composure Thursday that he regretted breaking down, and did not want to speak about it in detail. He did say, though, that he had been affected by apartheid memories."

Muzi Sikhakhane and Tembeka Ngcukaitobi, "Judging politics", *City Press* 16 October 2016 (https://www.news24.com/news24/Opinions/Voices/judging-politics-20161014**)** discuss the non-appointment of the candidate in the JSC's October 2016 sitting:

"The reasons given by the Judicial Service Commission (JSC) for rejecting Advocate Gcina Malindi's application for judicial office demonstrate how precarious the position of an activist lawyer has become.

They betray a lack of appreciation of he unique conditions placed by apartheid on the African majority.

… [T]he JSC "robustly debated" about a "cooling-off period" from Malindi's high political office …

[I]t is the "proximity" to politics hat is the subject of our concern.

First, Malindi hardly occupied any high political office. Second, this notion of a "cooling-off" period has no application in this case.

All his life, he has fought against the well-documented brutality and injustice of apartheid.

One does not "cool off" from one's commitment to justice.

The real question is whether the applicant's views are consistent with the Constitution and whether that individual has personal integrity. …

We presume that the JSC's reason was that Malindi's proximity – at least in time – to high political office rendered him neither fit nor proper to occupy judicial office. We contest this conclusion and its justification.

Malindi was a political activist before he was an advocate. His history is not that of a career politician for narrow personal gain.

Unlike some who question him, all he earned was torture, suffering and incarceration on Robben Island.

In the early days of the JSC, and considering the lawyers with political links who were appointed in those days, political activism would have been considered an attribute worthy of elevation to the apex of the legal profession.

Judges with wider life experiences are capable of resisting the ever present temptation of judicial populism. …

Should the holding of high political office in an organisation such as the ANC – for years a liberation movement – disqualify one for judicial appointment?

Does one's commitment to the struggle that culminated in our celebrated constitutional dispensation suddenly make one less worthy to protect and serve the very same dispensation for which they sacrificed their lives? …

Law and the politics of liberation have always been inseparable. This was stated by Malindi in his response to questions about his "proximity" to politics. …

We should end where we started. Malindi's political activism was the inevitable outcome of the times and his life experience. …"

MR PATRICK MALUNGANA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 5 March 1970

B.Proc, University of the North (1994)

P.Diploma, University of Johannesburg (2013)

CAREER PATH

Acting Judge, Gauteng High Court (4th term 2016, 2nd & 4th terms 2017, 4th term 2018, 2nd term 2019, 1st, 3rd & 4th terms 2020)

Director, Matojane Malungana Incorporated (2008 -)

Attorney, P. H. Malungana Att. (2008)

Attorney, K. P. Phasha Inc (2004 - 2007)

Attorney, Magabane Incorporated (2003)

Attorney Director, P. H. Malungana Att. (1998)

Candidate & Professional Assistant, Maluleke Msimang & Associates (1996 - 1997)

Candidate Attorney, Krams Attorneys (1995)

Member, Black Lawyers Association (2010 -)

Member, Law Society of the Northern Provinces (1997 -)

Member, Legal Practice Council

Chair, Disciplinary Hearing, Tsoga Security Services (2015 - 2019)

Chair, Disciplinary Hearing Independent Development Trust (2013)

Member, Assemblies of God

Member, Apostolic Faith Mission

SELECTED JUDGMENTS

PRIVATE LAW

KING PRICE INSURANCE COMPANY (PTY) LTD V. SERAKWANE A354/2018 [2019] ZAGPPHC 392 (16 AUGUST 2019).

Judgment delivered 16 August 2019.

This was an appeal against a judgment of the Regional Court, ordering the appellant to pay damages of R310,000 (with costs) to the respondent for repudiating an insurance cover. [Paragraph 1] The parties had concluded an agreement whereby the appellant undertook to insure the respondent's motor vehicle. A condition of the contract required the respondent to install a security device approved by the appellant. An employee of the appellant failed to provide the respondent with details of a company to install the tracking device but advised that it was the respondent's responsibility to install the device if he did not hear from the company. The vehicle was hi-jacked before the device was installed, and appellant repudiated respondent's claim. [Paragraph 2].

Malungana AJ (Mabuse J concurring) identified procedural issues in the matter. It appeared that prior to the judgment under appeal, the court *a quo* had dismissed the respondent's claim. Appellant therefore raised a point *in limine* that the court a *quo* was *functus* officio as the action was previously dismissed, and no application had been made to re-enrol the matter. The magistrate dismissed the point *in limine*, based on rule 32(3) of the Magistrates Court Rules. [Paragraphs 4 – 5]. Malungana AJ found that the magistrate had erred in dismissing the point *in limine*:

> "The court a *quo* should not have proceeded to hear the matter without an application setting aside the initial court order dismissing the respondent's claim ... In terms of Rule 55 the appellant ought to have been notified of such application, if any. … [T]he approach adopted by the court below fly [sic] against the Rule 55(1)(b) and is Incongruent with the principles of natural justice *(audi alteram partem.)*" [Paragraph 11].

Malungana AJ held that the "guiding principle of the common law is certainly of judgments", and that once a judgment was given in a matter, it was final and could not be altered by the judge who delivered it: "[h]e becomes *functus officio* and may not ordinarily vary or rescind his own judgment." [Paragraph 13]. The finding by the magistrate that Rule 32(3) did not require the application to be served on the appellant "would be illogical and irregular in the circumstances." [Paragraph 14]. On the merits of the appeal, Malungana AJ found that it was "improbable that the appellant would have meant to excuse the respondent from fulfilling its obligation to install the anti-hijacking device", and that the respondent was fully aware that he was required to contact the appellant should he not be contacted by the tracking company. [Paragraph 18].

Malungana AJ concluded that the magistrate had "completely misconstrued the application of Rule 32(3)" by holding that the application only need to be filed with the court and not served on the appellant, and in so doing had incorrectly determined the jurisdiction of the court *a quo*. Accordingly, the court *a quo* lacked jurisdiction to adjudicate the trial, and its judgment was a nullity and of no effect. [Paragraph 20].

The appeal was upheld.

COMMERCIAL LAW

OPPERMAN V COMPANIES AND INTELLECTUAL PROPERTY COMMISSION OF SOUTH AFRICA AND OTHERS (54506/2019) [2020] ZAGPPHC 208 (14 MAY 2020)

Judgment delivered 14 May 2020.

This decision concerned two related applications. One application was to reinstate a company, Ronsoe (Pty) Ltd), that had been deregistered by the CIPC in terms of s 83(3)(b) of the Companies Act). The other was an application for intervention by an interested party. [Paragraph 1] The Applicant – a shareholder of the deregistered company - had explicitly sought for the reinstatement of the company (by the CIPC-the first Respondent in the suit) in order to cause a resolution to be taken to institute legal action against the estate of another shareholder who was deceased. [Paragraph 8] The intervening party – a beneficiary in the estate of the deceased - applied to the Court, seeking leave to intervene on the basis that she had a direct and substantial interest in the application for reinstatement. [Paragraph 13]

Malungana AJ found that the question of whether to allow the intervention turned not on the question of whether the intervening party had any interest, but whether the interest was "direct and substantial". [Paragraph 22] Malungana AJ found that there was merit in the argument that "once the applicant shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene", and noted that the applicant had conceded that the intervening party had an interest in the reinstatement of the company. [Paragraph 23].

> "[T]here is no question of the fact that the relief sought by the Applicant, viz the restoration of the Ronsoe (Pty) Ltd, may retrospectively have the effect of the company obtaining enforceable rights against the intervening party …". [Paragraph 26]

Malungana AJ granted the application for leave to intervene, concluding:

> "[A]ny order reinstating the company … would potentially affect the rights of the intervening party in a material way. On his own version the applicant intends to convene a meeting of the would- be directors (shareholders) if granted the relief sought in the notice of motion, for the sole purpose of adopting a resolution to institute legal proceedings against the estate and the intervening party. In the likely event that such happen the intervening party may face a legal suite as a potential debtor. … [Paragraph 30]

Regarding the reinstatement of the deregistered company, Malungana AJ considered the question of whether it was equitable to order reinstatement, [paragraph 36] and found that:

> "In light of the uncertainties surrounding the deregistration of the company in question coupled with other anomalies, and the dispute in shareholding, I am of the opinion that it is equitable that the company be revived. This will afford the applicant to deal with the outstanding issues as well as other interested parties, if any, in exercising the rights which may otherwise have been affected by the deregistration." [Paragraph 44]

The application for intervention was granted, and the dissolution of the company was declared void.

CIVIL PROCEDURE

IGS CONSULTING ENGINEERS v. DEKRA INDUSTRIAL RSA (PTY) LTD, UNREPORTED JUDGEMENT, CASE NO: 11769/2019, GAUTENG HIGH COURT, JOHANNESBURG.

This was an application for leave to amend particulars of claim. The Plaintiff had initially stated in its claim that Defendant had applied to wind up the Plaintiff based on amounts that were never due, owing or payable to the Defendant, and Plaintiff claimed that the Defendant was indebted to it in these amounts. [Paragraph 3]. The Defendant raised an exception to the particulars of claim, and Plaintiff sought to amend the particulars. The Defendant argued that the proposed amendment still rendered the Plaintiff's claim excipiable for not disclosing a cause of action, alternatively for being vague and embarrassing, [Paragraph 9].

Malungana AJ considered applicable provisions of the Uniform Rules of Court, case law, and the requirements for the *condictio indebiti* [an action for the return of monies mistakenly paid]. [Paragraph 25]. Malungana AJ found that the use of the words "under protest" in correspondence and in the court order, to describe the payments made by the Plaintiff to the Defendant, was insufficient to conclude that the defendant was unjustifiably enriched. [Paragraph 28]. However, in the context of the payment being made "under protest", Malungana AJ found that it "remained an issue" whether the amounts were due to the Defendant. Malungana AJ disagreed with the Defendant's contention that the pleadings did not disclose a cause of action. [Paragraph 31].

Malungana AJ held that granting the amendment would "lead to a proper ventilation of the dispute between the parties. [Paragraph 33]. Plaintiff was granted leave to amend the particulars of claim.

CRIMINAL JUSTICE

S V NDEBELE (A207/2016) [2018] ZAGPJHC 690 (26 JUNE 2018)

Case heard 14 June 2018, Judgment delivered 26 June 2018.

This was an appeal on a question of law against the decision of a Regional Court magistrate to aquit the respondent of the rape of a 7-year-old girl. The question of law raised issues of the court's application of the cautionary rule to a single witness; a finding that there was no corroboration of the victim's evidence; and whether the victim was indeed a single witness. [Paragraphs 1 – 3].

Malungana AJ (Weiner J concurring) evaluated the evidence, and found that the complainant had been unwavering, and had stuck to her version. There was also corroboration of the complainant's evidence, contrary to the magistrate's finding that there was no medical corroboration of the complainant's version. [Paragraphs 17 – 20]. Malungana AJ found that although the trial court had not expressly stated that it was applying the cautionary rule in relation to sexual offences, it had in fact done so "due to the fact that [the magistrate] found that there was no corroboration of the complainant's version", and had applied the cautionary rule to three issues, "i.e. the fact that the complainant was a single, young witness, in a sexually related matter." Malungana AJ held that the court *a quo* had been wrong to do so. [Paragraph 24].

Malungana AJ found that the underlying reasoning of the court *a quo* revealed "a fundamental misconception as to the proper test that finds application when a trial court evaluates the evidence at the end of the trial." [Paragraph 27]. There was sufficient evidence to corroborate the complaint's version of events. [Paragraph 28]. Malungana AJ held that "the respondent's guilt was established by the evidence of the complainant supported by that of the other State witnesses", and therefore "the complainant was not a single witness whose evidence was uncorroborated by independent evidence."

In light of the court a quo's failure to apply the cautionary rule in respect of the complainant's evidence correctly, the court *a quo* had adopted the wrong test and the judgment could not stand. [Paragraph 39].

Malungana AJ found that it would not be appropriate to remit the matter for a trial *de novo*, and substituted a guilty verdict, with the matter being remitted to the Regional Court for sentencing. [Paragraphs 43 – 44].

MR NORMAN MANOIM

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 24 February 1958

B.A, University of Witwatersrand (1980)

LLB, University of Witwatersrand (1983)

CAREER PATH

Professor of Practice *(*part-time*)*, University of Johannesburg (October 2020- to date)

Acting Judge, South Gauteng High Court (November 2019 - March 2020)

Acting Director, Mandela Institute (University of Witwatersrand) (August 2019 - January 2020)

Chairperson, Competition Tribunal (August 2009 - July 2019)

Full time member, Competition Tribunal (August 1999 - July 2009)

Partner, Cheadle Thompson and Haysom Attorneys (1984 - 1999)

Candidate Attorney, Raymond Tucker Attorneys (1982 - 1984)

Candidate Attorney, Andrew, Lister and Tucker (1982)

Member, Law Society of the Transvaal (1982 - 1998)

Member, National Association of Democratic Lawyers (1984 - 1998)

Executive Member, Lawyers for Human Rights (1982 - 1984)

President, South African Students Press Union (1980-1981)

SRC President, Vice president and acting president of the National Union of South African Students (NUSAS), University of Witwatersrand (1979 - 1980)

Executive Member, Independent Board of Inquiry into Informal Repression (1992 - 1997)

Executive Member, Freedom of Expression Institute (1994 - 1997)

Chairperson, Yeoville Residents Association (1989 - 1990)

Executive Member, Johannesburg Democratic Action Committee *(*affiliate of the United Democratic Front*)* (1982 - 1984)

SELECTED JUDGMENTS

COMMERCIAL LAW

COMPUTICKET (PTY) LTD V COMPETITION COMMISSION [2016] 2 CPLR 921 (CT) [Competition Tribunal]

This was a review application brought by Computicket to set aside a decision made by the Competition Commission (the "Commission") to refer a complaint against it. The review relied on two arguments: (i) that the decision to refer was made by the wrong person as it was made by the Commission and not the Commissioner; and (ii) that the referral, even if made by the competent person, offended against the principle of legality.

The Tribunal (Manoim PM, Roskam TM and Wessels TM concurring) held that most of the arguments advanced by both parties were factual disputes and not substantive points of review. Deciding factual disputes on review under the guise of a test of reasonableness could easily lead to an amalgamation of these supposedly distinct processes. [Paragraph 100]. The facts of the case highlighted that what emerged ultimately as the review points were, in fact, disputes of fact and the conclusions based thereon. These were matters best decided through a hearing process rather than by way of review.

It was held that a review was decided on papers and not by way of a hearing which would involve, amongst other things, the hearing of oral testimony, cross examination, and full discovery. A hearing was therefore the superior process for resolving disputes of fact, and conclusions about them that inevitably arose in competition matters. [Paragraph 100]. As a result, the application was dismissed so as not to stray across the boundary from a strict rationality test into one of reasonableness [Paragraph 107].

COMPETITION COMMISSION V COMPUTICKET (PTY) LTD [2019] 1 CPLR 198 (CT)

BEFORE: N MANOIM PM, A WESSELS TM AND Y CARRIM TM

The Competition Tribunal was requested to determine whether Computicket, a dominant firm in the market for the provision of outsourced ticket distribution services to Inventory Providers (IPs) abused its dominance by securing exclusive agreements with its clients.

The Tribunal (Manoim PM, Wessels TM and Carrim TM concurring) found that Computicket's argument that section 8(1)(d)(i) of the Competition Act [prohibiting a dominant firm from "requiring or inducing a supplier or customer to not deal with a competitor"] was not applicable in cases involving contracts was incorrect. The Tribunal held that there was no basis for such an argument and that it made no economic sense. [Paragraphs 77 - 79] Having established that Computicket was dominant in the sector, it was held that the agreements were at least facially exclusive, and this met the definition set out in section 8(d)(iv). The agreements were therefore both exclusionary and anti-competitive as they included: (i) a lack of entry and hence, derivatively, a weakening of rivalry; (ii) higher prices; (iii) reduced supply to IPs; (iv) a degradation in quality; and (v) a lack of innovation. The Tribunal found that the Commission established a case of anti-competitive effect on a balance of probabilities and concluded that the administrative penalty payable by Computicket for the transgression of section 8(d)(i) was an amount of R20 million.

An appeal against the decision was dismissed in ***Computicket (Pty) Ltd v Competition Commission of South Africa*** **(170/CAC/Feb19) [2019] ZACAC 4 (23 October 2019)**, with the Competition Appeal

Court finding that not only was the exclusionary act substantial in terms of foreclosing the market to rivals, but there was also evidence pointing to actual harm to consumers, and no pro-competitive efficiencies were established.

CIVIL PROCEDURE

FOCUS PRODUCTS (PTY) LIMITED V JONES NYAMAMBI AND VANYATHI HOLDINGS CC., UNREPORTED JUDGMENT, CASE NO 5747/2020, GAUTENG HIGH COURT (JOHANNESBURG)

Case heard 28 May and 1 June 2020, Judgment delivered 25 June 2020.

This was an opposed application for provisional sentence. The plaintiff sought payment from the defendants based on an acknowledgment of debt (AOD) signed in October 2019. The defendants relied on several defences to oppose the application, the critical ones being that the amount contested in the AOD was unproven, that the first defendant never intended to hold himself personally liable, and that the agreement on which the indebtedness was premised, was unenforceable [Paragraph 4].

Manoim AJ held that the first defence raised, namely that that the defendant was unable to pay the amount as evidenced by an arrangement to pay the amount overtime, was not an indicator of inability to pay the debt but rather showed an expectation of source of finance [Paragraph 77]. The defendant had failed to disclose foreign interests, which he was struggling to access. This showed that at the worst, the defendants were experiencing a cash flow problem [Paragraph 81].

The defendants also failed the second leg of the test, relating to probability of success. The defence raised was that the 1st defendant did not appreciate that by signing the AOD, he was incurring personal liability. This argument was rejected because the defendant showed appreciation of the fact that the plaintiff sought to hold the defendant personally liable, as evidenced by an email he sent. [Paragraph 87]. The defendant had been in a position to dispute the claim for over a year but chose not to do so. [Paragraph 90].

Finally, Manoim AJ considered the defence that the AOD was not enforceable because it was an unlawful fronting practice. [Paragraph 95]. Manoim AJ held that in order for the defence to succeed, the defendant would have to prove that the underlying transaction was unlawful, [paragraph 97] and that this formed a part of a larger dispute between the parties, in order to constitute “special circumstances”. The defendants had not included this defence in any of their answering documents, except in the heads of argument, [paragraph 98] and as such it would be unfair on the plaintiffs to rely on the argument and it would directly contravene rule 8(5) of the High Court rules. [Paragraph 102].

Provisional sentence was therefore granted.

CRIMINAL JUSTICE

NHLANHLA TITUS RADEBE V THE STATE, UNREPORTED JUDGMENT, CASE NO A183/2019 (GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 3 September 2020, Judgment delivered 13 October 2020

The appellant in this matter was convicted of armed robbery along with two co-accused and sentenced to 18 years imprisonment. His co-accused were sentenced to 12- and 15-years imprisonment respectively. The appellant appealed both his sentence and his conviction, placing in issue whether the appellant was sufficiently identified by a single eyewitness.

Manoim AJ (Molaleli J concurring) considered applicable case law to identify how the courts deal with instances of a single witness and highlighted that it is not enough for the identifying witness to be honest - the reliability of the observation must also be tested. Such reliability is tested through factors such as lighting, eyesight, visibility, proximity to the witness and many others. [Paragraph 24]. Manoim AJ confirmed the trial magistrate's finding that the eyewitness evidence was reliable as the crime had been committed in the afternoon and the appellant had been at close range to the witness and had interacted with him for enough time to see his features clearly. [Paragraph 26]. In addition to the witness's testimony, the two co-accused were identified by both the complainants and had distinctive physical features. [Paragraph 28]. The conviction was upheld.

Regarding the sentence, the appellant argued that the sentence of 18 years was inappropriate and was heavily influenced by a previous armed robbery conviction from 2013 wherein he was sentenced to 10 years imprisonment with 5 years suspended. Manoim AJ held that although the Magistrate spent some time digressing on why he thought the sentence was inappropriate for a robbery conviction, he did not treat it as a second offence for the purposes of sentencing. [Paragraph 49]. Instead, the magistrate used his discretion to sentence the appellant to 18 years imprisonment given that the appellant had a history of previous convictions. [Paragraph 55]. Manoim AJ held that although the Magistrate was within his rights to do so, the difference in treatment between the appellant and the 2nd accused (who received a 12-year sentence) was too stark. [Paragraphs 60, 62] The sentence was set aside and replace with a sentence of 15 years' imprisonment.

MEDIA COVERAGE

Interviewed at the end of his tenure at the Competition Tribunal:

"Manoim reflects with some surprise that the monopolies of the apartheid era such as mining behemoth Anglo American and insurer Sanlam did not face a single dominance case before competition authorities. Instead, it was semi-privatised state-owned entities including telecommunications firm Telkom, chemical and energy giant Sasol and Iscor (the forerunner of steel company ArcelorMittal) that received a sanction.

Many of the monopoly companies under apartheid, according to Manoim, were most concerned about efforts to reduce concentration and were involved in policy formation, but were, ironically, "never in the firing line"."

"Manoim reflects that critics said there was no legal standard followed, while fans of the approach maintained there was jurisprudence setting the rules around job losses in mergers but no precedent to benefit small business.

His own view is somewhere in between, believing that a clear standard is useful to settle disputes. Despite some concern about Patel's increased prominence in competition matters … Manoim says he was never once pressured by Patel, or any other ministers he worked alongside." …

"He was never offered money, lunch or even a beer by any of the massive corporations making their way through his door.

"Not because there were any angels, but because of the way the system is designed," Manoim says, pointing out the referrals from the Competition Commission, which acts as a type of prosecuting authority; the tribunal adjudicates cases with three members; and then a possible appeal to the CAC "makes it very difficult to fix the system"."

- Tehillah Niselow, "**Breaking up is hard to do: Two decades at the helm of the Competition Tribunal", *Daily Maverick* (16 October 2019), available at: https://www.dailymaverick.co.za/article/2019-10-16-breaking-up-is-hard-to-do-two-decades-at-the-helm-of-the-competition-tribunal/**

MR MANDLA MBONGWE

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth : 29 March 1957

B Proc, University of the North (1982)

CAREER PATH

Acting Judge, Gauteng High Court (Periodically since 2013)

Mandla Mbongwe Attorneys (2007 – to date)

Partner, Moodie Robertson (2006 – 2007)

Director, Mandla Mbongwe Attorney (1985 – 2005)

Admitted as attorney of the High Court (1985)

Articled clerk, BP Matswiki Attorneys (1983 – 1985)

Law Society of the Northern Provinces

Disciplinary Committee (2005 -)

Member (1985 -)

Member, Black Lawyers' Association (1985 -)

Member, Johannesburg Attorneys' Association (1985 -)

SELECTED JUDGMENTS

PRIVATE LAW

KIRSTEN CURTIS TRUST IT 318/91 AND OTHERS V BERKLEY DEVELOPMENT (PTY) LIMITED AND ANOTHER [2014] JOL 32295 (GSJ)

Case heard 14, 16 May 2013, Judgment delivered 12 June 2013

The second applicant was the managing trustee of the applicant. Applicant entered into a contract of sale with the first respondent in terms of which the respondent would sell vacant land to the trust, and would build a dwelling on it. Disputes occurred regarding the progress and quality of the dwelling construction and the payments made by the applicants, leading applicants to cancel the agreement. The first respondent refused to accept the cancellation. The issue before the court was whether the applicants were entitled to cancel the contract.

Mbongwe AJ rejected a challenge to the second applicant's authority to institute proceedings, [paragraph 19] and to the qualifications of the applicants' expert witness [Paragraph 19] First respondent's argument that applicants had committed a breach of the agreement was also dismissed, as the alleged breach "was cured by, and the parties proceeded on the basis of advance payments being made by the first applicant on request by the respondent." [Paragraph 20]

Mbongwe AJ held that the first respondent, despite being given opportunities, had failed to meet "reasonable requests", and that the first applicant was justified in cancelling the agreement. First respondent was not prejudiced by the cancellation, as payments had been made in advance throughout the building operations. Relations between the parties had become severely strained, and "the required co-operation and trust between the parties unfathomable." [Paragraph 26]. Mbongwe AJ also rejected first respondnet's argument that the cancellation of the agreement did not affect the first respondent's *lien*. [Paragraph 27].

The agreement was held to have been validly cancelled, and first respondent was ordered to vacate the property, and to pay the costs of the application.

SHARMAN AND ANOTHER V NZIMANDE AND ANOTHER (6548/2013) [2013] ZAGPJHC 175

Case heard 13 June 2013, Judgment delivered 18 July 2013

This was an application for eviction in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE). The parties had a lease agreement and before the agreement ended, the parties concluded an instalment sale agreement in terms of which the respondent was to purchase the rented property from the applicants. At issue was whether the applicants were entitled to pay the agent's commission from the deposit amount, and whether the lease agreement and the instalment sale agreement were validly terminated by the applicants.

Mbongwe AJ held that the sale agreement did make provision for the payment of commission from the first payment made by the 1st respondent, and that commission became due on the conclusion of the agreement. Mbongwe AJ held that the 1st respondent was not entitled to withhold further payments on the basis of protracted and ongoing negotiations between the parties. [Paragraph 7].

Mbongwe AJ found further that the applicant's letters demanding payment and giving notice of termination were defective, as they did not accord with the provisions of the sale agreement. The purported notice was therefore invalid. [Paragraph 8] The sale agreement was not properly terminated

and remained in existence. [Paragraph 11]. The rental agreement "rooted" in the sale agreement thus also remained valid. [Paragraph 10].

Mbongwe AJ found that, although not raised by the parties, the agreement between the parties had a life span of twelve months and was not renewed or extended in writing as required by the Alienation of Land Act. The agreement was therefore terminated by "affluxion of time", and there was hecne no valid rental or sale agreement between the parties. [Paragraph 11].

> "I therefore, find that the agreement between the parties had run its intended course despite the 1st respondent's persistent failure to pay the monthly rental and instalments inbreach [sic] of the terms and conditions thereof. I further find that the 1st respondent's claim that he is in lawful possession and occupation of the property, particularly in the light of the applicants' demand that he vacates the property, to be lacking legal grounding , extremely absurd and stands to be rejected."

The application for eviction was granted.

ADMINISTRATIVE JUSTICE

PIONEER FOODS (PTY) LIMITED V ESKOM HOLDINGS SOC LIMITED AND OTHERS (2018/16) [2020] ZAGPJHC 248 (12 OCTOBER 2020)

Case heard 31 July 2020, Judgment delivered 12 October 2020.

This case related to the first respondent's statutory powers to interrupt the electricity supply to the second respondent municipality due to non-payment. Applicant operated a production business within the municipality, which stood to be affected by the electricity interruptions. The applicant accordingly sought to interdict the first respondent from implementing the interruptions, and to compel the first respondent to provide an uninterrupted supply of electricity to the second respondent. (Part A). Applicant further sought to review and set aside decisions of the first respondent aimed at the implementing the interruptions, an order directing the first respondent to supply electricity direct to its premises, and various alternative orders directing the first and second respondents take various steps to present interruptions to the supply of electricity. [Paragraph 1].

Mbongwe J noted that, following from the electricity supply agreement entered into between 1st and 2nd respondents, there was no direct relationship between the applicant and the 1st respondent. [Paragraph 3]. Mbongwe AJ analysed the steps taken by the 1st respondent prior to introducing the electricity supply interruptions, [paragraphs 5 – 7] and found that these steps "complied with all applicable statutory provisions, including the PAJA and regulatory provisions." [Paragraph 10] Mbongwe AJ found that the applicant's claims of ignorance of the initial public notification and the denial of the existence of the decision to interrupt power interruptions:

> "appears more of a designed mechanism to obstruct the 1st respondent from exercising and executing its statutory powers to ensure its sustainability. It was the stratagem, in my view, to create the urgency in PART A of these proceedings." [Paragraph 11].

Mbongwe AJ held that the applicant "in essence concedes its failure to engage in and exhaust prescribed internal dispute resolution formations", and that "[o]verlooking the peremptory prescripts of the PAJA in this regard is fatal to the applicant's application". Mbongwe AJ thus held that the application had been launched prematurely. [Paragraph 12].

Regarding Part B of the application, Mbongwe AJ considered the applicant's claim that the first respondent be ordered to supply electricity on an uninterrupted basis to the applicant's premises, and held:

> "This intervention alone [the load reduction process] will render it impossible for the first respondent to comply with the order sought and the applicant's insistence on the granting thereof is absurd. The load reduction process is a national inconvenience and it is unreasonable of the applicant, itself a part of the nation, to seek to be immunised from the inconvenience by an order of the court. … [S]ome of the electricity supply interruptions experienced by the applicant were due to the load reduction process. The applicant had ample time and opportunity to reflect these changes in its amended notice of motion, but chose not to do so. ... A court order must be implementable, bring about or restore fairness, equality and justice, inter alia, and ought to be respected. These constitutional imperatives will be lost in the relief sought." [Paragraphs 14, 16].

The application was dismissed with costs.

CIVIL PROCEDURE

MASINDI V ROAD ACCIDENT FUND (21738/2014) [2015] ZAGPJHC 118

Case heard 3 June 2015, Judgment delivered 12 June 2015

The plaintiff instituted proceedings against the defendant for compensation for bodily injuries sustained in a motor vehicle accident which occurred on the 17th of June 2009. The parties had reached a settlement agreement on the merits and quantum, subject to the plaintiff's claim surviving the defendant's special plea of prescription. The issue before the court was whether the plaintiff's claim had prescribed when summons was served on the defendant on the 17th June 2014.

Mgongwe AJ found that it was common cause that the prescribed 5 year period would have eneded at midnight on the 16th of June 2014, which was a Monday and a public holiday. Mbnongwe AJ noted that the relevant legislative section did not provide for a situation where the last day of the five year period fell on a Sunday or a public holiday.[Paragraph 4].

Mbongwe AJ then considered an argument that the plaintiff ought to have served summons on Friday the 14th of June, and that serving on the 17th of June fell outside the five year period, and held that "one of the cardinal rules" of statutory interpretation was that the meaning given should not result in an unforeseen absurdity:

"The proposition that the Plaintiff's summons should have been served on the 14th June 2014 would clearly mean that the Plaintiff is deprived of the full prescribed period of five years. This does not accord with justice, could not have been the intention of the legislature and stands to be rejected." [Paragraphs 7.1 – 7.2]

Mbongwe AJ preferred the Plaintiff's argument that section 4 of the Interpretation Act should be applied, as this would be "more plausible and just", and precluded undesirable results not intended by the legislature. [Paragraph 8]. Accordingly, the Plaintiff's claim had not prescribed when the summons was served on the Defendant. [Paragraph 10].

The special plea for prescription was dismissed and the defendant was ordered to pay the agreed amount.

CRIMINAL JUSTICE

VILANE V S (A230/2019) [2020] ZAGPPHC 681 (28 MAY 2020)

Case heard 2 March 2020, Judgment delivered 28 May 2020

The appellant was convicted of murder and entering and being in the country illegally and was sentenced to an effective term of life imprisonment. [Paragraph 1].

Mbongwe AJ (Collis J concurring) noted that the grounds of appeal did not include the magistrate's alleged failure to failure to comply with the peremptory provisions of section 93ter (1) of the Magistrates Court Act [relating to the role of assessors in a trial], but that this question was raised as a point in limine at the hearing of the appeal. [Paragraph 6]. Mbongwe AJ noted that the trial magistrate had sat without the assistance of assessors throughout the trial despite one of the charges being of murder. The provisions of s 93ter(1) had been violated as the magistrate had not explained the provisions of the section to the accused, nor had the accused waived his entitlement to be tried by a magistrate sitting with assessors. [Paragraph 9]. Mbongwe AJ emphasised that case law provided that the magistrate did not have discretion to dispense with assessors in a criminal trial, and that a failure to comply with s 93ter(1) constituted an irregularity and a failure of justice. [Paragraph 10].

The appeal was upheld, and the conviction and sentence set aside.

MR. ANTHONY MILLAR

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 25 June 1969

BA, University of the Witwatersrand (1990)

LLB, University of the Witwatersrand (1993)

CAREER PATH

Acting Judge, Gauteng High Court (August – September 2017; January – February 2018; March 2018; April – May 2018; July – August 2018; September – November 2018; January – May, July, August – September, September – October, November 2019; January – March, July – September 2020).

Norman Berger Attorneys

Director (2000 –)

Partner (1998 – 2000)

Attorney (1995 – 1998)

Candidate Attorney (1992 – 1995)

Council Member, Legal Practice Council (2018 –)

Board Member, Legal Practitioners Fidelity Fund (2016 – 2018)

Council Member, Law Society of South Africa (2016 – 2019)

Law Society of the Northern Provinces

President (2015 – 2017)

Councillor (2015 – 2018)

Chairman of Advisory Board, Small Claims Court for

the District of Randburg (2008 –)

Commissioner, Small Claims Court (2002 –)

Member, Black Lawyers Association (1999 – 2015)

Member, Johannesburg Attorneys Association (1993 –)

SELECTED JUDGMENTS

PRIVATE LAW

LDB V ROAD ACCIDENT FUND 2018 JDR 0112 (GP)

Case heard 31 January, 1 February 2018, Judgment delivered 5 February 2018

The Plaintiff brought an action for damages for loss of support arising out of the death of her late husband, as a result of injuries sustained by him in a motor vehicle collision. The issue was whether the plaintiff's minor child was entitled to claim a loss of support and the quantum in respect of such claims for which the Defendant was liable. The minor child was not the biological child of the deceased.

Millar AJ held that the marriage with the Plaintiff only strengthened the obligation to support the minor child even though the marriage had only lasted for five months. [Paragraphs 12-14] Furthermore, Millar AJ held that there was no limitation on the number of different persons who may contribute to the maintenance and support of another:

> "The fact that a biological parent has a duty, to support a child, which arises *ex lege,* does not preclude or exclude support of the child by others. It is self-evident that such a situation which will necessarily result in a child's needs being better met, is in the bests interests of the child." [para 15]

Millar AJ concluded that the deceased had undertaken a duty to support the minor child, and that the Defendant was therefore liable to compensate the child. [Paragraph 16]

Millar AJ accepted the agreed deduction of a five and 15 percent contingency for the general hazards of life in respect of the past and future loss respectively as agreed by the parties. [Paragraph 38]

MAROPE V MINISTER OF POLICE 2018 JDR 0503 (GP)

Case heard 12, 13 and 14 February 2018, Judgment delivered 14 February 2018

Plaintiff brought an action for damages against the defendant arising from alleged unlawful arrest and detention. The plaintiff was a Warrant Officer who had served in the police for 17 years.

After noting out that the plaintiff had been arrested without a warrant, Millar AJ turned to section 40(1)(b) of the Criminal Procedure Act and applied the reasonable ground test from *Mabona and Another v Minister of Law and Order*. Millar AJ concluded that the arresting officer did not act upon reasonable grounds since the officer in question did not make any attempt to verify information on

the computer system. Millar AJ therefore held that further enquiries were required ,and that the arrest and detention of the plaintiff had been unlawful. [paras 24-25]

With respect to the quantum of damages, Millar AJ applied the approach from *Mbanjwa v Minister of Police* and found that the distinguishing feature in the case was that the plaintiff was a police office who besides having been incarcerated in uniform, had been previously been based at the station concerned. [Paragraph 27] Based on the circumstances of this case, Millar AJ quantified the damages at R 275 000,00. [Paragraph 29].

CIVIL PROCEDURE

S M V A B (20/1732) [2020] ZAGPJHC 265 (11 SEPTEMBER 2020)

Case heard 1 September 2020, Judgment delivered 11 September 2020.

Applicant sought to interdict the use and distribution of personal information which had come into the possession of the Respondent. The parties had divorced in 2015 and had to continue to interact with each other regarding their children. Applicant's personal email address was hosted on the Respondent's cloud account, and her cellular telephone was paid for by one of the Respondent's companies. [Paragraphs 1 – 3] Respondent claimed that Applicant had subsequently accessed and copied all the emails in her account, without her knowledge, and distributed some of the e-mails to third parties. [Paragraph 5]

Millar AJ found that the Applicant's failure to include certain information in the application was not material, and that the Applicant had made disclosure of what was in her possession and what was relevant to the relief that she sought. [Paragraph 27]. Similarly, an argument about the non-disclosure of proceedings in the Childrens' Court was not material, and was "simply another arrow fired from the bow of the Respondent in his ongoing battle between himself and the Applicant." [Paragraph 28].

Millar AJ held that there was no basis for the disclosure of the information to third parties, [paragraph 30] and that this "was done clearly with the purpose of humiliating and bringing into disrepute the Applicant as well as the minor." [Paragraph 31]. Millar AJ found that the Respondent "knew that his accessing of the Applicant and minor's private communications were an infringement of their rights", [paragraph 40] and that the distribution of information to third parties "was done for no other reason than to try and engender a cognitive bias in the minds of those persons against the Applicant and possibly also the minor child." [Paragraph 41].

Millar AJ granted the interdict, and awarded costs against the Respondent on an attorney and client scale, as "the present application was entirely avoidable had the Respondent properly considered his position and conducted himself accordingly." [Paragraph 56].

MERE V MERE AND OTHERS [2019] ZAGPPHC 90 (26 MARCH 2019)

Case heard 28 January 2019, Order made 28 January 2019, Reasons delivered 26 March 2019.

After the order of 28 January, Applicant applied for reasons. The court file had been misplaced, and it was only when a duplicate file was opened on 22 March 2019 that Millar AJ was in a position to prepare the reasons. The applicant had sought an order to re-open a deceased estate and declare any liquidation and distribution accounts null and void. The application was postponed due to non-joinder and issues relating to the valuations of the properties in the estate being outdated. [Paragraphs 1 – 4]

Millar AJ addressed the conduct of the Applicant and his *pro bono* legal representative and pointed out that while the Applicant was represented *pro bono* by his attorneys, the 1st and 2nd Respondents were not:

> "They [1st and 2nd Respondent] have been put to the expense of having to defend themselves against the relentless pursuit by the Applicant of the re-opening of the estate of the deceased. They have not had the privilege of *pro bono* legal assistance." [Paragrph 13]

Millar AJ criticised the Applicant and his attorney for setting the application down for hearing even though there was a material non-joinder of parties:

> "It is for this reason that … the Applicant was to bear the wasted costs. Having regard to the length of time that the Applicant has pursued this application, the fact that the application is subject to the short comings that it is and that the Respondents were needlessly brought to Court and caused to incur the expenses for doing so, I formed the view that the Applicant ought not to be permitted to re-enroll this particular application until such time as the wasted costs have been paid. In this regard I was mindful of not only the right of the Applicant to have his case heard but also the right of the 1st and 2nd Respondents not to be put to unnecessary and avoidable expense." [Paragraph 17]

Millar AJ remarked that acting for a *pro bono* client would not absolve applicants' of the obligation to provide a professional service to the Applicant and to ensure that their conduct in providing that service does not amount to an abuse of any other party or for that matter the Court. [para 18]

CRIMINAL JUSTICE

SEBOE V STATE 2018 JDR 0227 GP

Case heard 4 September 2017, Judgment delivered 8 September 2017

The appellant was convicted in the Regional Court Pretoria of premeditated murder (count 1), unlawful possession of a firearm (count 2) and unlawful possession of ammunition (count 3). He was sentenced to life imprisonment for the premeditated murder and to 15 years imprisonment for count 2 and one year for count 3. The sentences for count 2 and 3 were to run concurrently with that for murder. The appeal was against conviction and sentence.

Millar AJ (Mothle J concurring) confirmed the conviction. Regarding the sentence for counts 1, 2 and 3. Millar AJ held that while the appellant had a previous conviction for domestic violence three years previously, that would not be indicative that the appellant was inherently violent or posed an ongoing danger to the community. Millar AJ found that the appellant was clearly unable to control his anger, which was considered as a reason for this and the prior conviction. [Paragraph 28]

Regarding the rehabilitation of the appellant, Millar AJ concluded that it was unlikely that the appellant would commit any further violent crimes if he attended a course, or at least that the possibility of him doing so would be minimized. [Paragraph 29] Against this backdrop, Millar AJ concluded that the trial court had overemphasized the interest of the community and was “dismissive” of the personal circumstances of the appellant. Millar AJ further noted that the State did not lead any evidence in the trial with respect to aggravation by the family of the deceased, and therefore did not provide the court a quo with a greater insight into the interest of the specific community where the crime occurred. [Paragraph 30]

Millar AJ therefore concluded that there were “substantial and compelling reasons for the court to have departed from the minimum sentence in respect of count 1 and it should have done so.” [Paragraph 31] The appeal against sentence on count 2 was upheld, and the sentence replaced with a sentence of 10 years imprisonment. The appeal against sentence on count 1 was upheld, and the sentence replaced with a sentence of 25 years imprisonment, of which 5 years were suspended on the condition that the appellant completed an anger management course and did not commit an offence of which violence is an element during the period of suspension. [Paragraph 34]

ADMINISTRATION OF JUSTICE

In **Ex Parte Goosen and Others 2020 (1) SA 569 (GJ)**, an application was brought for Millar AJ's recusal from a full bench appeal. The underlying issue related to a dispute over the admission of advocates under the Legal Practice Act. The Legal Practice council was one of the amici curiae in the case, and Millar AJ's recusal was sought to avoid a perception of bias arising from a conflict of interest due to his membership of an amicus appearing in the matter. [Paragraph 6]. The court found that more than a mere connection" was needed, [paragraph 27] and the application was refused.

MEDIA AND OTHER COVERAGE

Remarks quoted at the Black Lawyers' Association Annual General Meeting in 2018:

"Attorney Anthony Millar noted that fusion would bring advocates closer to clients, which is necessary. Mr Millar said that the direct consequence of fusion would be greater access to justice for the public. He added that fusion would also lead towards a unified legal profession. 'The name advocate is a job description and does not mean that advocates are better than attorneys. When cases are presented in court, the public sees advocates as the face of the profession while attorneys are viewed as the poor cousins. We need to change this,' he said."

- **Mapula Sedutla, "BLA AGM: Fusion is the way to go"", *De Rebus* 1 February 2019 (Available at http://www.derebus.org.za/bla-agm-fusion-is-the-way-to-go/)**

Report of Law Society dismissing complaint of unprofessional conduct against the candidate:

"The Law Society of the Northern Provinces has dismissed a complaint of unprofessional conduct against an attorney whose client earlier this year successfully challenged the fees she was charged by Bobroff & Partners for a Road Accident Fund (RAF) case."

"The Law Society confirmed that this week it held an inquiry into the complaint of touting laid against Anthony Millar, a partner at Norman Berger & Partners, and concluded there was no evidence of unprofessional conduct. … [T]he complaint was laid against Millar last year by the South African Association of Personal Injury Lawyers (Saapil). Ronald Bobroff is the president of Saapil, and Saapil also last year lodged a counter-application in the fee case that Millar's client brought against Bobroff."

"Millar this week asked the Law Society to dismiss the touting complaint, saying it was motivated by malice and spite, because Millar's clients have brought cases against Bobroff's firm."

- **Laura du Preez, "Complaint against Lawyer who challenged high fees dismissed", *IOL*, 9 June 2013 (Available at https://www.iol.co.za/personal-finance/complaint-against-lawyer-who-challenged-high-fees-dismissed-1529227)**

ADVOCATE CASSIM MOOSA

BIOGRAPHICAL INFORMATION

Born: 19 June 1965

BA, University of Durban Westville (1990)

LLB, University of Durban Westville (1990)

Certificate for Prosecutors, Justice College (1991)

Certificate for Direct Marketing, Damelin (1996)

Diploma, Alternative Dispute Resolution, University of Pretoria (2005)

Certificate, Labour Arbitration, AFSA (2005)

Certificate, Divorce Mediation, AFSA (2005)

Post Graduate Diploma in Labour Law, University of Johannesburg (2006)

Certificate in Conveyancing Practice, LEAD (2008)

CAREER PATH

Acting Judge

Gauteng High Court (July – September 2015; October – December 2015; January – April; May, June, July, August, September, October – December 2016; January – December 2017; January – February 2018; April 2018; July – December 2018; February – June, July - December 2019; January – March, June – July, September – November 2020)

Mpumalanga High Court (July – September, November – December 2020)

Advocate of the High Court of South Africa (1993 –)

Legal Consultant, City of Johannesburg (2001 – 2006)

State Advocate, Department of Justice (1992 – 1996)

State Prosecutor, Department of Justice (1988 – 1992)

Instructor, Practice Management, LEAD (2012 – 2016)

Prosecutor, Student Disciplinary Committee, University of Johannesburg (2004 – 2006)

Part-time Lecturer, Institute of Active Learning (1996 – 1998)

Magistrates' Commission (2013 – present)

Commissioner

Member, Legislative Committee

Chairperson, Ethics Committee

Member, EXCO

Spokesperson

Member, NADEL (2013 – 2016)

Instructor, Law Society of South Africa (2012 – 2016)

Member, Provincial Coordinator,

National Bar Council of South Africa (2009)

SELECTED JUDGMENTS

PRIVATE LAW

MHLANGA V MINISTER OF POLICE (41410/2010) [2018] ZAGPJHC 46 (16 FEBRUARY 2018)

Case heard 16, 17, 20, 21, 23, 27 February 2017, Judgment delivered 16 February 2018

The plaintiff sued damages as a result of an incident when members of the South African Police Services arrested the Plaintiff without a warrant. The Court, therefore, had to decide whether the arrest and subsequent detention was unlawful. The plaintiff further claimed damages for the alleged unlawful arrest and detention.

Based on section 40(1) of the Criminal Procedure Act, *Minister of Safety and Security v Kleinhans 2014 (1) SACR 613 (WCC) and Minister of Safety and Security v Sehoto & Another 2011 (1) SACR 315 (SCA),* Moosa AJ identified factors that must be present for an officer to effect an arrest without a warrant:

> "(1) The jurisdictional prerequisites for S 40(1) must be present;
>
> (2) the arrestor must be aware that he or she has a discretion to arrest;
>
> (3) the arrestor must exercise that discretion with reference to the facts
>
> (4) there is no jurisdictional requirement that the arresting officer should consider using a less drastic measure than arrest to bring the suspect before court." [Paragraph 24]

Based on this approach, Moosa AJ found that selling liquor with licence constituted an offence under section 154 (1)(a) of the Liquor Act, and therefore concluded that the arrest was lawful. [Paragraphs 27 - 31].

"What is more telling and in my view the death knell of the Plaintiff's case is the fact that she paid an admission of guilt; which she vehemently denies. It begs the question as to who would be so magnanimous to pay an admission of guilt on behalf of the Plaintiff, in order to secure her release from custody .." [Paragraph 29].

ADMIRE V THE MINISTER OF SAFETY AND SECURITY, UNREPORTED JUDGMENT, CASE NUMBER: 62343/2011 (GAUTENG HIGH COURT, PRETORIA)

Case heard 7, 9 and 10 May 2019, Judgment delivered 28 May 2019.

Plaintiff claimed damages resulting from an alleged unlawful arrest and detention, as well as an alleged assault by the member of the South African Police Services. Moosa AJ held that:

> "It is trite law that the Defendant bears the onus of proof regarding the lawfulness of the arrest. … It is trite that when a court is confronted with two mutually destructive versions, the proper approach would be for the court to consider the aspects of reliability, credibility, as well as the probabilities of the evidence given by the witnesses." [Paragraphs 37-38]

On the basis of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Another* and *Minister of Safety and Security v Sehoto and Another (1) SACR 315 (SCA)*, Moosa AJ concluded that the plaintiff failed to challenge the evidence regarding the exercise of discretion by the arresting officer at the time of arrest. [Paragraph 46] Therefore, Moosa AJ concluded that the arrest was lawful. He based his conclusion on his assessment that the witness of the defendant was reliable and credible, whereby the plaintiff and his witness did not make a good impression on the court – it "cannot be believed" and "cannot pass muster." [Paragraph 48]. Moosa AJ dismissed the claim with costs.

CRIMINAL JUSTICE

IONNAIDES V S (SH 363/2014, SA 8/2018. A18/2018) [2019] ZAGPPHC 280 (3 JUNE 2019)

Case heard 29 May 2019, Judgment delivered 3 June 2019

This was an appeal against the effective sentence of 20 years imprisonment. The Court granted leave to appeal for count 1 – rape of a minor child during the period between 2003 – 2005 (15 years' imprisonment); count 3 – child abuse (5 years imprisonment); count 4 – crimen injuria (5 years imprisonment). The appellant was 75 years old when he was sentenced.

Moosa AJ (Makhubele J concurring) described the circumstances under which a court of appeal might interfere in the sentencing discretion of a lower court. Based on S v Hewitt 2017 (1) SACR 309 SCA which states that age can be a mitigating factor, Moosa AJ concluded that the court a quo did exercise its discretion correctly by deviating from the imposition of the prescribed minimum sentence for the count 1 – rape of a minor. [Paragraph 9]. With regards to count 3 – child abuse, Moosa AJ also upheld the findings of the court a quo. [Paragraph 10]

Moosa AJ then focused on the order by the court a quo that the sentences run concurrently. Based on *S v Munyai 1993 (1) SACR 252 (A), S v Skenjana 1985 (3) SA 51 (1), S v Barendse 2010 (2) SACR 616 ECG* and section 12(1) of the Constitution, Moosa AJ concluded that:

> "[T]he court a quo misdirected itself and thereby caused a disparity between the sentence imposed and the sentence that is proportional to all the relevant facts. It is that the effective sentence of 20 ears imposed would extend beyond the appellant's natural life expectancy and therefore the sentence is shockingly inappropriate. Further, I am of the view that the sentence is vitiated by misdirection, is disturbingly inappropriate, cruel and inhuman." [Paragraph 18]

The Court dismissed the appeal against the sentence on count 1 ,and upheld the appeal against the sentence on count 3. Moosa AJ ordered that the sentence on count 3 run concurrently with the sentence on count 1. The appellant would therefore serve a sentence of 15 years imprisonment.

S V LEBOGANG, JUDGMENT ON SENTENCE, UNREPORTED JUDGMENT, CASE NUMBER SS 052/2018 (GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 8, 9, 11, 12, 15, 16 October and 5, 9, 22 November 2018, Judgment delivered 22 November 2018.

The accused pleaded guilty on 50 counts, including rape (13 counts), robbery with aggravating circumstances, kidnapping and sexual assault. The accused was a taxi driver who kidnapped, raped and sexually assaulted passengers.

After noting the seriousness of the crimes committed, Moosa AJ addressed the issue of mercy as "a component of justice." Moosa AJ cited the judments of *S v Rabie* and *S v SMM,* and concluded that sentencing is generally a matter of discretion left in the hands of the court [Paragraphs 26 – 27]. Moosa AJ held that:

> "The discretion, however, may not be exercised arbitrarily, but reasonably and judicially within the parameters of legislative prescription. Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be retribution and deterrence. Retribution may even be decisive" [Paragraph 28]

Moosa AJ pointed out that the level of crime in society had reached alarming proportions in the society, and found that the accused's abuse of the "pivotal role" of taxis in society constituted an aggravating factor. [Paragraphs 30, 40] After an analysis of the aggravating and mitigating factors, Moosa AJ did not find any compelling circumstances to deviate from the prescribed minimum sentence of life

imprisonment. [Paragraph 50] The accused was sentencedto an effective term of life imprisonment, and ordered to accused to participate in "sex offender programmes offered by the Department of Correctional Services." [Paragraph 63].

KHOZA V S, UNREPORTED JUDGMENT, CASE NUMBER: SS 142 2014 (GAUTENG HIGH COURT,

Case heard 23 May 2019, Judgment delivered 5 June 2019

The appellant had been convicted in the regional court inter alia of rape, and was sentenced to life imprisonment. [para 1] With reference *S v Shackell, S v Molomi and S v Hanekom*, Moosa AJ (Adams J concurring) set out the test for reasonable doubt, and related evidentiary requirements. [Paragraphs 35-37] On this basis, Moosa AJ concluded that:

> "… I am simply unable to place any reliance upon the veracity of the complainant's evidence. On the available evidence, I am of the view that there is a reasonable possibility that the complainant was involved in some form of coitus with someone else prior to her meeting the appellant; and due to the difficult circumstances that she found herself in, both with the police and her family decided to extricate herself from the situation by falsely implicating the appellant." [Paragraph 38]

Moosa AJ held that "the court a quo had misdirected itself in accepting the evidence of the complainant as being satisfactory in all material respects and rejecting and finding that the evidence of the appellant as beyond false, and riddled with improbabilities." [Paragraph 39] Moosa AJ held that the State failed to prove the guilt beyond reasonable doubt, upheld the appeal, and set the convictions and sentences aside.

MR VUYO MTATI

BIOGRAPHICAL DETAILS

Date of birth: 14 February 1971

B.Proc, Fort Hare University (1992)

Certificate Programme in Leadership Development, Wits Business School (2009)

CAREER PATH

Consultant, Derrocks Inc (2019 - to date)

Acting Judge, Gauteng High Court (January – March, October – December 2018; April - November 2019, April – September 2020)

Legal Executive, Legal Aid South Africa (2010 - 2019)

Provincial Head, Legal Aid South Africa (2005 - 2010)

Head of Office, Legal Aid South Africa

Welkom (2004 - 2005)

Qwa Qwa 2001 - 2004)

Partner, Mtati Sehume (1998 - 2001)

Partner, Mtati Mashilo Sesele (1996 - 1998)

Sole proprietor, TV Mtati and Partners (1995 - 1996)

Candidate Attorney, Mhlambi and Company (1993 - 1995)

Chair, Attorneys Insurance Indemnity Fund (2005 - 2007)

Chair, Attorney's Fidelity Fund (2003 - 2005)

Councilor, Law Society of the Free State (1998 - 2005)

Chair, Black Lawyers Association Free State (1996-1998)

Member, SANSCO (1988 - 1992)

Member, Congress of South African Students (1986 - 1987)

Commissioner, Small Claims Court, Soweto (2014 – to date)

Chair, Internal Audit Committee- Eastern Cape Liquor Board (2005 - 2010)

Chairman, Attorney Insurance Indemnity Fund (2002 - 2004)

Chairman, Attorneys Fidelity Fund (2000 - 2002)

Member, Law Society of the Free State (1998 - 2004)

SELECTED JUDGMENTS

PRIVATE LAW

RUSKROMAN BOERDERY (PTY) LTD V JOHANNA LAURENS,UNREPORTED JUDGMENT, CASE NO. A295/2018, GAUTENG LOCAL DIVISION, JOHANNESBURG

Judgment delivered 2 July 2020.

Mr Van Wyk was the sole shareholder and director of the appellant company. He had advanced R 3 350 184.00 to the respondent, with whom he was romantically involved at the time of advancing the money. The appellant's version was that the money was a loan. The respondent contended that the money was advanced gratuitously based on their romantic relationship and as such, she did not have to reimburse the money. [Paragraphs 1 - 4] The court *a quo* granted absolution from the instance to the respondent, finding that the appellant had not made out a prima facie case, and that "the existence of an oral agreement and repayment thereof cannot be reasonably inferred" [Paragraph 5].

On appeal, Mtati AJ found that the appellant had indeed made out a *prima facie* case, and thus the matter should have been heard to finality. There was some evidence suggesting that the respondent had planned to repay the unsecured loan, e.g., in her financial statement she had made a provision for the unsecured loan. [Paragraph 10]

Although the parties had not requested for the case to start *de novo* before a different court, Mtati AJ ordered that the case be heard *de novo* before a different presiding officer:

> "I am aware that the Appellant did not seek an order that the matter commences afresh before another Judge rather that it be remitted to the court *a quo.* In my view, the Court is bound to provide appropriate directives in certain instances especially when such directives are at odds with the ultimate outcome sought" [Paragraph 18]

Mdalana-Mayisela J (Carelse J concurring) concurred with Mtati AJ that the appeal , but disagreed with the order that the matter start *de novo* before another court. Mdalana-Mayisela J disagreed with the finding that the court *a quo* had made a finding on the totality of the evidence. [Paragraphs 25 - 26] Mdalana-Mayisela J found that starting the case *de novo* would visit unnecessary costs on the parties and that the parties had not asked for that specific order. [Paragraph 27]

ADMINISTRATIVE JUSTICE

KEMM AND OTHERS V MINISTER OF ENERGY AND OTHERS (88891/2018) [2019] ZAGPPHC 350 (16 AUGUST 2019)

Case heard 10 - 11 June 2019, Judgment delivered 16 August 2019.

The first and third applicants were board members of the South African Nuclear Energy Corporation Ltd, the second respondent, while the second applicant, Goodluck Shelane was the CEO of the second respondent. [Paragraphs 1 - 2] The issue for determination was the legality of the actions of the Minister of Energy in terminating the tenure of the first and third applicants as directors, and the suspension of the second applicant as the CEO of the second respondent. The court had to determine whether the Minister's actions were classified as executive action or administrative action, the latter being reviewable under the Promotion of Administrative Justice Act (PAJA). [Paragraph 20]

Mtati AJ found that the actions of the Minister were administrative action as they were actions taken under legislation, rather than executive actions that seek to implement policy considerations, and as such reviewable under PAJA. The Minister had taken the decisions under the Companies Act of 2008 and the Nuclear Energy Act of 1999. [Paragraph 22]

> "I am of the conclusion that the letters sent by the Minister to the applicants bears reference to the authority of the Minister, as the sole shareholder to the enabling legislation. The Minister relied on the Companies Act to remove the Applicants from their positions as directors of the Board. .. The conduct of the Minister falls squarely within the prescripts of an administrative action as defined in PAJA." [Paragraph 22]

It was held that the decision by the Minister to remove the first and third applicants was unlawful and thus set aside. However, the Minister had acted in accordance with his powers as provided in legislation in suspending the second applicant, pending a disciplinary hearing. [Paragraph 26-27]

CRIMINAL LAW

THE STATE V SPHAMADLA MBATHA, UNREPORTED JUDGMENT, CASE NO. SS121/2019, GAUTENG LOCAL DIVISION, JOHANNESBURG

Case heard 3-12 August 2020 ; Judgment delivered 20 August 2020.

The accused was charged with four charges including murder, housebreaking with intent to rob and robbery with aggravating circumstances. [Paragraph 1] There was a set of fingerprints lifted at the scene of the crime that matched the fingerprints of the accused. [Paragraph 22] While the circumstances giving rise to the crime had happened on 16 May 2019, the accused on his admission had broken into the house of the complainant on or around February to March 2019 and stolen a television set. The television set had since been recovered by the complainant. [Paragraph 7]

The issue before the court was to determine whether the evidence of similar facts, when looked at in totality had sufficient probative value to outweigh its prejudicial effects. [Paragraph 38] The state argued for a conviction based on the circumstantial evidence of the accused's fingerprints from the incident of 16 May 2019, while the defence argued for a discharge of the accused on the basis that the State had failed to prove its case beyond reasonable doubt, since the accused had offered a reasonable explanation for his fingerprints being at the crime scene. [Paragraphs 36 - 37]

After considering the evidence presented by the State and the burden of proof, the court found that the similar evidence had more probative value than its prejudicial effects. The court found that the accused knew where the television set was, since he had once stolen it, and the pattern used to gain entry was the same in the two instances. The court held that the totality of the evidence was that the only reasonable inference was that the accused committed the crime. [Paragraphs 49 - 51]

Further, the accused was a poor witness. The court found:

> "The accused was not an impressive witness in the eyes of the Court. He was changing the details of his exculpatory version to fit in the evidence of different witnesses. He was not very astute to succeed in the attempt to exculpate himself." [Paragraph 46]

The accused was convicted and sentenced to life imprisonment.

MEMANI V STATE (A576/16) [2018] ZAGPPHC 717 (13 APRIL 2018)

Case heard 1 February 2018; Judgment delivered 13 April 2018.

The appellant had been convicted on charges including culpable homicide, driving under the influence of liquor, corruption and driving without a driver's licence. [Paragraph 1]

Mtati AJ (Maumela AJ concurring) reviewed the evidence presented and found that the State had not discharged its burden of proof. The State did not call expert witnesses or produce any corroboration as to the speed of the vehicle at the time of the accident. The State did not carry out any blood tests to prove that the appellant was drunk and only relied on the evidence of the police officers who testified that the appellant could not walk straight and smelled of alcohol. [Paragraph 20]

On the corruption charge, the testimony of the State was contradictory, while the appellant's version that he was told the money was bail money did not change throughout his testimony. [Paragraph 23]

Mtati AJ partially upheld the appeal and set aside the decision of the magistrate and discharged the appellant on all counts other than that of driving without a valid driver's license. [Paragraph 27]

MS MASHIDU MUNZHELELE

BIOGRAPHICAL DETAILS

Date of birth: 29 February 1972

Bacalereus Iuris, University of Venda (1994)

LLB, University of Venda (1996)

Legal Practical Training, Polokwane Legal Practical Training (1999)

Certificate Programme in Leadership Development, Wits Business School (2009)

CAREER PATH

Acting Judge, Gauteng High Court (November - December 2017; October – December 2018; July – September 2019; January 2020; July – September 2020).

Regional Magistrate, Sibasa (Thoyoyandou) (November 2013 -)

Magistrate, Polokwane Magistrate's Court (October 2006 - October 2013)

Loius Trichardt Regional Court

Regional Court Prosecutor (April 2004- September 2006)

Prosecutor (May 2000-March 2004)

Candidate Attorney, Khathu Mulovhedzi Attorneys (October 1997-September 1999)

Member, Black Lawyers Association (2013 – to date)

Member, ARMSA (2014 – to date)

Member, JOASA (2006 – 2014)

Member and provincial coordinator, SAC-IAWJ (2007 – to date)

Member, Law Society of the Free State (1998 - 2004)

Vice Chairperson, Luvhaivhai Community drop-in Centre in Mutangari village (2014-)

Vice Chairperson, women's league, Apostolic Faith Mission Church of Southern Africa (2012-)

SELECTED JUDGMENTS

PRIVATE LAW

HONNIBALL V MINISTER OF POLICE (38136/2015) [2017] ZAGPPHC 781 (24 NOVEMBER 2017)

Case heard 6 November 2017, Judgment delivered 24 November 2017.

The plaintiff sued the defendant for damages for alleged unlawful arrest and detention, emotional shock and distress. [Paragraph 1] The plaintiff had been arrested and detained for 21 hours for possession of copper which the arresting officer suspected to be stolen property, despite being provided with documentation giving a reasonable explanation on the plaintiff's possession of the copper. [Paragraph 5] The plaintiff alleged that he suffered emotional distress when in custody as some of the other inmates made sexual advances against him. [Paragraph 12] The plaintiff also claimed that less copper was returned to him by the police after the case against him was withdrawn. [Paragraph 14]

Munzhelele AJ held that the defendant had the onus to prove the reasonable suspicion that allowed a police officer to arrest a person without a warrant. The defendant failed to discharge this onus as the plaintiff had produced all receipts giving a reasonable explanation for his possession of the copper. Further, the defendant did not call any employee of ESKOM to substantiate the arresting officer's assertions of reasonable suspicion that he believed that only ESKOM copper had codes. [Paragraph 27]

Munzhelele AJ held that the plaintiff did not prove that he received less copper than as had been confiscated, *inter* alia as he failed to produce a receipt for the weight of the copper, and he did not make a complaint at the time of discharge of the copper. [Paragraphs 39 - 41]

Munzhelele AJ held that the plaintiff had been able to prove the damages caused by the arrest and detention and awarded the plaintiff damages for unlawful arrest and detention in the amount of R80 000, special damages of R25 000 for future medical expenses, and special damages of R15 000 to compensate the plaintiff for instructing an attorney to represent him. Plaintiff was also awarded the costs of the suit. [Paragraph 54]

GRIMBEEK SAMANTHA AMANDA V ROAD ACCIDENT FUND, UNREPORTED JUDGMENT, CASE NO. 57751/14, GAUTENG DIVISION, PRETORIA

Case heard 6 December 2018, Judgment delivered 28 March 2019.

This was an action for damages by the plaintiff against the defendant arising from a motor vehicle accident where the plaintiff sustained a fractured left humerus. The plaintiff's estimated damages were a total of R960 000, made up of past and future medical expenses, past and future loss of income and general damages. The case related to the quantum of damages only, the merits having been settled in favour of the plaintiff. [Paragraphs 1 - 3].

Munzhelele AJ considered expert reports in ascertaining the different heads of damages. [Paragraph 4] One of the main arguments for the plaintiff was that she had dropped out of university as a result of the accident and the related complications from the accident, which hindered her access to employment opportunities. [Paragraph 8]

Munzhelele AJ granted the plaintiff's prayers for present and past medical expenses but found that the plaintiff did not qualify for general damages as she had been experiencing some of the medical conditions, such as migraines, before the accident. Furthermore, her claims were not backed by any medical report to justify the general damages. On the issue of loss of past and future income, Munzhlele AJ remarked that:

> "An enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future without the benefit of crystal ball or soothsayers" [Paragraph 30]

On analysing the reports of the medical experts and failure of the plaintiff to produce an educational therapist report, Munzhelele AJ held that there was no connection between the accident and the plaintiff's discontinuation of education. [Paragraph 34] Munzhelele agreed with experts' opinion that while the plaintiff suffered from Post-Traumatic Stress Disorder, this could have been caused by other factors such as her stressful relationship with her boyfriend. [Paragraph 32]

The plaintiff was awarded damages for past medical expenses, an undertaking for future medical expenses, and past and future loss of income, for a total award of R1 955 065.

CRIMINAL JUSTICE

PHIRI AND ANOTHER V S (A240/ 2017) [2017] ZAGPPHC 1261 (15 DECEMBER 2017)

Case heard 6 November 2017, Judgment delivered 24 November 2017.

This was an appeal against sentence. The first appellant had been convicted of murder and robbery with aggravating circumstances, while the second appellant was convicted on charges of rape and unlawful possession of firearm in addition to the charge of murder and robbery with aggravating circumstances. Appellants argued that they had been denied the right to a fair trial as they had not been informed clearly and properly of the exact nature, details and the consequences of the offences for which they were charged. They argued further that there had been a failure to make reference to the relevant Act in respect of the minimum sentence on their indictment. [Paragraphs 1 – 2, 9 - 11]

Munzhelele AJ (Janse van Nieuwenhuizen J and Cambanis AJ concurring) upheld the appeal, finding that it was unfair for the appellants not to be informed of the applicability of the Criminal Law Amendment Act. [Paragraph 22]. Munzhelele AJ held that:

> "The offences of the case in question occurred on 22 March 2001. The Act became applicable on or after 1 May 1998. Thus, the appellants should have been informed about the applicability of the Act and the sentence consequences thereof. The charge sheet should have been read with the provisions of the Act, particularly because at the time of this trial the Act was still new and most people were not familiar with its application. ..." [Paragraph 16]

> "Thus, it is unfair for the appellants not to be informed, either through the charge sheet or during plea proceedings or at the trial with regard to the applicability of the Act. To be informed about such a patently serious matter at the end of a trial as it happened in this case, defeats the very purpose envisaged by s 35(3) of the Constitution. Put simply, such would be a trial by ambush which is neither desirable nor permissible in a constitutional democracy underpinned by a Bill of Rights." [Paragraph 22]

The appeal against sentence was thus upheld, and the sentences set aside and replaced with effective sentences of 30 years' imprisonment in respect of each appellant. [Paragraph 32]

MAHLANGU V STATE (383/2017) [2019] ZAGPPHC 35 (25 FEBRUARY 2019)

Case heard 5 November 2018 ; Judgment delivered 25 February 2019.

The appellant had been convicted on the charges of housebreaking with intent to rob and robbery with aggravating circumstances. On appeal, he contended that the trial court had misdirected itself by convicting him without reliable identification evidence. [Paragraphs 1, 3]

The appellant submitted that there was no proper identification in the state witness evidence and further that the person who apprehended him was not called to testify. The recovered items that were alleged to be found on his person, tying him to the break-in, were also not identified with specific features. [Paragraph 7]

Munzhelele AJ (Nair AJ concurring) upheld the appeal on the basis that the state had not discharged its burden of proof of proving beyond a reasonable doubt that the appellant committed the crime. The state did not carry out any further investigation to establish the ownership of the car keys and the cellphone that the victim alleged belonged to them, while the appellant offered a reasonable explanation for his possession. [Paragraphs 13-15] An identification parade was also not conducted. [Paragraph 12] Munzhelele AJ held:

> "This high standard of proof universally required in civilized systems of criminal justice is a core component of the fundamental right to a fair trial enjoyed by every person in accordance with the Constitution, and in line with common law…….The convictions based on suspicions or speculation is the hall mark of a tyrannical system of law" [Paragraph 16]

The appeal was upheld, and the conviction and sentences were set aside.

ADVOCATE PORTIA DIPUO PHAHLANE

BIOGRAPHICAL DETAILS

Date of birth: 4 February 1968

B.Proc, Vista University (2000)

LLB, Vista University (2002)

CAREER PATH

Acting Judge, Gauteng High Court (November- December 2017; March 2018; July-September, October- December 2019; January-March, April-June, July-September, October -December 2020)

Advocate, (2003 – to date)

Independent marker, UNISA (2016 – to date)

Member, Church Square Association of Advocates (February 2003 -)

SELECTED JUDGMENTS

PRIVATE LAW

P AND ANOTHER V V (47202/2019) [2020] ZAGPPHC 41 (27 JANUARY 2020)

Case heard 27 January 2020, Judgment delivered 27 June 2020.

The application was by the first Applicant, who was the biological father to a 3-year-old minor, to confirm his parental responsibilities and rights including the right of guardianship. [Paragraph 1] First applicant also sought that the second applicant, the child's grandmother, be given unsupervised contact with the minor child. [Paragraph 10] The respondent, who was the child's mother, opposed to the application, especially with regards to the second applicant. The respondent was not opposed to the first applicant being awarded full parental rights. [Paragraph 6]

Relying on the case of Townsend-Turner & another v Morrow 120031 JOL 12035 (C), counsel for the respondent argued that the second applicant had no rights to the minor child. In *Townsend*, the court held that the law conferred no entitlement on anyone other than the legitimate parents of children to have access to them. Both counsel however submitted that *Townsend* was superseded by the Children's Act. [Paragraphs 9 - 10]

Phahlane AJ held that the court had a duty to safeguard the best interests of the child. Relying on the Family Advocate's interim report, Phahlane AJ held that the first applicant has visitation rights as provided in the recommendations of the report.

Regarding the second applicant, Phahlane AJ found:

> "… I am of the view that the second applicant has not made out a case which entitles her to claim all parental responsibilities and rights, as well as extensive contact she wants to have, with the child. It is also my view that it is not in the best interest of the child to grant the second applicant such rights." [Paragraph 22].

First applicant was awarded full joint parental responsibilities and rights with the respondent in respect of the minor child. Pending the final report of the Family Advocate, specific parental responsibilities and rights towards care and primary residence were awarded to the Respondent, subject to specified rights of unrestricted contact being awarded to the First Applicant. The application in respect of the second applicant was dismissed with costs.

ADMINISTRATIVE JUSTICE

MINISTER OF HOME AFFAIRS AND ANOTHER V MAHINGA (A653/2017) [2020] ZAGPPHC 437 (12 AUGUST 2020)

Case heard 19 February 2020, Judgment delivered 12 August 2020.

This was an appeal against a judgment setting aside the appellant's decision to revoke the citizenship of the respondent, on the grounds that it had been obtained unlawfully and in violation of the Citizenship Act. The respondent was a Congolese national who had become naturalized through marriage to a South African citizen. [Paragraph 3]

Phahlane AJ (Makhubele and Maumela JJ concurring) found that the court *a quo* had misdirected itself in relying on the decision in *Khoza v Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government*, and thereby committed a material error of law by applying the principles of a case which was distinguishable and not applicable to the facts before it. Phahlane AJ found that the court *a quo* had misdirected itself in finding that the Minister based his decision to revoke the respondent's citizenship on the facts which were never verified. [Paragraph 10]

Phahlane AJ found that there was a dispute of fact and that the *Plascon-Evans* rule was therefore applicable. The dispute arose because the Minister had addressed several concerns to the respondent and the respondent had not responded to these concerns. The concerns related to respondent's marriage being illegal and the circumstances surrounding his entry into the country. [Paragraph 16]

> "It therefore appears that on the objective facts, it is as a result of this failure to respond, that the Minister took a decision to revoke the respondent's citizenship. The fact that the respondent's marriage to Mfuku was a marriage of convenience, on the version of the Minister, must in terms of the ***Plascon-Evans*** rule be accepted" [Paragraph 18]

The court upheld the appeal and held that the decision of the court a quo to set aside the decision of the Minister was wrong and should be overturned. [Paragraph 22]

CRIMINAL JUSTICE

S V SITHOLE (CC54/2019) [2019] ZAGPPHC 497 (22 AUGUST 2019)

Case heard 12-15 August 2019, Judgment delivered 22 August 2019.

This was a judgment sentencing the accused following his conviction for culpable homicide. The accused had admitted to a crime of passion where, he had found the deceased, a woman he was in a relationship with, in bed with another man. He had asked the deceased to leave, the deceased tried to embrace him, and he pushed her. The deceased fell and hit the wall unconscious. He left and hours later when he came home, that is when he realized that the deceased was unconscious. He disposed of her body by wrapping it with a blanket, placing it in a box and dropping the box near the stream at a park. [Paragraph 7]

Phahlane AJ held that the offence of culpable homicide does not have a prescribed minimum sentence and that each case is judged on its own merits. The sentence should be blended with an element of mercy. [Paragraph 12]

> "…. [N]ot only will it strike a balance between the interests of the accused vis a vis those of society and the offence but will also look at the purposes of punishment. I have also indicated that in passing sentence, such should be blended with an element of mercy." [Paragraph 18]

Phahalane AJ accepted that the accused was remorseful and had shown genuine remorse during the trial. [Paragraph 16] An aggravating factor for the accused was that he tried to dispose of the body which could be said to defeat the ends of justice, though the accused was not charged with this offence. [Paragraph 17]

Phahlane AJ held that no evidence had been adduced to suggest a history of domestic violence between the accused and the deceased or between the accused with anyone else. [Paragraph 19] Phahlane AJ took into account the personal circumstances of the accused, in particular, the fact that the accused was a first offender, had pleaded guilty, was remorseful, and had spent a year and two months in custody. [Paragraph 20]

The accused was sentenced to 6-years imprisonment, 2 of which were suspended for a period of 5 years, on condition that the accused not be found guilty of culpable homicide during the period of suspension.

HENDRICK CHIKANE V THE STATE, UNREPORTED JUDGMENT, CASE NO A287/2019, GAUTENG HIGH COURT, PRETORIA

Judgment delivered 1 June 2020.

This was an appeal against conviction and sentence, the appellant having been convicted on a charge of rape under the Criminal Law (Sexual Offences and Related Matters) Amendment Act. [Paragraph 1] The appellant had been found in bed with the four-year-old complainant by the community. The complainant did not have any underwear on, and the appellant was half-naked and was found only wearing underwear and a t-shirt. [Paragraph 3]

Phahlane AJ (Bam J concurring) dismissed the appeal against conviction, holding that:

> "The trial court having taken into consideration the totality of the evidence presented before it, which is inclusive of Dr Obisi's evidence; the probabilities and improbabilities, the fact that the appellant was found naked even when he was found and went outside his room, held that the only reasonable inference to be drawn in the circumstances was the appellant raped the complainant" [Paragraph 19]

Phahlane AJ also dismissed the appeal against sentence, finding that the appellant was warned of the provisions of Minimum Sentencing Act on several occasions during the trial. Further, Phahlane AJ held that the fact that the appellant was a first-time offender did not amount to a substantial and compelling circumstance requiring the trial court not to impose the minimum sentence of life imprisonment.

> "Though the trial court did not pronounce on the aspects of mitigating factors vis a vis the aggravating factors, I am of the view that the aggravating factors of this case far outweigh the mitigating circumstances" [Paragraph 27]

The appeal was dismissed.

ADVOCATE BRAD WANLESS SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 28 June 1962

BA, University of Kwa-Zulu (1983)

LLB, University of Kwa-Zulu (1985)

Diploma in Maritime Law, University of Kwa-Zulu (1987)

CAREER PATH

Acting Judge

Gauteng High Court (August – September 2015; July – August 2016; July – August 2017; January – February, April – June, October – December 2018; February – March, April – June, July – August, September – October, October - December 2019; January – March, April – May, June, August – September, October, November – December 2020; February 2021).

KwaZulu-Natal High Court (March - April 2012)

Advocate

Senior Counsel (2016 -)

Senior Counsel, Society of Advocates for KwaZulu-Natal (2011 – 2016)

Junior counsel, Society of Advocates for KwaZulu-Natal (1990 – 2011)

Public Prosecutor, Department of Justice, 1988 – 1990

Member, Legal Practice Council (2019 –)

Member and sub-committee committee member, Society of Advocates for Kwazulu-Natal (1990 – 2016)

Director, EnterAfrica (Pty) Ltd (2016 –)

Director, Enana Online (Pty) Ltd (2017 – 2018)

SELECTED JUDGMENTS

PRIVATE LAW

PIENAAR V ROAD ACCIDENT FUND (2011/43693) [2015] ZAGPJHC 205 (11 SETEMBER 2015)

Case heard 25 August 2015, Judgment delivered 11 September 2015

This was an action instituted against the Road Accident Fund, for damages arising from a motor vehicle collision. The court had to decide on whether the defendant was liable to compensate the plaintiff, and on whether the damage had to be apportioned between the parties.

Wanless AJ analysed the evidence of the witnesses, and then set out the applicable law. In particular, Wanless AJ held that it was the duty of all road users to keep a proper lookout, including the checking of rear view mirrors [Paragraphs 57 – 58]. There was also a "stringent duty" on drivers turning across oncoming traffic, due to the inherently dangerous nature of the manoeuvre. [Paragraph 59].

Wanless AJ then analysed the most probably version of how the collision had occurred [Paragraph 61 ff], and found that it was "improbable" that the insured driver had indicated their intention to turn right, as "it is improbable that a driver would commence indicating to execute a right turn some 200 metres prior to the intersection where that driver intended to turn." [Paragraph 68]. In any event, the insured driver had failed to keep a proper lookout and take the necessary precautions [Paragraph 69]. The insured driver had therefore been negligent, and that negligence was a cause of the accident [Paragraph 70].

What remained to be considered was whether this negligence was the sole cause of the collision, or whether the Plaintiff had also been negligent. Wanless AJ noted that the Plaintiff had not given evidence, since the head injury sustained in the accident meant the plaintiff had no direct memory of the incident. [Paragraph 72]. Wanless AJ found that:

> "[T]here is no evidence before this court of any negligence whatsoever on behalf of the Plaintiff. Further, simply because the Plaintiff collided with the rear of the insured vehicle does not, to my mind, draw the sole inference that the Plaintiff must have been, to one degree or another, negligent. … On the same facts the exact opposite inference may be drawn, namely that the insured driver turned suddenly from the left hand lane into the right hand lane … directly into the Plaintiff's path of travel causing the collision. …" [Paragraphs 73 – 74]

Wanless AJ held that the negligence of the insured driver had been the sole cause of the collision. The defendant was therefore held to be liable to the plaintiff for all the agreed or proven damages.

GEORGIOU V TYRES 2000 (HERIOTDALE) PTY LIMITED (33788/2014) [2015] ZAGP JHC 206 (16 SEPTEMBER 2015)

Case heard 27 August 2015, Judgment delivered 16 September 2015

The plaintiff was claiming payment from the defendant in the sum of R354 959 arising from an oral agreement entered between the parties. The plaintiff refurbished and renovated the property of the defendant and through a representative of the defendant, the defendant undertook to pay for the refurbishment. The court had to decide whether the parties had agreed that the defendant would be

reimbursed for his expenses before reimbursing the plaintiff's costs, after which the parties would split the profit equally. Second, the court had to decide on whether the amounts claimed as expenses by the defendant should be accepted, and whether the defendant was liable for the claimed amount by the applicants.

Wanless AJ first dealt with the correct approach in cases where there are conflicting factual versions. In such cases, various factors are considered, including the credibility of the witnesses; the evaluation of each party's version and whether the party bearing onus has discharged such a function. In evaluating the evidence, Wanless AJ found it improbable that the parties would have agreed to reimbursing the defendant before the plaintiff. The court further found that it was more probable that the plaintiff would not have put herself at risk by agreeing to a term whereby the defendant would be reimbursed before she was. [Paragraphs 55 – 57]. Wanless AJ found that it was an implied term of the agreement that both parties would be reimbursed their costs before sharing the profits. Wanless AJ held that such an interpretation was one that gave business efficacy and in addition, satisfied the "officious bystander" test. [Paragraphs 58 – 59].

On whether the claim by the defendant for interest on an overdraft should be accepted, Wanless AJ found:

'To my mind it is clear that it should not. Despite having had the opportunity to do so the Defendant elected not to place any documentary evidence or evidence of a witness who had personal knowledge thereof before this court to show that this amount was, in the first instance, correct and more particularly, that it was legitimately incurred in relation to the purchase of the property. In the premises, there is nothing before me which could enable me to find that this amount can be claimed by the Defendant as an expense incurred in the purchase of the property.' [Paragraph 64]

The Plainitiff's claim was upheld.

SLABBERT V DU PLESSIS (A5052/2018) [2019] ZAGPJHC 190 (3 JUNE 2019)

Case heard 27 May 2019, Judgment delivered 3 June 2019

This was an appeal against a judgment granting the respondent (applicant in the court *a quo*) had been granted declaratory relief in relation to immovable property. The parties had "either wittingly or unwittingly (it not being necessary to decide) were part of a massive fraud perpetuated by Brusson Finance (Pty) Limited ". [Paragraph 3]. Appellant was ordered to pay costs on the attorney and client scale.

The main issue before the court on appeal related to an alleged oral agreement that purported to replace a written agreement on the transfer of the immovable property. The respondent had borrowed some funds from the appellant for a business venture against the security of her home. Several similar cases by the appellant had been declared fraudulent and unlawful by courts. The appellant argued that pursuant to the demise of the scheme, the parties had entered into an oral agreement, which in essence replaced the invalid agreement. The court *a quo* had concluded that since the transfer of ownership from the respondent to the appellant was occasioned by fraud, such transfer was of no force and effect, despite the alleged agreement. The appellant was therefore never at any stage the lawful owner of the immovable property. [Paragraph 9].

Wanless AJ (Matojane and Wright JJ concurring) held that there was nothing in the case to show that the court *a quo* misdirected itself in granting the respondent the relief sought. The court declined to consider whether there was a dispute of fact raised on the papers on whether the oral agreement was entered, since such agreement had no effect. Subsection 2(1) of the Alienation of Land Act required a deed of alienation to be signed by the parties to effect transfer of property. Since the appellant was relying on an oral agreement, and that no written agreement existed, the purported sale was of no effect. [Paragraph s 12 – 14].

Wanless AJ held that since the underlying agreement to pass ownership was tainted by fraud, ownership did not pass. Wanless J found further that:

> "The Appellant's Notice of Appeal raises a plethora of issues and consists of no less than 18 pages (excluding the annexures thereto). Each and every issue as set out therein has not (for obvious reasons) been specifically dealt with in this judgment. The principal reason therefor is that, once again in light of the fact that the transaction which took place is invalid, being tainted by fraud, it is unnecessary to do so, alternatively, these issues were either abandoned by the Appellant on appeal or were not argued with any real "conviction"." [Paragraph 18]

Wanless AJ turned finally to the question of costs:

> "... As a result thereof the Respondent has, once again, incurred unnecessary legal costs. In this regard the fact that the court *a quo* adopted what could well be described as a conservative approach in granting the Appellant leave to appeal on the basis that the Appellant had shown that a court of appeal may have come to a different decision (without stating any reasons therefor), does not diminish the culpability of the Appellant in proceeding with this appeal. Nor does it provide any sustenance for an argument that this court should, in dismissing this appeal with costs, deviate from the scale of costs as awarded by the court *a quo*.' [Paragraph 21]

The appeal was dismissed with costs awarded on the scale of attorney and client.

CRIMINAL JUSTICE

MORTON V S (RC35/2017; A367/18) [2020] ZAGPPHC 221 (26 MARCH 2020)

Case heard 6 February 2020, Judgment delivered 26 March 2020

Appellant was charged and convicted (based largely on a confession) on five counts (kidnapping, robbery with aggravating circumstances, murder, unlawful possession of a firearm, and unlawful possession of ammunition) in the Regional Court, by a magistrate sitting with two assessors. [Paragraph 1]. The accused was sentenced to an effective term of life imprisonment, with a fixed a non-parole period of 25 years in respect of the murder count. [Paragraph 2]. This was an automatic appeal against conviction and sentence.

Wanless AJ Sardiwalla J concurring) rejected argument that as a firearm had not been used to kill the deceased, and as the fatal injuries had occurred after the robbery, the court *a quo* had erred in convicting of robbery with aggravating circumstances, and should have convicted him of robbery only:

> "It is clear that the State never relied upon the wielding of a firearm during the commission of the robbery as an aggravating circumstance ...This is clear from the charge sheet … With regard to the injuries inflicted by the Appellant upon the deceased and which caused his death, there can be no doubt that these amount to the infliction of grievous bodily harm. …" [Paragraphs 16 – 17]
>
> "[T]he submission that the injuries were only inflicted after the commission of the robbery, cannot be correct. It must be common cause that the perpetration of the robbery only came to an end after the injuries were inflicted and the Appellant finally deprived the deceased of the deceased's motor vehicle... Hence, the infliction of grievous bodily harm took place during the robbery. However, even if this is incorrect and the injuries were sustained by the deceased after the robbery had been committed the Respondent has still proved that the Appellant is guilty of robbery with aggravating circumstances. …"

Regarding the appeal against sentence, Wanless AJ found that the appellant's circumstances "aree best described as "unremarkable" in the sense that they do not provide any mitigating factors in respect of sentencing." [Paragraph 25]. Wanless AJ considered the Probation Officer's report, and held that:

> "no truly convincing reasons why the court a *quo* should have departed from the prescribed minimum sentence of life imprisonment in respect of the Appellant's conviction on the charge of murder (Count 3). No mitigating factors are present. On the other hand, aggravating circumstances abound. ... Not only was the murder of the deceased carried out in a brutal and callous manner but the actions of the Appellant thereafter only serve to illustrate the heinous nature of the deceased's murder. …" [Paragraph 29]

The appeal was dismissed.

ADVOCATE BRUCE BEDDERSON

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 11 May 1968

BA, University of Durban Westville (1991)

LLB, University of Durban Westville (1994)

CAREER PATH

Acting Judge, KwaZulu-Natal High Court (August - September 2018; June 2019; March, August – September, October – November 2020; January – February 2021).

Advocate (1999 -)

Attorney
Admitted 9 June 1997
Professional Assistant, Vassit Sewpal (1997-1999)

Candidate Attorney, Vassit Sewpal |1995

Member of the Society of Advocates of KwaZulu-Natal

Advocacy trainer and lecturer for the Society of Advocates of KwaZulu-Natal

Member of Selection Panel for Pupil Advocates for the Society of Advocates of KwaZulu-Natal

Oral Examiner for Motion Court Practice for Pupil Advocates

Chairperson of Tax Appeal Board

[No dates given]

SELECTED JUDGMENTS

COMMERCIAL LAW

CONNINGHAM AND ANOTHER V CSG HOLDINGS LIMITED (9193/19P) [2020] ZAKZPHC 48 (28 AUGUST 2020)

Case heard 20 August 2020, Judgment delivered 28 August 2020

Applicants sought to have a restraint of trade clause in a Sale of Shares Agreement (which they had concluded with the Respondent) declared unconstitutional, contrary to public policy, of unreasonable duration and extent, and set aside. Respondents argued that the agreement included an agreement to arbitrate, which was applicable to the dispute, and therefore the application should be dismissed or alternatively stayed pending the finalisation of the arbitration proceedings. [Paragraphs 1 – 2]

Bedderson AJ found that the terms of the arbitration agreement were wide enough to enable an arbitrator to rule on whether the dispute fell within the scope of the arbitration agreement. [Paragraph 19] Bedderson AJ found further that the arbitration agreement only established two situations where the parties were not precluded from having access to courts, namely, to obtain an interdict or any urgent relief. This application dd not fall into either category. [Paragraph 20] Bedderson AJ further rejected a submission that a finding of invalidity of the restraint of trade clause would result in the entire agreement being invalidated, since a clause provided for "the severability of each and every provision of the agreement". [Paragraph 21]

Bedderson AJ further rejected an argument that the arbitrator did not have the power to determine the issue of the penalty imposed, since the agreement provided for the arbitration to be conducted in accordance with the rules of the Arbitration Foundation of Southern Africa (AFSA):

> "Where parties have agreed that the rules governing arbitrations under the auspices of AFSA apply, article 11 of the Commercial Rules of AFSA provides that the arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical and final determination of all the disputes raised in the proceedings. ..." [Paragraph 23]

Bedderson AJ held that the application be stayed pending the outcome of arbitration proceedings to decide the dispute.

ADMINISTRATIVE JUSTICE

SEAL CHEMISTRY (PTY) LTD V CAPSTAN TRADING AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. 6047/2015 (KWAZUL-NATAL HIGH COURT, DURBAN)

Case heard 7 September 2018, Judgment delivered 21 December 2018

The Applicant sought a prohibitory and mandatory interdict against the first respondent, Capstan Trading and the second respondent, Ethekwini Municipality. The crux of the matter was the

compliance with a mandatory interdict granted against the previous owner of the first respondent's property. In terms of the interdict, the then owner was directed to take steps to remedy an unstable embankment wall, which was the common boundary between the two properties. The matter was further complicated due to subsequent sales of the relevant property before compliance with the interdict. As the matter had not been rectified in compliance with the interdict, the applicant launched an application against the first respondent, the new owner of the property, and the second respondent, the municipality who regulated construction. [Paragraphs 1-10]

Bedderson AJ held that neither the first respondent nor the second respondent were party to the original interdict application. However, the first respondent by its conduct acknowledged that it was bound to comply with the original interdict. Moreover, the second respondent had an obligation under the Building Standards Act to regulate all construction of buildings in its jurisdiction. [Paragraphs 30-38]

Bedderson AJ found that the applicant had no authority to supervise the building activities on the first respondent's property. This authority fell under the jurisdiction of the second respondent. In this regard, it was not competent for the court to grant an interdict against further construction taking place on the respondent's property, as the second respondent has granted approval for the building plans and the applicant had not challenged the validity of those plans. Furthermore, the court did not have the power to prevent the second respondent from granting an occupation certificate. To do so would usurp the functions of the second respondent. [Paragraphs 28, 39]

Bedderson AJ ordered the first respondent to comply with the obligations set out in the interdict, as it had undertaken to do. The second respondent could not abdicate its duties and responsibilities under the Building Standards Act and was obliged to ensure compliance therewith. Thus, the second respondent was ordered to appoint a Building Control Officer to inspect and ensure compliance with this order. [Paragraphs 46-49]

CRIMINAL JUSTICE

PHUMLANI OSCAR MKHWANAZI V THE STATE, UNREPORTED JUDGMENT, CASE NO. AR 365/2018 (KWAZUL-NATAL HIGH COURT, DURBAN)

Case heard 7 June 2019, Judgment delivered 4 July 2019

The appellant had been charged with one count of murder. He pleaded not guilty. He was subsequently found guilty and the court *a quo* imposed a sentence of fifteen years imprisonment. The appeal was against sentence only.

Bedderson AJ (Jappie JP concurring) held that the Magistrate had failed to consider the sentencing requirements in the case of *S v Zinn.* Hence she did not sufficiently deliberate on the mitigating factors of the appellant's case. It was common cause that the appellant was a first time offender. He was a relatively young man at the time of the commission of the offence. He gained nothing from the commission of the offence and was gainfully employed at the time. He had three minor children under

his care. These were personal circumstances that warrant consideration for a lesser sentence. Moreover, the Magistrate had failed to adequately contemplate the role the consumption of alcohol had played and importantly, the appellant's prospects of rehabilitation. Accordingly, the imposition of fifteen years was excessive and harsh.

The appeal succeeded, and the sentence was set aside. The appellant was sentenced to twelve years imprisonment, half of which was suspended for five years.

SIBONISO HLABISA V THE STATE, UNREPORTED JUDGMENT, CASE NO. AR 620/2017 (KWAZUL-NATAL HIGH COURT, DURBAN)

Case heard 7 June 2019, Judgment delivered 28 June 2019

The Appellant was charged with the rape of a minor, who was approximately 6 years old. The appellant pleaded not guilty but was subsequently found guilty by the court *a quo* and sentenced to life imprisonment. The appeal was against sentence only. [Paragraph 1]

Bedderson AJ (Jappie JP concurring) held that it was trite that an appeal court could interfere with the sentence if there was a material misdirection, irregularity or if the sentence imposed was disturbingly shocking or startingly inappropriate or that it induced a sense of shock. In this matter, the court *a quo* was bound to impose a life sentence unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. [Paragraph 12]

Bedderson AJ held:

> "It is clear from the reading of the judgment on sentence that the Learned Magistrate over emphasised the seriousness of rape of young children. He failed to balance the factual circumstances that led to the commission of the rape in question. It is common cause that the rape took place during a traditional ceremony held at the complaint's homestead over a weekend where considerable amounts of alcohol were being consumed. … [The accused] stated that he started drinking from about 08h30 that morning and only stopped consuming alcohol at the time of the arrest. It is quite clear from the aforegoing that one cannot ignore the role that the consumption would have played inn the commission of the offence which the Learned Magistrate simply ignored." [Paragraph 15]

Bedderson AJ found that the appellant had consumed excessive amounts of alcohol. He was 31 years old and had two minor children. A life sentence was the harshest sentence that could be imposed, and, in those circumstances, it denied the appellant the possibility of rehabilitation. Those factors and the possibility for rehabilitation provided substantial and compelling reasons for imposing a lesser sentence. A sentence of 18 years was held to be sufficient and would send a message to the community that rape, especially of a minor, would be met with a severe sanction.

The appeal was upheld, and the Appellant is sentenced to 18 years imprisonment.

MR. BURT LAING

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 11 June 1959

BA, University of (KwaZulu) Natal (1977 – 1980)

LLB, University of (KwaZulu) Natal (1981 – 1982)

Diploma in Theology, Durban Christian Centre (2003 – 2005)

Advanced Certificate in Insolvency Litigation and Administrative Practice, University of Pretoria (2010 – 2011)

CAREER PATH

Acting Judge, KwaZulu Natal Local Division of the High Court, Durban (September – October, December 2015; January, April 2016; April, July – August, September, October, December 2017; January, April, May – July, September 2018; March 2020)

Acting Magistrate, Pinetown Regional Court

Sole Proprietor, Laing and Associates (2008 – to date)

Partner, Laing, Frank and MacDonald (1986 – 2008)

Partner, Laing and Frank (1986)

Professional Assistant, Farouk Vahed and Co. (1985 – 1986)

Articled Clerk, Farouk Vahed and Co. (1983 – 1984)

Black Lawyers Association

Exco member (2013 – 2016)

Convenor, Newly Admitted Attorneys Committee (2013 – 2015)

Member (1996 – to date)

Member, Association for Black Business Rescue and Practitioners of South Africa (2013 – 2017)

Member, KwaZulu Natal Law Society (1985 – to date)

Chairman and Member, Sparks Estate Community Centre

Elder/ Member, Bethel Assemblies of God Church, Sydenham

Chairman, Appeals Board of a SAFA (South African Football Association) Affiliate (Durban Central Football Association)

SELECTED JUDGMENTS

PRIVATE LAW

MASWABI V MINISTER OF POLICE, UNREPORTED JUDGMENT, CASE NO. 13682/2014, KWAZULU NATAL HIGH COURT, DURBAN

The plaintiff alleged that he was assaulted by policemen following his arrest for the possession of marijuana and claimed damages for assault ad wrongful arrest and detention. [Paragraphs 1 – 3]

With regards to the issue of being lawfully arrested for the possession of marijuana, Laing AJ found that the plaintiff was indeed guilty of possession. Therefore, the plaintiff's arrest was lawful. Laing AJ found:

> "[T]he plaintiff paid an admission of guilt [of] R100, and he effectively admitted his possession. There is no suggestion of compulsion or that he paid the fine just to get out of prison. If he was compelled to do so, then one would have expected his attorneys to appeal that decision and request repayment of the R100. There was no explanation as to why it was not done despite the passing 5 years." [Paragraph 24]

Regarding the issue of the assault, the plaintiff alleged that the policemen on duty had physically assaulted him and his friends with undue force and aggression that left him with minor injuries [Paragraphs 5 – 8]. The plaintiff alleged that the policemen had assaulted him because they were angered by the plaintiff's refusal to provide his personal details and because the plaintiff encouraged his friends not to confess [Paragraphs 29 – 31].

The plaintiff underwent a medical examination following his arrest to determine the extent of his injuries. However, the medical examination and testimony provided by the doctor did not corroborate the severity of the attack alleged by the plaintiff. [Paragraph 36]. Laing AJ found that there were "many unanswered questions and concerns" [paragraph 38/48] relating to the plaintiff's injuries and found that the injuries may have been sustained from an incident that took place prior to the plaintiff's arrest. [paragraph 37/47] In response to the plaintiff's allegations, the defendant denied that the policemen on duty had assaulted the plaintiff in this manner. [Paragraphs 14 – 21]. Rather, the policemen on duty claimed that the plaintiff was "noisy and uncooperative" [Paragraphs 14 – 21].

Laing AJ held that the plaintiff's testimony was unreliable [paragraph 32], and that the plaintiff's reasons as to why he believed that he was assaulted did not make sense. [Paragraph 33]. Laing AJ held:

> "If the plaintiff was in such an intoxicated state coupled with his belief that he was entitled to use dagga, the probabilities are that he would be obstructive and not co-operate." [paragraph 34]".

The claim was dismissed with costs.

COMMERCIAL LAW

EBRA-LINK LOGISTICS (PTY) LTD V GREAT BRIDGE LOGISTICS CC, UNREPORTED JUDGMENT, CASE NO. 5863/2017, KWAZULU NATAL HIGH COURT, DURBAN

The applicant applied for the provisional winding up of the respondent's business in terms of section 345(1)(a) of the Companies Act, following an alleged failure by the respondent to pay a debt owed for services rendered. [Page 1 – 2]. There was no dispute as to the fact that services were rendered by the applicant and that those services cost R516 876.00. [Page 2] The respondent disputed several aspects of the applicant's case, and claimed that the applicant was trying to defraud him with the help of a third party who had allegedly been the subject of a fraud report. [Page 3].

Laing AJ dismissed this claim as there was no evidence to corroborate it. Laing AJ held that this was an attempt by the respondent to self-corroborate his claim and to prove that an agreement existed to make the third party liable for the debt owing to the applicant. [Page 3].

The respondent argued further that the debt was not owed because the applicant's representative had telephonically agreed to remove all the debits for which the respondent did not receive payment and would instead debit the account and/ or business of a third party to release the respondent from his debts. [Page 4]. Laing AJ found that this did not corroborate the claim that the applicant and the third party had collaborated to defraud the respondent, as this agreement was an attempt to release the respondent from the debt. Remarking on this agreement, Laing AJ held that:

> "The implication from this allegation … is that the applicant is indeed an innocent party and not a party to fraud as alleged. One would have expected the respondent to deny liability and not assist the applicant to point out the correct debtor"

The applicant denied this allegation and seeing that there was no other evidence of this novation agreement, Laing AJ held that the applicant was a creditor to the third party. [Page 4].

The respondent further alleged that the written contract requiring him to pay his debt to the applicant was compromised by the applicant's representative. [Page 4]. However, the respondent failed to furnish sufficient evidence to support this claim. The respondent tendered a portion of the fees owing to the applicant on a conditional basis. However, Laing AJ suggested that this was done to strike a bargain was evidence of the respondent acting in bad faith because if any form of payment was due, it should have been due and paid unconditionally. [Page 5]. Laing AJ held further that the respondent did not attempt to furnish financial statements to prove solvency, and this failure corroborated the applicant's claims. [Page 6]. The respondent also alleged that the applicant was abusing the court as the applicant was aware that the debt was disputed, but Laing AJ held that there was no prima facie evidence to support this claim [Page 7].

Thus, the remaining issue in dispute was whether the notice should have been brought in terms of section 69(1) of the Close Corporations Act, and whether failure to refer to the correct piece of legislation significantly or materially affected the nature of the application [Pages 2, 6]. Laing AJ held that:

> "The intention and purpose of this legislation is to provide a warning of the possibility of [being] wound up in the event of a failure to make payment. In this particular case, the defence put up, on receipt of the notice, is that the debt is not due by the respondent. It did not deal with the issue of its insolvency. There is thus no prejudice to the respondent as it would make no difference if the notice indicated that it was sent in terms of the Close Corporations Act." [Page 6]

Laing AJ found that the applicant had shown on a balance of probabilities that it was a creditor with *locus standi*, and that the respondent had failed to show that the debt was in fact not due by it, but owing by a third party. [Page 7] An order for provisional liquidation was granted.

CRIMINAL JUSTICE

S V MANYATHI AND OTHERS, UNREPORTED JUDGMENT, CASE NO. CC10/15D, KWAZULU NATAL HIGH COURT, DURBAN

Judgment delivered 6 April 2016

Three accused were charged with robbery with aggravating circumstances, kidnapping, murder (alternatively, the conspiracy to commit murder,) and the unlawful possession of a firearm in respect of accused 2. [Page 1] The accused denied responsibility.

In dealing with the first three counts, Laing AJ held that the issue in this case related to identifying the perpetrators of the robbery, the kidnapping and the murder. [Page 64, paragraph 5] In addition, Laing AJ held that a further issue was whether the accused had acted in concert. [Page 64, paragraphs 5 - 10].

The State led direct evidence against accused 1 and circumstantial evidence against accused 2 and 3 to prove that the three accused conspired and acted together to commit the offences. [Page 64, paragraph 20]. On the process of reasoning by inference, particularly against accused 2 and 3, Laing AJ held:

> "So, it is a two-legged approach, the one must be that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such that they exclude every other reasonable inference. The cumulative effect of all the evidence must be taken into account in order to establish whether proof beyond a reasonable doubt has been furnished by circumstantial evidence." [Page 65, paragraph 15]

Laing AJ held further that caution must be applied as there was danger in convicting on the evidence of an accomplice, on the testimony of a witness who has a motive to implicate the accused [page 65, paragraph 20], or on the testimony of accomplices after the fact. [Page 66, paragraphs 5 – 10].

Laing AJ held further that:

> "Insofar as identity is concerned, it is generally recognized that evidence of identification based upon a witnesses recollection of a person's appearance is dangerously unreliable unless approached [with] due caution." [Page 66, paragraph 15]

Laing AJ found that on all the evidence, it could be inferred that the versions of events given by the accused "proved to be false beyond all reasonable doubt." [Page 109, paragraph 5 – 10]

> "[T]here is no doubt that the only inference drawn from the proved facts is that the accused 3 arranged with accused 2 to have his wife [the deceased] killed that night. They created a ruse of a robbery, kidnapped the deceased and took her to … with the help of … and accused 1 strangled and stabbed [her] severely." [Page 109, paragraph 5]

Laing AJ found that all three accused persons were guilty of the robbery with aggravated circumstances, kidnapping and murder. [Page 109, paragraph 15]. Accused number 2 was further convicted of possession of an unlicensed firearm.

ADVOCATE ROB MOSSOP SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 16 January 1961

BA, University of Natal (1981)

LLB, University of Natal (1984)

CAREER PATH

Acting Judge, Kwazulu-Natal High Court (2nd term 2016, 4th term 2019, 1st and 4th term 2020 1st Term 2021)

Advocate, Kwazulu Natal Bar (1996 – to date)

Appointed Senior Counsel (December 2015)

Commissioner, Small Claims Court (2002 – to date)

District Criminal Court Magistrate, Durban Magistrate's Court (1991-1995)

Regional Court Prosecutor, Durban Magistrate's Court (1990 - 1991)

District Court Prosecutor, Durban Magistrate's Court (1990)

Corporate Legal Advisor, Altron Corporation Limited (1989 - 1990)

Professional Assistant, Thorpe and Hands Attorneys (1989)

Articled Clerk, Thorpe and Hands Attorneys (1987 – 1988)

Legal Officer, Provost School, National military service (1985 - 1986)

Convenor, Complaints Committee 2, Society of Advocates of Kwazulu-Natal (2017- to date)

Member, LPC Disciplinary Panel for Advocates

Member, Natal Law Society (1987 – 1990)

Member, The Confraternity of St James of South Africa

SELECTED JUDGMENTS

PRIVATE LAW

JANARDHAN JAYANTHI NAIDOO AND ANOTHER V CYRIL CHARLES DENT AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: 8207/2017 (KWAZUL-NATAL HIGH COURT, DURBAN)

Case heard 8 October 2019, Judgment delivered 8 November 2019

Applicants had sought to evict the first and second Respondent from certain immovable property. The Applicants claimed that their late father (from whom they inherited the land) leased a portion of the land to the first and second Respondents in the early 1960's via an oral lease for an indeterminate period. [Paragraph 6] The Applicants also claimed that when they explored the intention of selling the immovable property after their father died, the first and second Respondents were notified and given the option to either purchase, conclude a formal lease on, or vacate the property. [Paragraph 9] When the Respondents failed to respond accordingly, the Applicants commenced formal eviction proceedings. The first and second Respondents raised *a point in limine* that they had lived on the property in an uninterrupted fashion since 1962 and had consequently become owners by acquisitive prescription. [Paragraph 22]

Mossop AJ found that there had been compliance with the procedural provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE"). [Paragraph 20] Mossop AJ rejected the claim of acquisitive prescription, finding that the Respondents could not have acquired the immovable property in the manner alleged, as the rights of the Appellants to the property had been acknowledged in several written and oral interactions between parties over the years. [Paragraph 33]

Mossop AJ found that insofar as the requirement of occupation adverse to the rights of the true owner was concerned, if an occupier acknowledged the rights of the owner at any stage during a period of 30 years, the occupier's position ceased to be adverse to the owner and the occupier lacked, from the time of recognition of the owner's rights, the necessary possession required to acquire ownership by acquisitive prescription.

However, Mossop AJ found that the evidence did not show that an eviction would be just and equitable. Mossop AJ held that the matter required an appropriate measure of compassion and empathy, especially because of the first and second Respondents' long association with the land. Mossop AJ also expressed concern about the possibility of homelessness of the first and second Respondents, who were senior citizens, and whether there was an alternative accommodation for them. [Paragraph 53]

> "I am mindful of the fact that there is no unqualified constitutional duty on local authorities to ensure that an eviction is not resorted to unless alternative accommodation or land was made available. I am, however, reluctant, to grant an eviction order against the first and second Respondents, who are long settled on the portion of the immovable property that they occupy, unless a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the third Respondent's formal housing programme". [Paragraph 57]

An order was made directing the 3rd Respondent (the Ethekwini Municipality) to investigate and report on *inter alia* the personal circumstances of the first and second Respondents, whether an eviction

order would render them homeless and whether there was scope for a mediated process and settlement of the matter. The matter was postponed sine die for further consideration of the report.

CIVIL PROCEDURE

WESTMEAD CARRIERS CC V AMERASAN PILLAY N.O. AND OTHERS, UNREPORTED JUDGEMENT, APPEAL CASE NO: 426/2018 AND 635/2018 (KWAZUL-NATAL HIGH COURT, PIETERMARITZBURG)

This was an appeal against decision of Magistrates for Verulam and Durban, declining to reconsider orders authorising the issuing of search warrants against the Appellant pursuant to section 69(3) of the Insolvency Act. The Appellant was alleged to have concealed or withheld assets belonging to a closed corporation that had been placed in liquidation. The Respondents were the duly appointed liquidators.

Mossop AJ (Chetty J concurring) identified the core issue as being whether it was competent for the appellant to have brought the application for reconsideration, which in turn required consideration of whether the order was interim or final. [Paragraph 15] Mossop AJ found that the order was final one, noting that "the order granted… provided for no return date" and there was "no opportunity for the Appellant to be further heard by the Magistrate" [Paragraph 16]

> "There is moreover no evidence that the order authorising the search warrant was an interim order. Ex facie the terms of the search warrant, it was to be executed on issue. For that reason there was no provision made for any person to show cause on a notional return date why such order should not be granted". [Paragraph 27]

Mossop AJ found that the magistrates had therefore been *functus officio*. [Paragraph 31] Mossop AJ concluded that the Magistrates' decisions were correct. [Paragraph 38] The appeal was dismissed with costs.

CRIMINAL JUSTICE

MTUNGWA V S (AR140/2020) [2021] ZAKZPHC 11 (5 FEBRUARY 2021)

Case heard 5 February 2021, Judgment delivered heard 5 February 2021

This was an appeal against the decision of a regional magistrate sentencing the Appellant to five years' imprisonment and life imprisonment (to run concurrently) for two separate counts of assault with intent to cause grievous bodily harm, and rape. The Appellant relied on the defence of alibi in the court *a quo*.

Mossop AJ (Pillay J concurring) evaluated the evidence and noted that even though the Complainant was the only credible witness, an accused may be validly convicted of any offence on the single evidence of any competent witness:

> "There is no magic formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of a single witness and consider its merits and having done so, should decide whether it is satisfied that the truth has been told, despite any shortcomings or defects in the evidence". [Paragraph 28]

Mossop AJ found that owing to the fact that the Complainant and the Appellant had a prior intimate relationship, they were not strangers to each other. This along with the fact that the crime was committed in a lit room rendered it unlikely that the Complainant was mistaken about the identity of her attacker. Mossop AJ found the Appellant's allegation that the Complaint intended to falsely incriminate him for terminating their relationship to be baseless. [Paragraph 36]

> "Moreover, it was suggested to the Appellant by the prosecutor that if the Complainant's goal was to achieve the restoration of the relationship (which according to the Appellant had already been restored) it was not clear how this could be achieved by falsely implicating him in a brutal crime which potentially could see him imprisoned. The Appellant had no explanation for this". [Paragraph 37]

Mossop AJ rejected the Appellant's alibi defence, finding that it could not withstand scrutiny. [Paragraph 39] This was *inter alia* because cross-examination revealed that there was a time around when the crime was committed where he had "disappeared*".* [Paragraph 40]

> "An Alibi is only as good as its details and the details in the Appellant's Alibi are, in my view, lacking."

Mossop AJ held that the Appellant's Alibi was false and the State's evidence establishing the Appellant's presence at the scene of the crime was compelling. The appeal was dismissed, and the conviction and sentence confirmed. [Paragraph 56]

NTOKOZO MADUNA V S, UNREPORTED JUDGEMENT, CASE NO: AR 546/2018 (KWAZUL-NATAL HIGH COURT, DURBAN)

Judgment delivered 20 March 2020

This was an appeal against sentence. The appellant had been convicted of robbery with aggravating circumstances and was sentenced to a fifteen year's imprisonment. The appellant subsequently stood trial again on two counts of robbery with aggravating circumstances and one count each for the unlawful possession of firearms and ammunition. The appellant was convicted and sentenced to fifteen years' imprisonment for each of the two counts of robbery (to run concurrently), and to fifteen years imprisonment for both the unlawful possession of firearms and unlawful possession of ammunition. The effect was that the Appellant was sentenced to thirty years' imprisonment at the second trial. The Appellant consequently was facing a total prison term of forty-five years from both trials. [Pages 1-2]

Mossop AJ (Hadebe J concurring) noted that the Magistrate "did not … consider the cumulative effect of those sentences on the sentence that the Appellant was already serving or whether any portion of those sentences she intended to impose should be ordered to run concurrently with the sentence the Appellant was already serving". [Paragraph 10, Page 4] Mossop AJ found that the rationale for ordering sentences to run concurrently was to obviate the severity and harshness of the sentences if their cumulative effect was not taken into consideration. [Paragraph 15, Page 4]

> "[The Magistrate] did not even think about the sentence that the Appellant was already serving and made no effort to obtain any information concerning it. Had she done so there is every probability that we would not be seized with this matter as we are. … Magistrates

> are accordingly enjoined to seek out all information that could be relevant when it comes to the question of sentence". [Paragraph 10, Page 5]

Mossop AJ held that the court was at liberty to intervene to mitigate the net effect of the sentences imposed in the two trials. The sentence imposed following the second trial was made to run concurrently with the first, effectively reducing the Appellant's sentence to 30 years' imprisonment. [Page 6]

MR. VUSI NKOSI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 23 November 1963

B. Proc, University of Zululand (1989)

LLB, University of KwaZulu Natal (1990)

CAREER PATH

Acting Judge, Kwazulu-Natal High Court (August 2011 – October 2011; March – April 2012, September 2012; March 2015; January – March, July - August 2017; January – March 2021)

Partner, Shepstone and Wylie Attorneys (1998 – Present)

Associate Partner, Shepstone and Wylie (1997 – 1998)

Part time Member, Voters Roll Revision Court of former Durban Metropolitan Council and

Associated Substructure Councils (1996)

Professional Assistant, Shepstone and Wylie (1995 – 1997)

Case Coordinator, Community Law Centre (1994 – 1997)

National Liaison Officer, Adjudication Secretariat, Independent Electoral Commission (1994)

Candidate Attorney, Shepstone and Wylie (1992 – 1993)

Paralegal Trainer, Community Law Centre (1991)

Member, Legal Practice Council KwaZulu Natal Province (2014 – to date)

Member, KwaZulu Natal Law Society (1994 -2014)

Member, Disciplinary Committee, Westville Boys High School (2005 - 2008)

Political Commissar, KwaThema Youth Congress (1989 - 1992)

Member, United Democratic Front (1989 - 1992)

Chairperson, the ML Sultan Foundation (1998 – Present)

SELECTED JUDGMENTS

COMMERCIAL LAW

FIRST RAND BANK LIMITED V FIELD CREST INTERNATIONAL KZN (PTY) LTD, UNREPORTED JUDGMENT, CASE NO. 1652/2012 (KWAZULU NATAL HIGH COURT, DURBAN)

Case heard 16 March 2015, Judgment delivered ? April 2015.

Plaintiff claimed for payment of a sum of money against defendant based on a deed of suretyship allegedly executed between the parties. Judgment was obtained against the two other parties, jointly and severally, for the amount owing. However, due to plaintiff's inability to recover the amount, defendant as surety and co-principal debtor was being sued.

Nkosi AJ held:

"Based on the averments made by the parties as set out above, the crisp issue for determination by this Court is whether Paola was duly authorized to bind the defendant in executing the relevant deed of suretyship sued upon by the plaintiff. If not, then the ancillary determination to be made … will be whether the defendant is estopped from denying Paola's authority to bind it based on its alleged representations relied upon by the plaintiff to its prejudice." [Paragraph 7]

"Based on the evidence led on behalf of the parties in this matter, it is clear that Paola did not have the express authority to bind the defendant in any contractual dealings with the plaintiff. That being the case, the question is whether the defendant had, at any stage, either expressly or impliedly, done anything to represent to the plaintiff that Paola had ostensible authority to do so, thus causing the plaintiff to act to its prejudice. … I think the answer to this question must also be in the negative." [Paragraph 16]

"Firstly, except for the aforesaid resolution adopted by the defendant's directors on 28 August 2007 appointing Paola as one of the two signatories in respect of its bank account with the plaintiff, no other evidence was adduced by the plaintiff to illustrate its past dealings with the defendant. The onus to prove the alleged dealings between the two rested with the plaintiff ..." [Paragraph 17]

"… [I]n order to succeed in holding the defendant liable for the actions of Paola on the basis of estoppels, the plaintiff would have to prove that the representation of existence of authority was made by the defendant itself, and not just by Paola as one of its erstwhile directors. There is no evidence before this Court that the defendant had at any stage represented to the plaintiff that Paola had authority to bind the defendant in any contractual dealings with the plaintiff." [Paragraph 18]

The claim was dismissed with costs.

ADMINISTATIVE JUSTICE

BREAKERS SHARE BLOCK LIMITED V ETHEKWINI MUNICIPALITY, UNREPORTED JUDGMENT, CASE NO. 6933/2014 (KWAZULU NATAL HIGH COURT, DURBAN)

Case heard 5 March 2015, Judgment delivered 13 April 2015

Applicant leased property within the jurisdiction of the Respondent, and was obliged to pay all rates associated with said property to the respondent. The property was categorised as "residential" in the

past for the purposes of rates, however, it was re-categorised as "business and commercial" resulting in a significant increase in the amount payable. Applicant challenged the re-categorization.

Nkosi AJ held:

"It is common cause that the re-categorisation of the Applicant's property for the purposes of rates had primarily occurred as a result of the amendment of the Respondent's Rates Policy ("the Rates Policy") by its Council. It is also apparent that in doing so, the Respondent's Council was acting in terms of section 5(1) of the Act, in terms of which it is required to annually review and, if necessary, amend its rates policy." [Paragraph 10]

"In particular, the internal remedies referred to by the Respondent are to be found in section 50(1)(c), read with section 54 of the Act. The remedy available to the Applicant in terms of section 50(1)(c) is its entitlement to lodge an objection with the Respondent's Municipal Manager against the changed usage and/or re-categorisation of the property for the purposes of rates. If dissatisfied with the outcome of its objection, the Applicant can still exercise its right of appeal to the Valuation Appeals Board (VAB) in terms of section 54 of the Act." [Paragraph 14]

"In my view, there is no doubt that the decision taken by the respondent to re-categorise the property as 'business and commercial' for the purposes of rates constitutes an administrative action as define in the Promotion of Administrative Justice Act (PAJA). In taking the decision, the Respondent was exercising the power entrusted upon it as an organ of state in terms of the Constitution, read with the relevant provisions of the Act." [Paragraph 15]

"In the present case, the Applicant has neither invoked nor exhausted the internal remedies available to it under the Act. Therefore, it accordingly follows that the Applicant is precluded from relying on PAJA in its challenge of the Respondent's decision to re-categorise the property as "business and commercial" for the purposes of rates. …" [Paragraph 17]

"In the present case, the Applicant has not demonstrated the existence of any right which forms the basis of its application for declaratory relief. Instead, it is contending that the declaratory order it seeks is based on a question of fact that its property is, and remains, a residential property, irrespective of the provisions of section 50 and 54 of the Act." [Paragraph 20]

"I also share the view … that a declaratory order is not an appropriate relief for the determination of facts…" [Paragraph 22]

The application was dismissed with costs. An appeal to the Supreme Court of Appeal was dismissed in ***Breakers Share Block Limited v Ethekwini Municipality*** **(804/2015) [2016] ZASCA 117.**

CRIMINAL JUSTICE

S V NAIDOO AND OTHERS, UNREPORTED JUDGMENT, CASE NO. DR 58/17 (KWAZULU NATAL HIGH COURT, DURBAN)

Judgment delivered 25 August 2017

The second accused sought to review the decision by a magistrate to recuse herself in criminal proceedings.

Nkosi AJ held:

"After conducting an extensive research on the subject of the recusal of presiding officers from the proceedings over which they were presiding, I was unable to locate a single case where a decision taken *mero motu* by a presiding officer to recuse himself or herself from the proceedings was taken on review. In my view, this is hardly surprising because no purpose whatsoever would be served by compelling a presiding officer to continue presiding over a matter in which he or she has already expressed doubt about his or her impartiality. This is irrespective of the reasons given by the presiding officer concerned for having such doubt." [Paragraph 15]

"Ordinarily, it is an accused person who is expected to call for the recusal of the presiding officer in a criminal trial. This could be for a variety of reasons, the most notable of which would be the likelihood of bias whether real or perceived. It is for this reason that I find the circumstances of the case rather peculiar and unique." [Paragraph 16]

"In fact, it is curious to note that notwithstanding an unequivocal admission by Ms. Fikeni that her ability to continue presiding impartially over the matter has been compromised, Accused No. 2 is nonetheless seeking to have her decision to recuse herself from the proceedings reviewed and set aside. I simply do not understand what Accused No. 2 is seeking to achieve by bringing this application. In my view, he is merely attempting to use Ms Fikeni's expression of doubt about her impartiality as a ground to take her judgment on review if she completes the trial and finds him guilty as charged." [Paragraph 17]

"…I reiterate that Ms. Fikeni's reasons for recusing herself from the matter are, in my view, of mere academic importance. The fact of the matter is that once she recused herself from the matter, she immediately became *functus officio*. For that reason, it accordingly follows that the provisions of section 9(7) of the Magistrate's Court are not of any relevance for the purposes of this application."

The application was dismissed. Nkosi AJ found that the proceedings before the recused magistrate had become a nullity, and ordered that the trial recommence before a different magistrate.

MHLABA V S, UNREPORTED JUDGMENT, CASE NO. AR 41/17 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

This was an automatic appeal against conviction and sentence of the applicant for the rape of a seven-year-old. Appellant alleged that his wife had influenced the complainant to fabricate the rape allegation and argued that the court a quo did not exercise the necessary caution when dealing with the testimony of the single witness on which conviction was based.

Nkosi AJ (Gyanda J concurring) held:

"… I am satisfied that the presiding magistrate in the Court a quo had approached the evidence of the complainant with the necessary caution required of a single witness, who is also a minor. In my view, the complainant's responses to the numerous questions posed to her by the presiding magistrate to test her competency had clearly shown her to be competent to testify." [Paragraph 21]

"… Besides, it is apparent from the record that both the public prosecutor and the appellant's attorney were also satisfied with the complainant's competence to testify. If they were not, then they ought to have made their objections known to the presiding Magistrate when she conducted the complainant's competence test." [Paragraph 24]

"There is simply no substance to the appellant's allegations that the complainant was influenced by her mother to falsely accuse him of a crime he did not commit. Had that been the case, then the fact that the complainant's mother had disappeared shortly after the arrest of the appellant would surely have resulted in the complainant not being able to recall some of the details of her sexual molestation by the appellant. Her sustained recollection of such details is, in my view, an indication that she was testifying on the events she had actually experienced." [Paragraph 26]

"… [T]here is nothing in the personal circumstances of the appellant which would cause this court to interfere with the life sentence imposed ..." [Paragraph 28]

"The Appellant's rape of the complainant on more than one occasion was a shameless act, and is likely to leave the complainant scarred for life. Instead of protecting the complainant as her parent, the appellant chose to use her repeatedly as a sexual object to satisfy his lust. His behaviour was no different from that of an animal which preys on its young."

The appeal was dismissed.

MXOLISI V S (AR483/16) [2017] ZAKZPHC 5 (23 FEBRUARY 2017)

Case heard 14 February 2017; Judgment delivered 23 February 2017

Appeal against conviction for rape and sentence of ten years' imprisonment. One of the issues on appeal was the reliability of the evidence of the complainant, a single witness.

Nkosi AJ (Seegobin J concurring) held:

"Needless to say, the crime of rape, by its very nature, is seldom committed in front of other witnesses ... In most instances, the testimony of another witness, like in the present case, is limited to such witness' subjective observation of the complainant after the actual act of rape. Depending on the nature of such evidence, it may nonetheless assist the court in determining a more probable version when confronted with two conflicting versions, such as those of the appellant and the complainant in this appeal." [Paragraph 5]

"In this appeal, it is common cause that the evidence regarding the actual act of rape consists of the single evidence of the complainant. The court a quo, in its assessment of the evidence led before it, accepted the evidence of the complainant as reliable. It also found the complainant's version of the actual rape incident more probable than that of the appellant. Based on my own consideration of the evidence led before the trail court, I am satisfied that the court a quo was correct in its findings regarding the credibility of the complainant, as well as the reliability of her evidence." [Paragraph 8]

"… I find nothing substantial or compelling in the numerous factors raised … as supposedly mitigating the appellant's guilt. The appellant is 28 years old, a first offender and has completed a grade 11 standard of education. He is also a father of three minor children with three different women, and the children live with their respective mothers. He supports all three children using the income he derives from piecemeal jobs, though the youngest receives a child grant. There is no explanation as to why the other two children are not receiving the same grant. Be that as it may, taken in their totality, these are ordinary factors which are not uncommon amongst persons who are convicted of rape and other crimes by our courts on a daily basis." [Paragraph 13]

"All in all, the factors raised on behalf of the appellant in mitigation are totally outweighed by the aggravating factors raised by the state against him. These include, inter alia, the prevalence of the

crime of rape, as well as the appellant's betrayal of the complainant's trust. According to her testimony, the complainant regarded the appellant as her brother and relied on him for protection against any harm. Little did she know that her trust was misplaced on a sexual predator who has no regard whatsoever for family ties." [Paragraph 14]

The appeal was dismissed.

SELECTED ARTICLES

'Serious concern about the legal basis of the Constitutional Court judgment in the shack dweller's appeal', *De Rebus,* December 2009, page 34.

The article critiques the Constitutional Court judgment in *Abhlali Basemjondolo Movement SA and Another v The Premier of the Province KZE and Others*, which found that section 16 of the *KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007* was unconstitutional.

"Apparently, the Constitutional Court ruling that s 16 of the Act is invalid is hailed as a victory because this means that the government can no longer compel anyone to evict squatters from the land or building, which renders the Act 'toothless'. However, the sole purpose of the Act was never to give the government power to compel landowners to evict squatters from land they are occupying."

"Contrary to the widely held belief that the main purpose of the Act was officially to sanction an indiscriminate eviction of shack dwellers and render them homeless, one need only read its long title to establish that its main purpose is to achieve the direct opposite."

"… [B]earing in mind that s 16 of the Act expressly provides that any eviction in terms of that section … can be carried out only in a manner provided for in the applicable provisions of the PIE Act, it is difficult to understand conceptually how an owner or a municipality could possibly proceed with the eviction of unlawful occupiers even if the PIE Act cannot be complied with. …"

"… [I]t is unthinkable that the MEC would proceed to issue a notice for eviction of persons from a slum even if he is fully aware that the provisions of the PIE Act cannot be complied with."

"Of course, one can fully understand that the reasoning of the Constitutional Court was probably underscored by the fear of the Abahlali and that the implementation of the Act would affect the constitutional right of its members to housing. However, the fact of the matter is that the constitutional challenge … by the Abahlali was misdirected right from the outset …"

ADVOCATE CAROL SIBIYA

BIOGRAPHICAL DETAILS

Date of birth: 12 June 1975

B Proc Degree, University of Natal (1993 - 1996)

LLB, University of Natal (1997)

Practical Legal Training, Practical Law School Pretoria (1998)

Advanced Certificate in Child Law, University of Pretoria (2000)

CAREER PATH

Acting Judge, KwaZulu-Natal High Court (June 2019; November- December 2018)

Advocate, (2009 – to date)

Road Accident Fund

Senior Claims Handler (2002 - 2007)

Claims Handler (2000 - 2002)

Candidate Attorney, Andre van Rensburg Attorneys (1999)

Candidate Attorney, Gamede Conradie (1998)

Member, KwaZulu Natal Society of Advocates (2009 – to date)

Member, Sinosizo Siyaphambili (NGO)

Member, One Life Church-Westville

SELECTED JUDGMENTS

PRIVATE LAW

FAAS PROPS CC AND ANOTHER V JAZZ SPIRIT 1400 CC, UNREPORTED JUDGMENT, CASE NO 7757/18 (KWAZULU-NATAL HIGH COURTY, PIETERMARITZBURG)

Case heard 23 November 2019, Judgment delivered 23 February 2019.

The applicants claimed a right of way servitude over a portion of immovable property owned by the first respondent. The claim was made on two alternative bases, either through acquisitive prescription or through necessity. [Paragraph 1] The first applicant and respondent owned properties that were adjoining each other. [Paragraph 6] The area over which the applicants sought the servitude was a shared driveway that belonged to the respondent. [Paragraph 7] The respondents had previously

interrupted access by blocking the shared driveway, claiming that continued use of the driveway constituted trespass by the applicant. [Paragraph 9]

In order to prove the claim of servitude, the applicants needed to prove that they had openly exercised the rights of a servitude holder as if they had those rights (without seeking permission) for an uninterrupted period of thirty years. [Paragraph 10] To succeed in their claim by way of necessity, the applicant needed to prove that their property was landlocked and there was no reasonable means to access the public road. [Paragraph 11]

Sibiya AJ held that:

> "The requirements for a right way by prescription are quite stringent. That is because of the drastic nature of the relief, which has been said to amount to expropriation, in that it results in the acquisition of a real right over someone else's property, thus reducing the owner's use and enjoyment thereof. Accordingly, the court must be satisfied the requirements are met" [Paragraph 32]

Sibiya AJ held that the evidence presented by the applicants failed to show that there was continuous and uninterrupted use of the shared driveway for the required time of thirty years. The applicants also did not make out a case for servitude of necessity. [Paragraph 44]. The application was dismissed.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

INDEPENDENT INSTITUTE OF EDUCATION (PTY) LTD V THE KWAZULU- NATAL LAW SOCIETY AND OTHERS (9090/18) [2019] ZAKZPHC 6; [2019] 2 ALL SA 399 (KZP); 2019 (4) SA 200 (KZP) (22 FEBRUARY 2019)

Case heard 11 December 2018; Judgment delivered 22 February 2019.

The application concerned the status of an LLB degree offered by Varsity College. The legislation regulating the admission of legal practitioners for practice as an attorney or advocate allowed admission only to those candidates with an LLB degree from a university. Varsity College, despite being registered and duly accredited, was not a university. [Paragraph 1]

The court was required to determine whether section 26(1) of the Legal Practice Act 28 of 2014 infringed the constitutional rights to equality before the law in terms of section 9(1), freedom of trade, profession and occupation in terms of section 22, and to establish private education institutions in section 29(3) of the Constitution. [Paragraph 9]

Sibiya AJ held that the specific parts of the legislation limited the constitutional right to establish private education institutions as the applicant enjoyed the same rights to offer the accredited four-year LLB as public university. [Paragraph 26] There was a limitation of the right to equal protection of the law as there was no rational basis for differentiating persons with a degree from the applicant and those with a LLB degree from public university, and there was no governmental purpose sought to be achieved with the differentiation. [Paragraph 36]

Sibiya AJ also held that the limitations of the constitutional rights were not justifiable, and as such declared section 26(1) of the Legal Practice Act to be unconstitutional and invalid. [Paragraph 52] In determining the appropriate relief, Sibiya AJ held that since the Minister of Justice had indicated that the legislation was in the process of amendment, "I am not convinced that this case calls for a breach of the separation of powers and dictating to Parliament what the wording of the amendment should be. there was no need to breach the separation of powers in directing what the wording of the amendment should be." [Paragraph 61]

Sibiya AJ ordered that students who had graduated from the first applicant after 1 January 2018, were qualified to enter the practice of the legal profession as graduates from public universities in South Africa. [Paragraph 88].

The Constitutional Court did not confirm the declaration of invalidity, finding that on the ordinary meaning of "university", the applicant was a university, and the section was thus not unconstitutional. Applicant's graduates were declared to be eligible for enrolment and admission under the Legal Practice Act: **Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others 2020 (2) SA 325 (CC)**.

CRIMINAL JUSTICE

NQOBILE ZONDI V THE STATE, UNREPORTED JUDGMENT, CASE NO. AR329/18 (KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 14 June 2019; Judgment delivered 12 August 2019

This was an appeal against conviction and sentence, where the appellant had been convicted and sentenced to life imprisonment for the rape of an 11-year-old girl. [Paragraph 2] The victim, was the only witness whose testimony connected the appellant with the rape.

Sibiya AJ (Ploos van Amstel J concurring) dismissed the appeal, finding that the court *a quo* had correctly considered the evidence of the single witness, the complainant. The complainant had been truthful, honest and she did not contradict herself. Her evidence was corroborated with the medical evidence, the oral evidence of the doctor that examined her, and the evidence of the mother. [Paragraphs 25 - 26]

> "I find no reason to interfere with the court *a quo's* finding that the complainant was raped and that there was no motive to implicate the appellant falsely for the rape. The magistrate was correct to find the appellant guilty of the rape of the complainant, and the appeal against the conviction on this count must be dismissed." [Paragraph 29]

Sibiya AJ dismissed the appeal against the sentence ,holding that;

> "The rape of a child is a serious crime. The personal circumstances of the appellant have already been set out earlier in this judgment and do not constitute a convincing reason to depart from the minimum sentences prescribed by the legislature. The sentence imposed by the magistrate is not disproportionate to the crime and the interests of society and does not induce a sense of shock." [Paragraph 37]

MEDIA COVERAGE

A *Mail & Guardian* article "Resignations take arms deal probe from mess to 'farce'", 11 August 2014 (available at https://mg.co.za/article/2014-08-11-resignations-take-arms-deal-probe-from-mess-to-farce/) describes a letter by the candidate and advocate Skinner SC resigning from the Arms Deal commission of inquiry:

"They … criticised Seriti's decision not to permit as evidence a damning leaked report that showed that German arms dealer Ferrostaal paid R300-million, through a web of middlemen and offshore accounts, allegedly to influence senior politicians to secure the sale of submarines to South Africa.

Sibiya and Skinner said that for Seriti to deny the admission of documents such as the report into evidence "nullifies the very purpose for which the commission was set up". …

[Hennie] Van Vuuren said the resignation by advocates Sibiya and Skinner was a "radical step".

"It was also brave and principled because, as lawyers, they clearly refuse to draw a salary from a commission whose integrity they believe has been deeply undermined. They … have helped shine the light on the many internal troubles, and allegations of a second agenda within the commission. …"

ADVOCATE JACQUES BASSON

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 29 June 1970.

BLC, University of Pretoria (1990)

LLB, University of Pretoria (1993)

CAREER PATH

Acting Judge, Labour Court (July 2018, July 2019)

Advocate (1999 – to date)

Legal Administration Officer, Department of Finance: Pensions Administration (1991 – 1998)

SELECTED JUDGMENTS

LABOUR LAW

ESKOM HOLDINGS SOC LIMITED V DE WET NO AND OTHERS (JR2568/14) [2018] ZALCJHB 258; (2018) 39 ILJ 2715 (LC) (16 AUGUST 2018)

Case heard 11 July 2018, Judgment delivered 16 August 2018

The issues in this case were whether the CCMA had jurisdiction to determine a dispute referred to it in terms of section 6(4) of the Employment Equity Act [EEA] (which established that differentiation between employees performing the same or substantially the same work, or work of equal value, constituted unfair discrimination provided the differentiation took place on a listed ground) where the dispute arose before the amendments became operative (1 August 2014), but where the dispute was only referred to the CCMA after that date in accordance with an agreement between the parties. The second issue was whether a reasonable attempt had been made to resolve the dispute. [Paragraphs 1 - 3] Applicant had taken steps to address salary disparities, and adjusted salaries below a certain threshold. Third respondent lodged a grievance and referred a dispute to the CCMA in terms of section 6(4). [Paragraph 4] Applicant challenged the jurisdiction of the CCMA, which was dismissed. [Paragraph 6 – 7] Applicant sought to review and set aside that decision.

Basson AJ considered the argument that the CCMA lacked jurisdiction, as the amendments had been passed after the dispute arose. Basson AJ held that the issue was whether the jurisdiction of the CCMA was determined at the date on which the cause of action or dispute arose, or on the date when the action was instituted. [Paragraph 8] Basson AJ considered the legal principles relating to the retrospective operation of legislation:

> "The principle that legislation will affect only future matters and not take away existing rights, is founded on the rule of law. The time-honoured principle is that no statute is construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws, unless the legislature clearly intended the statute to have that effect. ... [I]f the court is left in doubt as to the retrospective effect of a provision, the presumption against the retrospectivity would not be rebutted." [Paragraph 9]

Basson AJ noted that the applicant relief on the Labour Court decision in *Bandat v De Kok* where the Labour Court found that the EEA did not apply retrospectively to pending proceedings. Whilst describing the decision as "undoubtedly correct", Basson AJ held that the present case was distinguishable, the action having been instituted after the amendment became operational. [Paragraphs 11 – 12]

Basson AJ held that where the legislature introduced a procedural amendment, if an action was instituted after the amendment became operative, the new procedure applied, since the old procedure was no longer part of the law. Where an action was instituted before the amendment became operative, the old procedure remained intact. Therefore the procedure was to be determined at the date on which the action was instituted, not on the date when the cause of action arose. [Paragraph 18]

Basson AJ found that the action had been instituted after the amendments to the EEA had been introduced, and that the new procedure allowed for the parties agree that the unfair discrimination dispute be referred to the CCMA by agreement, which was done. Basson AJ held that the Commissioner had therefore been correct to reject the applicant's challenge to jurisdiction. [Paragraph 19]

On the challenge relating to failure to exhaust internal remedies and that the grievance did not relate to unfair discrimination, Basson AJ held that the grievance clearly related to a dispute relating to the differentiation between employees performing the same or substantially the same work based on an arbitrary ground, and was thus a dispute as contemplated in section 6(4) of the EEA. Basson AJ found that the nature of the dispute remained the same and that a reasonable attempt had been made to resolve it. [Paragraphs 22 – 23] This ground of review was also rejected.

The application was dismissed, with no order as to costs.

MR VUSIMUZI NKOSI

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 29 December 1961.

BIurs, University of Zululand (19900

LLB, University of the Witwatersrand (1993)

LLM, University of Pretoria (1996)

Diploma in Finance and Accounting, UNISA (2005)

CAREER PATH

Acting Judge

Mpumalanga High Court (2015)

Limpopo High Court (2014)

North Gauteng High Court (2013)

Labour Court (2012)

South Gauteng High Court (2011)

Small Claims Court Commissioner (2004 – to date)

Part time commissioner, CCMA (1999 – 2002)

Attorney, Nkosi Attorneys (1998 – to date)

Part time law tutor, Tswane University (1999)

Part time law tutor, UNISA (1996 – 1998)

Professional Assistant, Heystek Oberholzer & Louw (1996 – 1997)

Assistant state attorney (1996)

Articled clerk, Rooth & Wessels (1984 – 1995) [Dates as appear on the questionnaire]

Black Lawyers' Association (1995 – to date)

Ordinary member, African National Congress.

SELECTED JUDGMENTS

No judgments in the field of Labour Law could be found in respect of this candidate.

ADVOCATE TSUNGAI PHEHANE

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 22 April 1973

Bachelor of Arts, University of Cape Town (1993)

Bachelor of Laws, University of Cape Town (1996)

Diploma in Legislative Drafting, Vista University (2002)

Post Graduate Diploma in Labour Law, Graduate Institute of Management and Technology, Johannesburg (2003)

Certificate in Advanced Company Law, University of the Witwatersrand (2009)

CAREER PATH

Acting Judge, Labour Court (March, 30 September – 4 October 2019; January – March 2020)

Advocate (2012 – to date)

Management Consultant, Nkonki Inc (2011)

Senior Manager: Employee Relations, South African Post Office (2010 – 2011)

BP Southern Africa (Pty) Ltd

- Executive Assistant to the CEO (2009 – 2010)
- Manager, Employee Relations (2007 – 2008)

Department of Labour

- Acting Executive Manager: Human Resources Management (2006 – 2007)
- Manager, Employment Relations (2003 – 2007)
- Assistant Manager: Employment Relations (2001 – 2003)

Professional Assistant, Maserumule Inc Attorneys (2001)

Legal Officer, National Department of Labour (1999 – 2001)

Candidate attorney, Bernadt Vukic Potash and Getz (1997 – 1998)

Member, Pretoria Society of Advocates (2012 – to date)

Member, Advocates for Transformation, Tshwane (2012 – to date)

Member, Institute of Directors (2009)

Member, SASLAW (1999 – 2000)

Member, PSA Ethics Committee (2019, 2020)

Member, PSA Transformation Committee (2018)

Member, PSA Arbitration Committee (2017)

Deputy Chairperson, Parish Pastoral Council, Parish of the Resurrection, Bryanston (2016 – 2019)

Chairperson of Parish Pastoral Council, Catholic Cathedral of the Sacred Heart, Pretoria (2010 – 2013)

SELECTED JUDGMENTS

LABOUR LAW

NATIONAL UNION OF METALWORKERS OF SA ON BEHALF OF DHLUDHLU & OTHERS V MARLEY PIPE SYSTEMS (SA) (PTY) LTD (2020) 41 ILJ 2175 (LC)

Case heard 18 – 20 March, 30 September, 1 – 2 October 2019, Judgment delivered 23 January 2020.

This case dealt with whether the dismissal of 145 employees of the respondent was procedurally and substantively fair. Respondent counter claimed, requesting the court to order just and equitable compensation for any loss attributable to a strike. [Paragraphs 1 – 2] The employees were dismissed following a disciplinary hearing, after being found guilty of participating in unprotected strike action and assaulting an employee of the respondent. [Paragraphs 14 – 15]

Phehane AJ analysed the legislative framework [paragraphs 16 – 19], and then dealt with whether or not the strike was protected. [Paragraphs 20 ff] Phehane AJ found that there were mutually destructive versions regarding the alleged assault on respondent's employee [paragraph 42] and held that the evidence of respondent's witnesses was credible, reliable and consistent. Furthermore the versions of these witnesses were consistent with video footage. [Paragraph 47] Phehane AJ found that on a balance of probabilities, the respondent in relation to the assault was probable, and that the dismissal was substantively fair. [Paragraphs 51 – 52]

Phehane AJ then dealt with the ultimatum that was delivered to the employees and found that the respondent had issued the ultimatum to the striking employees and had been prevented by a shop steward from further distributing the ultimatum. [Paragraph 57] Phehane AJ found that a disciplinary hearing had been held prior to the dismissal of the employees, at which the individual employees were represented by NUMSA and were given an opportunity to present their version. Phehane AJ found that in the circumstances, the procedure was fair and therefore the dismisaal was procedurally fair. [Paragraphs 61 – 62]

Regarding the identification of the employees, applicant argued that two employees, MR Mokoena and Mr Ledwaba, were not guilty of participating in the strike action. Phehane AJ rejected this argument:

> "It is astounding that the applicant contends that Mr Ledwaba should not be found guilty of participating in the strike action. Mr Ledwaba's evidence places him at the forefront of the unprotected strike action, which he conceded. In the circumstances, I find that there is no basis for reinstating or compensating Mr Ledwaba." [Paragraph 68]

Regarding the remaining employees who had not participated in the assault, respondent argued that they had acted with common purpose in perpetrating the assault and were guilty of derivative misconduct. [Paragraph 70] Phehane AJ considered case law on the issue, and held that the employees had acted in common purpose with the perpetrators" by associating themselves actively with their acts and omissions." [Paragraph 75]

> "Before the assault, the individual employees partook in unprotected strike action, assembling in the canteen and marching and singing on the respondent's premises carrying placards inscribed with words ... During the unprotected strike action, the employees acted with common purpose in approaching the administration building offices, threatening Mr Chinner and assaulting Mr Steffens. … After Mr Steffen's assault … the employees acted with common

> purpose by dancing and singing. The employees continued to do so at the security gate with the police on the other side of the gate and continued to assemble and hear the address of their leaders." [Paragraphs 76 – 78]

Phehane AJ found that dismissal was an appropriate sanction in the circumstances [paragraphs 82 – 87], and awarded the respondents R829,835 as compensation for the loss incurred due to the unprotected strike action. [Paragraph 99]

MAILA V GUARDS ON CALL SECURITY CC (JS 204/17) [2019] ZALCJHB 67 (2 APRIL 2019)

Case heard 4 – 5 March 2019, Judgment delivered 2 April 2019.

Applicant was employed by respondent from 2013 until 2017, when he was dismissed for operational requirements. The procedural and substantive fairness of the dismissal was not in dispute, but applicant claimed that he had not received the full amount of severance package which he claimed was due to him. Applicant claimed a balance of the severance package of R34 336.08, and alleged that the respondent had unlawfully deducted an amount of R750.00 from his salary over a period of 45 months. [Paragraphs 1 – 3]

Phehane AJ began by finding that the claim for severance pay was properly before the court, and the court had jurisdiction to adjudicate the claim. [Paragraphs 7 – 10] Phehane AJ discussed the evidence [paragraph 12 ff], and considered the question of whether the retrenchment notice relied on by the applicant was authentic. Phehane AJ found that the respondent's witnesses corroborated each other's' evidence regarding the creation of the retrenchment notice, and that there were no material contradictions in their evidence regarding the retrenchment notice. Their evidence was further corroborated by proceedings at the CCMA. [Paragraph 55]

Phehane AJ found that to the extent the applicant relied on an oral agreement entered into at the beginning of his employment, he

> "did not prove the existence of such agreement nor did he present any evidence of the monthly deductions of R750 per month. I find it improbable that he would sit back over a period of 45 months and not complain about the deductions and the repayment thereof, until 3 years had lapsed. I equally find it improbable that he would work additional shifts for no pay and take no leave over a three-year period without any complaint." [Paragraph 56]

Phehane AJ found it more probable that there had been no deductions from the salary [paragraphs 57 – 58], and held that respondent had discharged its onus of proving that the retrenchment notice it relied on was authentic; that the retrenchment package was the correct amount; and that there was no short payment. [Paragraph 61]

The application was dismissed, with no order as to costs. [Paragraph 69]

ADVOCATE FRANCOIS VAN DER MERWE

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 29 May 1961.

BA (Law), Rand Afrikaans University (1982)

LLB, Rand Afrikaans University (1984)

LLM, Rand Afrikaans University (1988)

CAREER PATH

Acting Judge, Labour Court (July 2016)

Advocate

South Cape Society of Advocates (2018 – to date)

Johannesburg Bar (2014 – 2018)

Labour consultant / Independent advocate (1994 – 2013)

Dispute resolution panellist, IMSSA, Tokiso, private dispute resolution organisations (2010 -)

Part – time Commissioner/ senior commissioner, CCMA / "various bargaining councils" (2000 – to date)

Director: Central Negotiations, Public Service Commission (1992 – 1994)

Part – time lecturer, RAU (1992 – 1993)

Labour consultant (1991 – 1992)

Lecturer, Technikon SA (1991)

Senior Industrial Relations Officer / Acting Industrial Relations Manager, Randfontein Estates Gold Mining Co (1989 – 1990)

Industrial Relations Officer, Sandton Municipality (1987 – 1988)

Legal Officer, SA Transport Services (1986)

Member, Die Ruiterwag (1980 – 1985) ("approximately")

SELECTED JUDGMENTS

LABOUR LAW

SOUTH AFRICAN MUNICIPAL WORKERS UNION AND OTHERS V CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY (JS987/15) [2016] ZALCJHB 568 (26 OCTOBER 2016)

Case heard 14 July 2016, Judgment delivered 26 October 2016.

Applicants filed a statement of claim relating to a claim of unfair discrimination under the Employment Equity Act, and a claim for arrear salary under the Basic Conditions of Employment Act. [Paragraph 1] Respondents raised an exception on the grounds that the unfair discrimination claim did not disclose a cause of action and alternatively were vague and embarrassing. [Paragraph 2]

Van Der Merwe AJ held:

> "The basis of the Respondent's exception concerning the unfair discrimination claim is that the Applicants have not identified the ground of the alleged discrimination whether listed or unlisted and in case of the last mentioned did not allege that the unlisted ground had the potential to impair the fundamental human dignity of the Applicants as human beings or to affect them adversely in a comparably serious matter. With regard to one Applicant, that it is vague and confusing that in addition to the same (unidentified) ground that is relied upon in the case of all Applicants there is an additional (listed) ground of gender." [Paragraph 5]

Van der Merwe AJ found that the statement of claim was excipable, as the claim of unfair discrimination by the five of the Applicants did not state the grounds of discrimination for the differentiation in remuneration, and an additional claim of unfair discrimination on the ground of gender was" inconsistent with and contradictory to the other claim of discrimination, and is, therefore, vague and embarrassing." [Paragraph 8]

The exception was upheld, and applicants were granted leave to file an amended statement of claim within 14 days. [Paragraphs 10 – 11]

FAMOUS BRANDS MANAGEMENT CO (PTY) LTD V COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2016) 37 ILJ 2857 (LC)

Case heard 12 July 2016, Judgment delivered 29 July 2016.

This was an application to review and set aside a ruling by a commissioner of the CCMA, dismissing the employer's point in limine on the issue of jurisdiction. [Paragraph 1] The employer had argued that the dispute was a collective dispute that could not be heard by the CCMA in terms of section 10(6)*(aA)* of the Employment Equity Act (EEA), as the provision allowed only individual disputes to be arbitrated before the CCMA and that collective disputes had to be determined by the Labour Court. [Paragraphs 3 - 4] The underlying dispute before the CCMA was a complaint of unfair discrimination regarding equal pay for equal work in terms of the EEA. [Paragraph 5]

Van der Merwe AJ identified the core question for determination as whether the CCMA had jurisdiction, "after failed conciliation, to arbitrate a dispute concerning alleged unfair discrimination involving so-called equal pay for equal work where more than one complaining employee is involved". [Paragraph 10] Van der Merwe AJ held:

> "At the time of the most recent amendments to the EEA, the legislature must have been aware of the already existing division between matters for arbitration in the CCMA and matters for adjudication in the Labour Court, and intentionally chose to import the option for all unfair discrimination claims, by persons earning less than the prescribed amount, to be arbitrated before the CCMA. Some of these matters may be more complex and others less. Our unfair discrimination law is relatively undeveloped. ... The fact that more than one individual is involved does not necessarily mean that a dispute is potentially more complex even if there may be more administrative or logistical challenges in dealing with a dispute involving many people." [Paragraph 14]

Van der Merwe AJ held that there was no suggestion in the amendments to the EEA that "more than one of these persons [vulnerable, powerless and exploited employees] should not be able to require of the CCMA to arbitrate their unfair discrimination dispute." [Paragraph 15] Van der Merwe AJ found further that provisions of the Labour Relations Act referring to an "employee" had been interpreted to include the plural. [Paragraph 20] Van der Merwe AJ concluded:

> "On an overall conspectus and in the absence of any binding authority to the contrary, I am unconvinced that more than one person earning below the determined income threshold cannot pursue an unfair discrimination case based on equal pay for equal work in an arbitration before the CCMA. …" [Paragraph 21]

The application was dismissed.

JUDGE T.P. MUDAU

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 December 1962.

BIuris, University of Venda (1987)

LLB, University of Venda (1992)

LLM, Rand Afrikaans University (2004)

CAREER PATH

Judge, Gauteng High Court (2016 -)

Acting Judge, Gauteng High Court (2012, 2013, 2015)

Regional Magistrate, Randburg (2005 – 2015)

Acting Regional Magistrate, Gauteng (2001 – 2005)

Senior Magistrate, Johannesburg (February 1997 – 2005)

Senior control magistrate and head of section, criminal courts (from 1998)

Acting Regional Magistrate, Thoyandou (1997)

Magistrate, Thoyandou (1992 – 1997)

Head of section, civil and family courts

Appointed as magistrate (1987)

Member of Provincial and National Executive, JOASA

Elder (designate), Church of the Holy Ghost

Member, School Governing Body, Randpark High School (2015 - 2019), Randpark Primary School (2012 – 2014)

SELECTED JUDGMENTS

PRIVATE LAW

E V E (2013/27961) [2013] ZAGPJHC 262 (24 OCTOBER 2013)

Case heard 14 October 2013, Judgment delivered 24 October 2013.

Applicant sought an order, pending a divorce action, for inter alia maintenance for herself, and a contribution towards her legal costs. The respondent opposed the application on the grounds that the applicant's monthly financial requirements were excessive and could be covered by her earnings, and that he could not afford to pay the amount claimed [Paragraph 7].

Mudau AJ held that the respondent, who could "hardly be described as a man of straw", had failed to provide evidence of his true financial means, and had "not fully, frankly and clearly disclosed his financial affairs." [Paragraphs 8 – 9]. Mudau AJ held further that although the respondent's total monthly expenses appeared to far exceed his monthly salary:

> "I have no difficulty in finding that the respondent is not candid with this court with regard to his financial affairs. It can easily be inferred … that the respondent is financially stable. …" [Paragraphs 10 – 11]

After identifying certain expenses as non-essential, Mudau AJ found that the applicant had established a case which entitled her to maintenance *pendente lite*. Respondent was ordered to pay maintenance *pendente lite* of R15 000.00 per month to the applicant, and to pay R3 000.00 towards the applicant's legal costs. [Paragraphs 14 – 15].

COMMERCIAL LAW

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE V LOUIS PASTEUR INVESTMENTS (PTY) LTD AND OTHERS (12194/17) [2021] ZAGPPHC 89 (4 MARCH 2021)

Case heard 8 – 9 October 2020, Judgment delivered 4 March 2021

This was an application to convert business rescue proceedings into liquidation proceedings in terms of section 132(2)(ii) of the Companies Act, alternatively to remove the second respondent as business rescue practitioner of the first respondent. [Paragraph 1]

Mudau J found that the "very nature" of business rescue proceedings meant that they had to be conducted with "a maximum possible expedition", and in terms of section 132(3) of the Companies Act, should terminate within a period of 3 months, unless extended by order of a court. A business rescue plan should be developed and implemented "within a reasonable period", but in this case, there had been an "extraordinary" delay, described by the applicant and the substituting business rescue practitioner as "deplorable." [Paragraph 35]

Mudau J noted that no progress report on the business rescue proceedings had been prepared or updated since 2012 [paragraph 36] and found that the fact that a business rescue plan had been adopted was no bar to the relief sought by the applicant. [Paragraph 41]

"The argument that the adoption of a business rescue plan is final and binding on creditors and the company, and that for that reason liquidation of a company under business rescue with an adopted business rescue plan is no longer possible, is at odds by the proviso of section 141(2)(a)(ii) which allows the business rescue practitioner, at any time during business rescue proceedings, to apply to court for an order discontinuing the business rescue proceedings and placing the company into liquidation. The inference that the adoption of business rescue plan is no hurdle for the later liquidation of the company under

business rescue is overwhelming ... Significantly, whether a liquidation order should ensue is indivisibly linked to the question of the viability of business rescue proceedings." [Paragraph 42]

Mudau J held that the 10-year period which had been allowed for the business rescue plan to be implemented was contrary to the procedure in the Act, and had failed to achieve the desired results. Furthermore, the business rescue practitioner had failed to conclude that the implementation of the plan would result in a better return. The applicant therefore had *locus standi* to bring the application. Mudau J held that the evidence did not show that there would be an improved return because of business rescue. The conversion of business rescue proceedings into liquidation proceedings was therefore "completely justified". [Paragraph 43]

Mudau J found that it would be just and equitable for the first respondent to be wound up. [Paragraph 48]. A punitive costs order was made against the former business rescue practitioner. [Paragraphs 49 – 56]

CRIMINAL JUSTICE

MOMBERG V S (A206/2018) [2019] ZAGPJHC 183 (28 JUNE 2019)

Case heard 11 June 2019, Judgment delivered 28 June 2019

The appellant was convicted on four counts of *crimen injuria* and sentenced to three years' imprisonment, with one year conditionally suspended. The appellant had made telephone calls to the South African Police Services' emergency helpline following a robbery and had insulted and sworn at helpline operators and police officers, using racially offensive language [Paragraphs 5 – 14]. The appellant raised a defence of sane automatism or non-pathological criminal incapacity.

Mudau J (Mia AJ concurring) held that a voluntary act was an essential element of criminal responsibility, and that defences such as automatism required careful scrutiny, even where supported by medical evidence [Paragraph 15]. Mudau J rejected the appeal against conviction:

> "… I cannot find any fault with the reasoning and conclusion of the magistrate. Her insulting words were not directed at the black person who allegedly smashed and grabbed but innocent people far removed from the scene of the original incident. In this case, the appellant had the presence of mind to call 10111 repeatedly but was clear in her choices that she did not want any help from black officers. There is no doubt that she was focused when she stopped the police patrol car but took offense when approached by a black police officer ... The insulting words were clearly directed at the black police officers and blacks in general. It follows, accordingly, that the appeal against conviction is without merit." [Paragraph 23]

The appeal against sentence was also dismissed:

> "… the incident took place while the police officials were engaged in their official duties. The insults arose out of and were in part directed at the performance of their work. Offenses committed against police officers whilst on duty are generally considered in a serious light. The police in this country work under very difficult circumstances. Regard being had to the totality of the facts regarding this case and the usual approach regarding sentence referred to as the 'triad', coupled with the fact that the appellant is and was quite evidently unremorseful for her conduct, the sentence imposed cannot be faulted." [Paragraph 34].

KHABEER V S (A300/2013) [2016] ZAGPJHC 136 (2 JUNE 2016)

Case heard 30 May 2016, Judgment delivered 2 June 2016

Appellant was convicted of attempted murder and sentenced to 10 years' imprisonment. The appeal was against sentence. Shortly before the hearing of the appeal, the accused attempted to have an updated pre-sentence report, prepared by a criminologist, received as further evidence.

Mudau J (Swartz AJ concurring) held that if the report were to be admitted, "it does nothing more than show that the appellant and his children have added more years to their respective ages" and was "nothing more than a repetition of what was already before court." The evidence was therefore not materially relevant to the appeal [Paragraph 4].

On the merits of the appeal, Mudau J held:

> "[T]he appellant's actions on the night in question were that of someone acting rationally, purposefully and above all, goal-oriented. It is contrary to when someone acts with their temper and commits regrettable acts when they should have known better. … [T]he appellant had powers of discernment and restraint, when his conduct is objectively viewed. The appellant was without doubt subjected to stressing conditions in his personal life but faced no more than millions of couples who do not resort to this kind of extreme violent behaviour. The objective evidence supports the State's contention that the appellant was not only fully aware of his actions but that there was premeditation in the commission of the offence." [Paragraph 19]

Mudau J rejected an argument based on the Constitutional Court judgment of *S v M* (*Centre for Child Law as Amicus Curiae)* and proceeded to note that it was "a notorious fact that instances of crime perpetrated against women in particular in this country are unacceptably high. These attitudes towards women inherently undermine the right to human dignity, the right to freedom and security of their persons, the right to privacy and the right to freedom of association as enshrined in the Bill of Rights." [Paragraphs 20 – 21; 23]. Mudau J held that the facts of the case rendered a non-custodial sentence "outrageously unsuitable" [Paragraph 25]. The application to admit further evidence and the appeal were both dismissed.

S V MGIBELO 2013 (2) SACR 559 (GSJ)

Case heard 14 – 17, 20 – 21, 23, 27, 29, 31 May 2013; 6, 13 June 2013, Judgment delivered 20 June 2013

The accused was convicted of murder, attempted murder and arson. The accused and the deceased had previously been in a love relationship and had a child together. The accused had set on fire a shack where the deceased and his girlfriend were sleeping. The deceased died from the burn wounds, whilst his girlfriend "barely survived."

Mudau AJ emphasised the seriousness and prevalence of the offices [Paragraph 4], and described the attack as "callous, cruel and brutal. This was pure savagery. These were defenceless victims who had no means of escape …" [Paragraph 5]. Mudau AJ held that whilst the case appeared to have "the features of a 'crime of passion'", a proper consideration of the facts showed that "the conduct of the accused was At a glance, this case has, but a proper consideration of all the relevant facts shows that, on the contrary, the conduct of the accused was motivated by revenge or vengefulness. ..." [Paragraph 6]

Mudau AJ held further that the accused's conduct had been "well planned and acted on throughout", and that the accused "was determined to carry out her threats" [Paragraph 8]. Mudau AJ held that the case was distinguishable from a 'crime of passion' "'in which an accused reacts spontaneously to perceived

provocation, driven by anger, without sufficient time to consider his actions'" [Paragraph 9], and that the accused had committed "crimes of vengeance", and shown no remorse." [Paragraph 12].

"… [T]he accused is clearly not a candidate for a non-custodial form of sentence. I did not hear any argument or submission to the contrary. As the accused is a mother to two minor children, it is imperative to have regard to the interests of these children in mind when a proper and just sentence is considered. …" [Paragraph 14]

"With due regard to all the factors in mitigation and aggravation of sentence, I fail to find in the accused's favour the presence of 'substantial and compelling circumstances' that justify the imposition of lesser sentences than those prescribed. The offences committed were unnecessary. The accused's personal circumstances are commonplace and are overshadowed by the gravity of these crimes. In respect of count 2 (attempted murder), in view of the manner in which the crime was committed, as well as the permanent scars suffered by the complainant, there is justification to consider a sentence beyond the minimum sentence prescribed." [Paragraph 17]

The accused was sentenced to life imprisonment on the count of murder; 10 years' imprisonment on the count of attempted murder; and five years' imprisonment on the count of arson. She was also declared unfit to possess a firearm.

ADMINISTRATION OF JUSTICE

SOUTH AFRICAN LEGAL PRACTICE COUNCIL V CHALOM (18445/2020) [2020] ZAGPPHC 663 (26 NOVEMBER 2020)

Case heard 12 November 2020, Judgment delivered 26 November 2020.

This was an application to suspend the respondent from practising as an attorney, alternatively striking his name from the roll of practising attorneys. [Paragraph 1] The application was premised on the respondent's failure to submit auditor's reports for the period from 2016 – 2019. As a result, he was practising without a fidelity fund certificate. [Paragraphs 19 – 23] It was also alleged that the respondent had failed to pay his membership fees for the period from 2016 – 2020. [Paragraph 25] There were further complaints relating to the respondent's handling of a divorce matter [paragraphs 37 – 39], and mention was also made of a newspaper article quoting the respondent describing the judiciary as corrupt. [Paragraphs 40 – 41]

Mudau J (Thlapi J concurring) found that the respondent's answering affidavit:

> "does not constitute a serious, honest and meaningful attempt to answer to and deal with the merits of the application. It is fraught with *ad hominem* attacks against the chairperson of the LPC rather than dealing with the merits of her affidavit. The respondent's papers tell a woeful tale of ignorance, ineptness and indifference as far as the Rules are concerned." [Paragraph 50]

Mudau J noted that the respondent did not dispute his failure to comply with the regulatory framework and had been "exposed as a person who lacks the qualities of a fit and proper person." Mudau J criticised the respondent's conduct in these and other proceedings as "deplorable" and "unbecoming of an officer of the court." [Paragraph 53]

> "The respondent makes numerous unfounded, offensive, insolent and vexatious allegations against the LPC, its Chairperson and the former Law Society in pleadings and affidavits ... His wave of insults and intemperate comments know no bounds. His unfounded allegations know no bounds, for everyone who disagrees with him becomes the subject of his ridicule and offensive

> comments, which cannot be associated with an officer of this court. This equally goes for his attack on how judges are appointed at the recommendation of the JSC. His utterances go beyond the free speech, as a right enshrined in our Constitution, which right in any event is not absolute. Human dignity is listed in section 1 of our Constitution as a foundational value. Equally, section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. The trampling of these values cannot be promoted and be associated with an officer of the court." [Paragraph 54]

Mudau J held further that whilst judges and the courts should not be above criticism,

> "any criticism in that regard must not only be informed, but also be fair to the individual Judge or the court. Allegations such as that the judiciary in South Africa is corrupt, which is a generalized statement, is not only unfair, but damages the image of hard-working men and women in the judiciary untainted by allegations of corruption. The way the respondent conducts himself illustrates a lack of character and a lack of integrity. The respondent, no doubt displays unbridled contempt for his regulatory body and the judiciary. He articulates this contempt through consistent reference to the enforcement of the law upon him as somehow being analogous with apartheid." [Paragraph 57]

Mudau J held that the conclusion was unavoidable that the respondent was not a fit and proper person to continue to practice [paragraph 58], and granted an order was granted striking the respondent's name from the roll of attorneys of the Gauteng Division of the High Court. [Paragraph 62]

In **Isaacs v Potgieter 2019 JDR 0624 (GJ)**, Mudau J sat with Weiner and Sutherland JJ. The judgment is under the name of "the court". The decision distinguished the defences of duress and undue influence and held that the written agreement in question was unenforceable due to undue influence by the Plaintiff on the Defendant.

The judgment is praised by Carmel Rickard ("Woman "unduly influenced" to sign by "bully" partner, so agreement invalid", 29 April 2019, available at https://africanlii.org/article/20190429/woman-%E2%80%9Cunduly-influenced%E2%80%9D-sign-bully-partner-so-agreement-invalid):

> "For me, the appeal judges' decision on this domestic drama shows a welcome and growing judicial sensitivity to the reality of ordinary people's lives and the potential for terrible legal, financial and emotional consequences resulting from subtle – and not so subtle – abuse.
>
> "Women are most often on the receiving end of such abusive relationships, and this seems a classic case, with counsel for Potgieter attacking the credibility of Isaacs via what the court termed, "(t)he old refrain of 'why didn't you leave; no-one would have tolerated such abuse'?" Fortunately, in this case at least, the judges did not accept such a glib and outdated approach but sensitively evaluated evidence of how the relationship actually worked."

MEDIA COVERAGE

Quoted at an event celebrating his appointment as a judge:

"To this end, continuous legal training is not only necessary, but a must for those generally involved in the administration of justice and in particular judicial officers to improve their skills. It is for this reason that, since I graduated from law school in 1987, I have taken advantage to participate, and whenever called upon, organised various workshops and conferences in my field of work under the auspices of the Justice College and the Judicial Officers Association of South Africa.".

- Elmon Tshikhudo, "Local law expert now a judge in Gauteng Division", *Limpopo Mirror* 12 February 2016, available at https://limpopomirror.co.za/articles/news/35366/2016-02-12/local-law-expert-now-a-judge-in-gauteng-division

Prior to the candidate's interview for appointment to the high court in 2015, the General Council of the Bar noted that (see https://johannesburgbar.co.za/wp-content/uploads/Mr-TP-Mudau.pdf):

> "The candidate has demonstrated in his judgments in both *Chuir* and *Tlale* … that he is particularly cognisant of the rights of women" [paragraph 5.1, page 4],

but noted comments by members of the Bar that:

> "give rise to reservations about the ability of the candidate to handle proceedings in the urgent court and about his work ethic." [paragraph 12.3, page 8].

An article by the Wits Justice project entitled "One man's long walk home" describes the story of a Mr Thuba Sithole, who was convicted and sentenced to 15 years imprisonment for armed robbery. The article charges that the case "shows shoddy police work, dodgy eyewitness testimony, a dismissive magistrate and a careless defence lawyer resulted in an innocent man being put behind bars." The article describes Mr Sithole appearing in the Randburg Magistrates' Court on 4 February 2009, before "magistrate Phanuel Mudau". The article describes the evidence of the complainants as "riddled with inconsistencies", and lacking certainty regarding the identification of Sithole. The article also argues that Sithole could not have covered the distance between his work and the crime scene in time.

> "His manager, Dean Dekanah, wrote a letter stating that Sithole left the store at 7.06pm, but the magistrate dismissed this evidence because while the letter did have a Pick 'n Pay stamp on it, it was not printed on an official letterhead.
>
> "Mudau was unperturbed by, and Kahn [Sithole's lawyer] did not protest the fact that no stolen goods were found on Sithole, nor were there any of his fingerprints on Sutton's car. If the crime occurred as described, Sithole's fingerprints would have been all over Sutton's car and her car keys .."

The article notes that an appeal against the conviction was dismissed by the high court.

- Ruth Hopkins and Kyla Herrmannsen, "Wits Justice Project: One man's long walk home", *Daily Maverick* 6 October 2014, available at https://www.dailymaverick.co.za/article/2014-10-06-wits-justice-project-one-mans-long-walk-home/.

JUDGE GEORGE PHATUDI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 8 March 1959

BIuris, University of Limpopo (1984)

LLB, University of Limpopo (1988)

LLM, University of Pretoria (1995)

CAREER PATH

Acing Deputy Judge President, Limpopo High Court (February – June 2019)

Judge, Limpopo High Court (2016 -)

Attorney and Director, M.G. Phatudi Incorporated (1999 – 2016)

Advocate (1996 – 1999)

Lecturer, University of the North (1989 – 1995)

Legal Advisor, Anglo-American Property Services Ltd (1986 – 1987)

Deputy Chairperson, Black Lawyers' Association (2001 – 2003)

Deputy Chairperson, Limpopo Law Council (2001 – 2002)

Member, Disciplinary Committee, Law Society of the Northern Provinces (2001 – 2016)

Arbitrator, Arbitration Foundation Panelist (2005 – 2009)

Commissioner, CCMA (1996 – 2000)

SELECTED JUDGMENTS

PRIVATE LAW

ISMAIL NO AND ANOTHER V ERF 87 DULLSTROOM CC (A357/2015) [2015] ZAGPPHC 835 (11 DECEMBER 2015)

Case heard 3 November 2015, Judgment delivered 11 December 2015

The appellants had instituted an action against the respondents in which they claimed the reduction of a purchase price, being the difference between the original price and the price that the appellants would have been willing to pay for the property, if they had been aware of a road reserve or servitude attached to the property.

Phatudi AJ (Jansen J concurring) held that it was trite law that the appellants could not rely on a "voetstoets" clause where the purchaser could establish that the appellant was aware of a latent defect in the property. [Paragraph 1.8]. After considering the meaning of a latent defect, Phatudi AJ found that it was common cause that the respondent had purchased the property in order to fully utilise it, and had caused plans to be drawn up by an architect for full utilisation. [Paragraph 3].

"The fact that the respondents were compelled to re-draw the initial plans to obviate the 397 m2 short fall … because of the road reserve, can only be indicative of the fact that no building could be permitted to be erected on the road reserve. In the premises, it follows that the defect occasioned by the road reserve constitutes a latent defect in the property sold of which the appellants were aware and failed to disclose to the respondents." [Paragraph 4]

Phatudi AJ agreed with the appellant's submission that it would have been legally impossible for them to have extended developments to the road reserve. "This … caused the respondent not only undue hardship, but also prejudice of a serious pecuniary nature. The road reserve thus constituted an "abnormal quality" which impaired the utility of the property". [Paragraph 10].

"… Where one party has knowledge not accessible to the other party, and where from the nature of the contract the latter … binds himself verbally or otherwise on the basis of the information communicated … the non-disclosure of any such fact is fatal. The contract is voidable at the instance of the aggrieved party because the risk run is in fact greater or different from the risk understood and intended to accept at the time of the agreement." [Paragraph 11.3]

Phatudi AJ held that the misrepresentation had been "conveyed intentionally" and had caused the respondent to act to its detriment. [Paragraph 12].

The appeal was dismissed with costs.

COMMERCIAL LAW

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA V FACTOPROPS 1052 CC AND ANOTHER [2015] 3 ALL SA 319 (GP)

Case heard 25 March 2014, Judgment delivered 20 May 2014

This case concerned the question of whether the interpretation and meaning of the word "mortgage bond" in the 1969 Prescription Act was wide enough to include reference to a Notarial Mortgage Bond. Applicants sought to amend their plea to incorporate a special plea of prescription.

Phatudi AJ held:

"… There are in our law, only four legislative enactments in place in so far as my memory can stretch, which makes reference to the concepts of "mortgage bond", "notarial contract", and "notarial bond". None of these measures, in my view, define quiet adequately the pure juridical meaning to be assigned to each for purposes of interpreting prescription of debts." [Paragraph 26]

Phatudi AJ held that, based on the language used in the Deeds Act and the Securities Act, a notarial bond which hypothecated corporeal and moveable property specified and described in the bond, could not constitute a mortgage bond. [Paragraph 31]. Phatudi AJ disagreed with academic opinion that the Prescription Act did not distinguish between different types of mortgage bonds, and held that prescription applied to the debt concerned, not to the mortgage bond itself.

"In consequence, where a mortage bond is registered after the due date of the debt, the usual prescriptive period applicable to that debt will apply … until the registration of the mortgage bond, when the 30-year period will find application. Accordingly, any period of prescription which has already begun to run, for instance 2 years before registration of the bond, will be taken into account, and the prescriptive period, after registration of the mortgage bond, will be a further 28-years period." [Paragraph 33.2]

Phatudi AJ held that a mortgage bond could not be equated to a notarial bond, and that the intention of the lawmaker had been "to maintain a distinction in respect of both character and the general purport of the two securities". [Paragraph 45]. Phatudi AJ then considered whether the debt in this case originated from a loan agreement or from a notarial bond, and found that the "nucleus" of the respondent's claim was founded on money lent and advanced to the applicant by the respondent, in terms of a loan agreement. [Paragraph 63]. Accordingly, the debt on which the respondent relied originated in the loan agreement. [Paragraph 73].

"… I come to the conclusion that there exists no real impediment why an amendment should not be permitted introducing the Special Plea of Prescription. Such an amendment, would in my view not be excepiable as disclosing no valid defence. I accordingly, do not hesitate to grant the application sought, and it is hereby granted." [Paragraph 95]

Applicants were granted leave amend their plea.

CIVIL AND POLITICAL RIGHTS

MEC FOR HEALTH, LIMPOPO v RABALAGO AND ANOTHER 2018 (4) SA 270 (LP)

Case heard 20 March 2017, Judgment delivered 20 March 2017

Applicant brought an urgent application for an interim interdict against the respondents. First respondent, who according to the judgment "describes himself as a 'prophet' and chairperson of the second respondent, a religious organization or church known as Mount Zion General Assembly" [Paragraph 8], was reported to have used "Doom insecticide to spray his congregants in order to heal members of his church assembly." [Paragraph 9.1]. Applicant cited inherent health risks if Doom were applied to humans. [Paragraph 10].

Phatudi J noted that each can of Doom contained several warnings of potential harm, as well as recommended precautions. [Paragraph 11]. Phatudi J noted the right to freedom of religion found in section 15 of the Constitution, as well as the respondents' reliance on section 31(1) of the Constitution, which allows for people to form cultural, religious and linguistic communities. [Paragraphs 18 – 20].

"It was … submitted on behalf of the respondents during argument that Doom was indeed applied or employed on specific congregants during the 'faith healing ministrations'; and that religious belief and faith healing are the reasons for spraying it (to 'pray for people as per 'instruction from God by the spirit'; 'God spoke to the first respondent on 18 November 2016 while in the church crusade at Mookgopong to conduct faith healing ministrations to the people.') It was further submitted of the congregants who submitted themselves to the spraying of Doom that their testimonies revealed that they were healed and delivered from sickness and various ailments that beset them. This spiritual intervention with healing powers from Doom or other media, descended as and when the spirit of God instructed the pontiff in his church assembly, crusades and other tabernacles of worship, to heal ailing members." [Paragraph 22].

Phatudi J analysed judgments of the Constitutional Court on freedom of religion, and held:

"… What … limits the right in ss 15(1) and 31(1) asserted by the first respondent, is the application and use of a toxic substance such as Doom spray on the human body contrary to the warnings on each can of Doom spray. I therefore venture to suggest that the legislation that prohibits misuse of such insecticides or pesticides as Doom spray on humans limits the very religious rights claimed by the first respondent under the Constitution. What then becomes paramount in this instance is whether the limitation is justifiable under s 36 of the constitution. … I am inclined to think that the use of Doom spray for alleged ceremonial or spiritual healing under the cloak of freedom of religion and worship cannot in my view, be left unlimited by s 36 proportionality analysis." [Paragraphs 34 – 35].

Phatudi J held further that there were no "watertight mechanisms in our law by which a law enforcement agent could distinguish" between "unorthodox ways of religious worship, which otherwise have a propensity of danger or harm", and "unconventional methods used for non-religious purposes." Phatudi J held that he would prefer to "err on the side of conservatism and carve a wide chasm limiting the scope and type of freedom of religion and belief entertained by the first respondent and his church assembly, and the s 15(1) and 31(1) rights." [Paragraph 36].

The interdict was granted.

CIVIL PROCEDURE

TAHO V PUBLIC SERVICES SECTOR EDUCATION AND TRAINING AND OTHERS (58602.2013) [2013] ZAGPPHC 453

Case heard 12 November 2013, Judgment delivered 21 November 2013

This was an application for an interdict, in which the applicants sought an order to set aside disciplinary proceedings initiated and conducted by the respondents.

Phatudi AJ dealt first with a question of whether the Labour Court enjoyed concurrent jurisdiction and held that the question of whether the court had jurisdiction should be left to the court hearing the main application. [Paragraph 10].

"Put, differently, seeing that the Chirwa's case has removed the uncertainty on the issue of concurrent jurisdiction of the labour court, which is a court of equivalent jurisdiction with this court on labour matters, what, however, has not yet been settled is the question whether this jurisdictional power extends to the provisions of Section 31 of the SDA, which is part of the secondary dispute of the subject matter before this court. The moot point raised is, therefore, res nova in our constitutional jurisprudence after 1994, and accordingly requires a robust interrogation by our courts. Such interrogation, however, can in my opinion, not be conducted in an urgent court." [Paragraph 11]

"The preferred approach would be to grant interim relief where the damage or prejudice to the applicant by the refusal of the relief sought may be irreparable, and irreversible, even though the preponderance of success on the merits might be slim, and should ordinarily be granted where no harm would befall the respondents, and if it does, would be innocuous." [Paragraph 13]

Phatudi AJ held that the argument about jurisdiction during an interim relief application was "somewhat premature and ought not to arise at all." [Paragraph 14]. Phatudi AJ held that it was unclear whether the respondents taking issue with the question of locus standi was directed at the main application, or this interlocutory matter. If it was raised in relation to the main application, it was done so prematurely. [Paragraph 16]. Phatudi AJ held that the issue of locus standi was "not a prerequisite" for determining whether interim relief should or should not be granted on an urgent basis.

"Rule 6(12) of the Uniform Rules of Court set out squarely, the requirements of urgency, and what applicant is required to aver to set out explicitly, the circumstances giving rise to urgency. ... Counsel for respondents was not heard arguing forcefully the question of urgency in his submissions. If he did, then his submissions were planted in sandy soil, it could not germinate or it was simply not argument sufficiently persuasive to guide the court to a contrary view." [Paragraph 21]

The application was granted.

SELECTED ARTICLES

Address on Judicial Ethics to District Magistrates in KwaZulu-Natal, published in *The Judiciary*, December 2020.
(https://www.judiciary.org.za/images/Judiciarynewsletter/Judiciary_Newsletter_December_2020.pdf)

"The concept of "judicial ethics" derives historically from the common law, but in the main, involves such issues as honesty, integrity both inside and outside the courtroom, honour, dignity, independence and above all, accountability to the rule of law and the Constitution, which is the supreme law of the Republic." [Pages 18 – 19]

"Judicial accountability, and judicial independence, are in my view, fundamental elements that underpin judicial ethics for every single judicial officer." [Page 19]

"It would offend good judicial ethics for a judicial officer to associate himself/ herself with undesirable comments or conduct by individual subjects to his/her control that are racist, sexist, or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution. …" [Page 20]

"A pattern of intemperate or intimidating treatment of legal practitioners or conduct evincing arbitrariness and abusiveness often gives rise to prejudice and subverts the effective administration of justice and should, therefore, be avoided." [Page 21]

JUDGE VIOLET SEMENYA

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 17 October 1961.

B Iuris, University of Limpopo (1985)

LLB, UNISA (2003)

CAREER PATH

Judge, Limpopo High Court, Polokwane (2017 – to date)

Acting Judge, Gauteng High Court

Pretoria, Polokwane, Thohoyandou (2 terms, 2016)

Pretoria (1 term, 2015)

Regional Magistrate, Mokerong Magistrate's Court (2004 – 2016)

Senior Magistrate and Head of Court, Seshego Magistrate's Court (2003 – 2004)

Magistrate, Mokerong Magistrate's Court (1991 – 2003)

Acting Head of Court (2003)

Prosecutor, Mankweng Magistrate's Court (1985 - 1991)

Secretary, Limpopo, OASA (1994)

Member, ARMSA (no dates given)

Member, SA – IAWJ (no dates given)

Chancellor, Anglican church (2002 – to date)

SELECTED JUDGMENTS

PRIVATE LAW

MC v JC 2016 (2) SA 227 (GP)

Case heard 24 July 2015, Judgment delivered 24 July 2015.

The parties had been married out of community of property with an antenuptial contract that included the accrual system. In divorce proceedings in the court *a quo*, the only issue to be decided was the respondent's claim for forfeiture of marital benefits by the appellant, on the basis of substantial misconduct, in terms of section 9(1) of the Divorce Act read with section 9 of the Matrimonial Property Act. It was common cause that the marriage had irretrievably broken down. The regional magistrate granted an order of partial forfeiture of marital benefits and a costs order in favour of the respondent. [Paragraphs 1 – 3] On appeal, the issue of the constitutionality of section 9(1) of the Divorce Act was raised by the court. [Paragraph 4]

Semenya AJ (Jansen J concurring) considered the provisions of section 9(1) of the Divorce Act, and rejected an argument by the appellant that the respondent had failed to establish a difference in accrual between the two estates. [Paragraphs 14 – 15] Semenya AJ further rejected an argument that the court *a quo* had taken into account irrelevant factors in deciding whether the appellant would unduly benefit if a forfeiture order were not to be granted.

"He held that the only issue he should consider was substantial misconduct as raised in the pleadings. I fail to find any misdirection on the part of the regional magistrate in this regard. The factors complained about are … closely linked to the adulterous relationships in which the appellant engaged. ... The adulterous relationships frustrated the children and caused emotional suffering. It cannot be said that he overemphasised his reliance on these factors …" [Paragraph 21]

On whether the court a quo had been correct to find that the "numerous adulterous relationships" conduct by the appellant constituted substantial misconduct, Semenya AJ differed with the "sentiment" that this was the sole cause of the breakdown of the marriage,

> "in the sense that, contrary to the allegations by the respondent that he was willing to forgive her and to continue to work towards mending their relationship, he admitted, reluctantly, that he rejected her efforts to reconcile ..."

Semenya AJ found that while it was "indeed seldom that a marriage can break down solely due to the conduct of one party", the court *a quo* had correctly found that the conduct of the appellant amounted to substantial misconduct. [Paragraph 22] Semenya AJ found that the respondent's testimony that the appellant was a "diligent, industrious wife and mother who resigned from her employment to devote her time to their children and family", allowing the family to prosper, and could be inferred to have used most of her earnings from when she was employed towards the maintenance of the household, the court *a quo*'s finding that the appellant would benefit unduly if a forfeiture order were not granted could not stand. [Paragraphs 22 – 23]

Semenya AJ found that section 9(1) of the Divorce Act "might infringe upon the rights to equality of married persons who are in a process of divorce", in that a party "guilty" of substantial misconduct under the Act could be in a weaker bargaining position with regard to either redistribution of property or the sharing of patrimonial benefits if the marriage is out of the community of property with the inclusion of the accrual system. "This is the case, a fortiori, when the 'innocent' party is the possessor

of the estate." Semenya AJ found that this infringed the right to equality. [Paragraph 32.1] Semenya AJ found that there may also be an infringement of women's reproductive rights:

> "There are many instances when these rights are exercised within a marriage relationship, which may lead to divorce on the basis of irreconcilable differences. For instance, for fear of divorce, a woman may secretly terminate her pregnancy. (Many reasons may push a woman into choosing abortion — health, finances, etc.) This may be viewed as unfaithfulness, which goes to the core of the nature of a marriage, ie trust. Armed with this, the other spouse may approach the court with divorce proceedings and successfully acquire an order for forfeiture. This will obviously breach a woman's right to reproduction." [Paragraph 32.2]

Semenya AJ held further that "[b]eing forced to remain in an unhappy marriage relationship for fear of losing patrimonial benefits may deprive a spouse of the right to dignity." [Paragraph 32.3] Semenya AJ found that the applicant's argument that section 9(1) "wholly outdated within the constitutional context" "may have merit" [paragraph 33], and made an order requiring notice of the constitutional issue to be given and requiring the appellant to join the Minister of Justice and the Speaker of Parliament to proceedings. [Paragraphs 35 – 44]

CIVIL PROCEDURE

In **Thobejane and Others v Premier of the Limpopo Province and Another (1108/2019) [2020] ZASCA 176 (18 December 2020)**, the Supreme Court of Appeal overturned a judgment by the candidate. Appellants sought to set aside a decision by the respondent not to recognise them as traditional leaders. Appellants raised a point of non-joinder. [Paragraph 1] Semenya J first dismissed the point of non-joinder [paragraph 3], but then when delivering judgment, revisited and upheld the point of non-joinder. [Paragraph 4] The SCA held that the first order was final in effect, and therefore the high court was "not competent to revisit it." [Paragraph 6] The SCA further felt "constrained to comment on the high court's decision to grant leave to this Court":

> "That leave to appeal was correctly granted is beyond question. The high court recognised the irregularity of its order of 17 May 2019. But as to why leave was granted to this Court, escapes me. There is nothing in the issues canvassed here which even remotely warrants the attention of this Court. No controversial legal principle was involved. … [T]he inappropriate granting of leave to appeal to this court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court's roll with a case which is not. This must be deprecated." [Paragraph 14]

CRIMINAL JUSTICE

S v TN AND OTHERS 2020 (1) SACR 633 (LP)

Case heard 30 January 2020, Judgment delivered 13 February 2020.

This was an automatic review where 3 of the 4 accused were children who were convicted of rape and sentenced to five years' imprisonment. On review, questions arose as to whether the proceedings had been in accordance with justice, as there were issues relating to the complainant's performance as a witness under cross examination, and inconsistencies between the evidence of the complainant and other eyewitnesses. [Paragraphs 1 – 2]

Semenya J (Kganyago J concurring) held:

> "[I]t cannot be overlooked that the complainant's evidence-in-chief differs materially with what she said during cross-examination. ... When taken through what she stated in-chief she simply avoided the question by either stating that she did not know anything about what she was being asked, or could not remember what she had stated or what had transpired. She continued in that way with regard to crucial questions relating to who had an act of sexual penetration with her, and where. I am of the view that these are the sort of inconsistencies which, according to *Mkhohle*, should persuade the court to reject a witness's evidence in its totality. More so after evaluating in the light of other evidence presented before it." [Paragraph 21]

Semenya J found that the complainant was not a "truthful, reliable and trustworthy witness", as her evidence differed significantly from other witnesses and was self-contradictory. The version of other state witnesses corroborated that of the accused. Semenya J found that the state had not proved guilt beyond a reasonable doubt, and that it appeared that the regional magistrate had convicted the offenders "simply because he did not believe their version." [Paragraph 26]

Semenya J concluded that:

> "It is indeed desirable that sexual-offence cases in general, and where victims are children in particular, should be prioritised and be accorded the sensitivity that they deserve. It is equally established that courts should play an active role in curbing their escalation. However, in doing so, courts should guard against going beyond what are legally acceptable and established principles governing evaluation of the evidence presented before them. Doing so will undeniably bring the administration of justice into disrepute. I am alive to the fact that there is a thin line between what is legally wrong and what is morally unacceptable. The conduct of the accused and the complainant in this matter is clearly abominable; however, I find it to be discriminatory to punish the offenders alone, who themselves are children, when the complainant was also a willing party in what happened. The moral blameworthiness of the offenders in this matter does not necessarily translate into criminality." [Paragraph 27]

The convictions were set aside.

S v MDHLULI 2020 (1) SACR 98 (LP)

Case heard 10 January 2019, Judgment delivered 10 January 2019.

This was an appeal against a denial of bail. [Paragraph 1] The investigating officer had testified that he was in possession of affidavits from officials in the Department of Home Affairs and the Department of Correctional Services, relating to the records of the appellant's movements in and out of South Africa, and in relation to a condition of the appellant's parole. These affidavits had not been handed in as evidence during the bail hearing, and the magistrate had, of her own accord, called official of the departments to testify. [Paragraphs 12 - 13]

Semenya J found that it was "evident from the magistrate's judgment that she placed more emphasise [sic] on the evidence of the Home Affairs official" in refusing to grant bail. The appellant argued that the evidence of these witnesses had been improperly placed before the court and should be disregarded. [Paragraph 17]

Semenya J upheld the appellant's argument that the court could order either party to put more information on record, but could not do so itself of its own initiative:

> "[T]he duty of the judicial officer is clearly to order the prosecutor or the accused to place sufficient information before it so that it can be in a position to make a just decision. … The judicial officer is not empowered, of his or her own accord, to call witnesses so as to place the necessary information or evidence before it. A comparison between the above sections and s 186 of the CPA will make this point more evident. …" [Paragraphs 20 – 21]

Semenya J therefore held that the magistrate had acted outside her powers in admitting the evidence, which was not properly before the court. [Paragraph 23] Semenya J held further that at the time of the bail application, the state did not have a strong case against the appellant, as fingerprints lifted from the stolen vehicle had not yet been compared with those of the appellant, the court a quo having incorrectly found that the fingerprints were a match. [Paragraph 29]. Semenya J found further that the appellant was not a flight risk [Paragraph 30 – 31]

The appellant was granted bail.

S v LINUS 2015 (1) SACR 381 (GP)

Case heard 28 August 2014, Judgment delivered 28 August 2014.

Appellant was convicted and sentenced to ten years' imprisonment on a plea of guilty on two counts of dealing in drugs under the Drugs and Drug Trafficking Act. The appeal was against sentence. The appellant argued that the magistrate had overemphasised the interests of the community and overlooked other factors, including the personal circumstances of the appellant. The appellant further argued that the magistrate did not consider alternatives to a custodial sentence. [Paragraphs 1 – 2]

Semenya AJ (Molopa – Sethosa J concurring) held that the offence for which the appellant had been convicted was very serious:

> "It indeed has a devastating effect on the communities. It destroys the youth and frustrates parents; its consumption leads to dysfunctional families and disrupts proper schooling. It is the source of most social ills in our societies … It also adversely affects our economy in that operations such as the one that led to the arrest of the appellant do not come cheap. Lots of taxpayer money is injected into them in order to assist the police in investigating and combating the commission of these type of crime. Such funds could be used by the state towards healthcare facilities, education and other services. Families' disposable incomes go towards rehabilitating those who are already addicted. The offence the accused has been convicted of is of those that Legodi J [in *s v Chipape*] describes as most serious, as to warrant a sentence of imprisonment …" [Paragraph 6]

Semenya AJ found that the prescribed minimum sentence for the offence was 25 years imprisonment, demonstrating "how seriously the legislature views such offences". Semenya AJ noted that the offence imposed was less than half the minimum sentence. [Paragraph 7] Semenya AJ found that the magistrate had "accepted the personal circumstances of the accused as mitigatory factors", and weighed them against other factors before "properly arriv[ing] at the conclusion that it was necessary to protect the members of the community, and that, in my view, includes the appellant's own children as well, against the harmful products the accused was dealing in." Semenya AJ dismissed that

appellant's argument “that he poses no danger to society by dealing in this harmful substance” as “ridiculous.” Paragraph 8]

The appeal was dismissed.

MR ANDRÉ PETERSEN

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 16 October 1973

B.Iuris, University of South Africa (1995)

LLB, University of South Africa (1999)

CAREER PATH

Regional Magistrate (2010- to date)

Acting Judge, Gauteng and North West High Courts (October – December 2015; April – May, October – November 2016; April - June, October - November, December 2017; January - March, April - June, July - September 2018; December 2018 - January 2019; April - June, October - December 2019; January - March 2020)

District Court Magistrate (2000 - 2010)

Public Prosecutor (1995 - October 2010)

Department of Justice and Constitutional Development

Assistant Administration Officer, (January 1994-January 1995)

Administration Clerk (January 1992-January 1993)

Member/National Secretary/Provincial Secretary- Gauteng, Judicial Officers Association of South Africa (October 2000 -)

Member/Provincial Secretary- Association of Regional Magistrates of Southern Africa (2013 -)

Member, National Union of Prosecutors South Africa (1995 - 2000)

SELECTED JUDGMENTS

PRIVATE LAW

FOURIE v GEYER 2020 (6) SA 569 (NWM)

Case heard 27 June 2019; Judgment delivered 22 August 2019

The applicant launched a claim to recover money he had loaned the applicant. [Paragraph 1] The respondent raised a point *in limine,* contending that the Acknowledgment of Debt ("AoD") between the parties was a credit agreement which subjected it to the National Credit Act ("NCA"). [Paragraph 7] The respondent contended that the agreements were unlawful in terms of the NCA since the applicant was not registered as a credit provider. [Paragraph 15]

Petersen AJ held that the AoD had the salient features of a credit agreement at arm's length. [Paragraph 20] The applicant was also required to register as a credit provider in terms of the NCA. [Paragraph 29] Petersen AJ held the point *in limine* in favour of the respondent. [Paragraph 30] The AoD was thus declared unlawful.

> "The applicant would not, however, be left without a remedy as he retains his right to claim restitution based on unjustified enrichment." [Paragraph 32]

ADMINISTRATIVE JUSTICE

WILLIAM MAKHUBE MOTLHABANE V PREMIER OF THE NORTH WEST PROVINCE, UNREPORTED JUDGMENT, CASE NO M122/19 (NORTH WEST HIGH COURT, MAHIKENG)

Case heard 16 May 2019; Judgment delivered 20 June 2019

the Member of the Executive Committee ("MEC") had promulgated regulations which prohibited the holding of initiation schools without a permit. The applicants sought an order declaring the regulations null and void. [Paragraph 2] The issue was whether the Premier had acted within the law in delegating powers to the MEC to enact the guidelines. [Paragraph 4]

Petersen AJ held:

> "In terms of the peremptory provisions of section 5 of the NWPDA, the Premier has no authority to delegate any power conferred on him by any law to issue proclamations and to make regulations. … The Premier was therefore not empowered to delegate the power to promulgate the Regulations … to the MEC" [Paragraph 9]

Petersen AJ held that the Regulations promulgated by the MEC were invalid. [Paragraph 10] In deciding the effect of a declaration of invalidity, the Petersen AJ applied the provisions of section 172(1) of the Constitution [paragraph 12], and held that:

> "The harm in my view which would result in declaring all arrest under the invalid Regulations unlawful, would be disproportional to the harm occasioned by an order restricting the retrospectivity of the declaration of invalidity. … If this Court fails to make a just and equitable order to mitigate the harm, there is no doubt that it would have chaotic, if not catastrophic consequences for the administration of justice and the fiscus. The balance of convenience accordingly favours an order restricting the retrospectivity of the declaration of invalidity." [Paragraph 16]

The declaration of invalidity of the Regulations was thus held to apply prospectively and not retrospectively. [Paragraph 18.2]

CRIMINAL JUSTICE

OTTO V S (A858/2014) [2016] ZAGPPHC 605 (19 APRIL 2016)

Judgment delivered on 19 April 2016

This was an appeal against conviction by the appellant, who had been convicted of rape. The state cross-appealed against the sentence of ten years' imprisonment. [Paragraph 1]

The appellant challenged the evidence of the complainant as being improbable. He contended issues such as the complainant lack of recollection of how she was dressed, the behaviour of the complainant to spend time the appellant after the alleged rape and the improbability of the appellant's sons not to have heard the complainants talking and being raped. [Paragraph 14]

Petersen AJ (Mphahlele J concurring) held that the complainant's evidence called for a dual approach, a cautionary approach as a single witness to the alleged rape and on the basis of cautionary rule applicable to the evidence of a child. [Paragraph 17] Petersen AJ dismissed the appeal against conviction, holding that:

> "The legal principles applied to the complainant's evidence on consent … demonstrates that the consent by the complainant was neither real, given voluntarily nor demonstrated tacitly. The appellant irrespective of denying intercourse could not have reasonably believed that the complainant had consented to the kissing, the sucking of his penis or the vaginal or anal penetration, all acts which on their own constitute either sexual penetration or sexual

> violation. In that regard he acted both unlawfully and had the requisite mens rea to rape the complainant." [Paragraph 28]

On sentence, Petersen AJ commented that the "scourge of abuse of children" had not been eradicated from society, and that courts needed to send a message "to others of like mindedness that "we are determined to protect the equality, dignity and freedom of all and we shall show no mercy to those seek to invade those rights."" [Paragraph 44] Nevertheless, Petersen AJ held that the imposition of the mandatory minimum sentence of life imprisonment would be disproportionate. [Paragraph 50] The cross appeal was upheld and the appellant was sentenced to 22 years imprisonment. [Paragraph 52.2]

> "The appellant at the age of 43 is to be treated as a first offender. He is in stable employment and apparent stable family circumstances as a breadwinner. In respect of the offence, the rape occurred during a visit to the appellant's home in what appears to be an isolated incident. Without derogating from the seriousness of the rape, save for the injuries caused during the course of the rape, the emotional impact on the victim is not to be overlooked." [Paragraph 51]

An appeal to the SCA was dismissed in ***Otto v S*** **(988/2016) [2017] ZASCA 114; 2019 (3) SA 189 (SCA) (21 September 2017)**. Regarding the sentence, the SCA held that whilst agreeing "that stern sentences are required to punish those who abuse the vulnerable in our society, and to deter those who may be tempted to do so, the idea that no mercy should be shown to them overstates the point." [Paragraph 28] Nevertheless, the SCA found that "[f]ar from inducing a sense of shock, the carefully considered sentence imposed by the court below strikes me as being one that is proportionate to 'the crime, the criminal and the legitimate needs of society'. [Paragraph 30]

BOOI KHUPUKA MAKHUBELA AND ANOTHER V STATE, UNREPORTED JUDGMENT, CASE NO A33/2017 (GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 9 June 2017; Judgment delivered 30 June 2017

This was an appeal against a sentence of life imprisonment imposed on the first and second appellant. [Paragraph 1] The appellants were accused of luring women into taxis under the pretense of providing genuine taxi services, overcoming them, robbing them, often at knife point, raping them and discarding them in remote places. [Paragraph 4] The appellants argued that life sentence was inappropriate on the grounds that there were substantial and compelling circumstances in their

personal circumstances and that the sentence disregarded rehabilitation purpose of sentencing. [Paragraph 7]

Petersen AJ (Mokgoathleng and Bam JJ concurring) held that the sentencing proceedings by the court a quo had been victim centered [paragraph 23], and emphasised the devastating effects of the abuse of women and children. [Paragraph 24] Petersen AJ found that there had been no misdirection by the trial judge:

> "The trial judge carefully considered the personal circumstances of the appellants, weighed them against the circumstances of the offences, and the impact on the victims and those close to them. The mitigating and aggravating factors were considered and after a balanced approach to the totality of these factors, no substantial and compelling circumstances were found to warrant deviation from the mandated sentences." [Paragraph 30]

ADVOCATE FRANCES SNYMAN SC

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 19 July 1972

National Police Diploma, Pretoria Technicon (1991 - 1994)

B.Iuris, University of South Africa (1996 - 1999)

LLB, University of South Africa (2000 - 2001)

CAREER PATH

Acting Judge

North West High Court (October 2020 – April 2021)

Gauteng High Court (August 2019; January, February – March, August – September 2020)

Advocate, (2002 – to date)

Senior counsel (2019)

South African Police Service (SAPS)

Captain (1997-2002)

Warrant Officer (1996)

Sergeant (1993)

Constable (1991)

Member, Legal Practice Council (2019 – to date)

Pretoria Bar Society of Advocates

Member, Bar Council (2010 - 2011)

Member, Training Committee (2014 - 2019)

Member, Ethics Committee (2002 - 2019)

Member (2002 - 2009)

Member, Help4Souls- community- based Organisation (April 2020 – to date)

SELECTED JUDGMENTS

PRIVATE LAW

KADUR AND OTHERS V MINISTER OF POLICE AND OTHERS (2016/8525) [2020] ZAGPJHC 205 (13 MAY 2020)

Case heard 20 February 2020; Judgment delivered 13 May 2020

This was a claim by a mother and daughter (the first and second plaintiff) and their neighbours for damages resulting from the unlawful arrest, assault and malicious prosecution by two police officers. [Paragraph 1] The facts, described by the court as "shocking" [paragraph 1], were that two police officers had come to first and second plaintiffs' residence on a Sunday morning. The plaintiff had reported an altercation the previous night with neighbours regarding a parking spot. When the police officers arrived, they had assaulted the first plaintiff, banging her head against the wall, touching her inappropriately and strangling her. [Paragraphs 24 - 26]

A video recording of the incident had been made by a concerned neighbor which was allowed into evidence. [Paragraph 28] The third and fourth plaintiffs, who were a married couple and neighbours to the first and second plaintiffs had approached the police officers and tried to intervene on behalf of plaintiffs. [Paragraph 32] All the plaintiffs had been arrested and were released on bail. [Paragraph 40]

The defendants did not file any notice of intention to defend the claim. [Paragraph 2] Snyman AJ found that all the proper procedures had been complied with in terms of service on the defendants and that judgment could be granted by default against the defendants. [Paragraphs 8,12 and 15] Synman AJ held that the evidence supported the claim that the four plaintiffs were unlawfully arrested and maliciously prosecuted and that the first and second plaintiffs were assaulted. [Paragraph 47]

On quantum of the damages, Snyman AJ found that:

> "The principle in determining the amount of the award is the award should be fair to both sides - it must give just compensation to the plaintiff, but not "not pour out largesse from the horn of the plenty at the defendant's expense …"[Paragraph 54]

Snyman AJ ordered the first and third defendants to pay the first plaintiff R 300,000, the second plaintiff 250,000 and the third and fourth plaintiffs R20,000 respectively. The judgment as well as the flash-drive with the video were ordered to be served on the Independent Complaints Directorate. [Paragraph 71]

CRIMINAL JUSTICE

MONYAI v S, UNREPORTED JUDGMENT, CASE NO A157/2019 (GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 6 February 2020; Judgment delivered on 6 May 2020

This was an appeal against sentence. [Paragraph 1] The appellant had been found guilty on five counts of robbery with aggravating circumstances and sentenced to a total of 35 years' imprisonment. [Paragraph 2] There was an incomplete record as the transcribed record was done on an old machine and the record could not be traced. Further, the trial magistrate had retired and there were no independent notes of the trial. [Paragraph 5] Despite agreement between the parties that the appeal should proceed with the incomplete record, the court had to determine whether proceeding with incomplete record would be just and fair. [Paragraph 7]

Snyman AJ (Mdalana-Mayisela J concurring) held that since the appellant had not relied on any of the documents missing from the record on appeal as part of his grounds of appeal, the record was sufficient:

> "The records absent from Court, would not play a determining part in the outcome of the appeal as the information contained in the absent record, has been obtained from secondary sources and/or is common cause before this Court. … The appeal can proceed on the defective record and the appellant will suffer no prejudice thereto." [Paragraphs 34 - 35]

Synman AJ dismissed the appeal against the sentence, finding that the trial judge had correctly considered the mitigating circumstances of age, the fact that the appellant was a first-time offender and the time awaiting trial. [Paragraphs 44, 48 and 52]

> "The sheer magnitude and frequency of the criminal conduct surpasses the fact that the appellant is a first offender. I dare say that the appellant is not so much a first offender, as some- one who has been caught for the first time." [Paragraph 46]

Snyman AJ held that there were numerous opportunities for the appellant to prove his capability for rehabilitation in prison:

> "Because of the nature, the seriousness and prevalence of the offences committed by the appellant I deem it to the benefit of the appellant to serve a longer sentence of imprisonment to enable himself rehabilitate in prison." [Paragraph 56]

MATHENJWA V S (A46/2020) [2020] ZAGPPHC 470 (18 AUGUST 2020)

This was an appeal against conviction and sentence, the appellant having been convicted of the rape of a minor and kidnapping, and sentenced to an effective term of life imprisonment. [Paragraph 1] Appellant argued that the State had not proved its case beyond reasonable doubt, the appellant's version was reasonably possibly true and that the sentence was out of proportion. [Paragraph 3]

Snyman AJ (Lamont J concurring) held that the complainant's evidence was corroborated by every witness called by the State. [Paragraph 10] There was no basis upon which the court *a quo* could have found the appellant's version to be reasonably possibly true. [Paragraph 11] Snyman AJ held that the magistrate in the court *a quo* had come to a reasonable finding in convicting the appellant based on analysis of the evidence. [Paragraph 11]

On sentencing, Snyman AJ held;

> "An aggravating circumstance is that the appellant was a police officer. He was supposed to protect the most vulnerable of the society, which most definitely includes the complainant as a 13-year-old girl." [Paragraph 14]

The appeal was dismissed. [Paragraph 17]

JUDGE VIOLET PHATSHOANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 20 November 1972

BProc, University of the North (1995)

LLB, University of the Free State (1996)

LLM, University of the Free State (1999)

CAREER PATH

Acting Deputy Judge President, Labour Court (January – December 2018; May – December 2020)

Acting Deputy Judge President, Northern Cape High Court (July – December 2017; July – October 2019; August – December 2020)

Acting Judge President, Northern Cape High Court (June – July 2017; September – October 2019)

Acting Judge of Appeal, Labour Appeal Court (2016 – 2017)

Acting Judge, Labour Court (2016)

Judge of the High Court, Northern Cape Division (2011 -)

Acting Judge, Northern Cape High Court (2010 – 2011)

Enrolled as notary and conveyancer of the High Court (2009)

Part time lecturer, University of the Free State (2006 – 2009)

Part time arbitrator, conciliator, CCMA (1999 – 2004)

Admitted as Attorney of the High Court (1999)

Chairperson, Phatshoane Honey Inc attorneys (2002 - 2011)

Director, Naude's Attorneys (2000 – 2002)

Professional Assistant, Naude's Attorneys (1999 – 2000)

Candidate Attorney, Naude's Attorneys (1997 - 1999)

Researcher, Supreme Court of Appeal (1996)

Member, International Association of Women Judges (2011 onwards; Vice chairperson, programmes 2012 – 2014)

Member of Council, Sol Plaatje University (2014 -)

SELECTED JUDGMENTS

PRIVATE LAW

FREEPAK BK V DURAAN AND ANOTHER (729/2013) [2013] ZANCHC 42 (18 OCTOBER 2013)

Case heard: 16 August 2013; Judgment delivered 18 October 2013.

Applicant sought to enforce a restraint of trade agreement that would interdict the respondents from being involved in a business in the Northern Cape that was involved in selling similar products (packing material) to the applicant.

Phatshoane J held:

> "The Duraans make it plain that they intend to open a business which sells similar products as that of the applicant. They do not dispute that they had personal contact with the applicant's clients or that these clients had their contact details. In their own words Van Der Walt rarely visited the branch and was seldom involved in the business. This goes to show how well they were acquainted with the applicant's clients. They also do not say why is it necessary for them to open the same business as the applicant except that they have been involved in the packaging business for 15 years; there is nothing secretive or special about this industry; and that they have been out of employment since February 2013." [Paragraph 23]

> "In its current form the restraint clause impedes the Duraans' involvement in any business which sells similar products as the applicant in the whole of South Africa. It does not define the territory within which the restriction is to apply. Nevertheless, the applicant seeks an order in terms of which the restraint is to operate only in the Northern Cape. Similarly the period of five years over which the prohibition is to endure is out of kilter with what would be reasonable in the circumstances of this case." [Paragraph 27]

The order was granted, with the period of operation of the restraint of trade limited to two years.

LABOUR LAW

NOOSI V EXXARO MATLA COAL (JA62/2015) [2017] ZALAC 3 (10 JANUARY 2017)

Case heard 25 August 2016; Judgment delivered 10 January 2017

This was an appeal against the Labour Court's refusal to condone a late filing of a review record, and dismissal of the review.

On the condonation issue, Phatshoane AJA (Landman JA and Savage AJA concurring) held that the delay, of eight weeks and four days outside the six-week period provided for in s 145 of the LRA, was "inordinate", particularly considering that one of the primary purposes of the LRA was the effective and expeditious resolution of labour disputes. [Paragraph 29]

> "In my view, failure to deal with labour disputes promptly and effectively may render the purpose of the LRA manifestly nugatory. Mr Noosi did not provide a plausible explanation for the wanton delay. He failed to provide the dates in respect of which he interacted with his union representatives and those in respect of which he instructed his attorneys of record to assist him. This would have enabled the Court to assess the legitimacy of the explanation

> proffered for the delay. The remissness on the part of the union officials to file the review application in time ought to squarely be imputed to him." [Paragraph 31]

The appeal was dismissed with costs.

MBS TRANSPORT CC V COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS BHEKA MANAGEMENT SERVICES (PTY) LTD V KEKANA & OTHERS (2016) 37 ILJ 684 (LC)

Case heard 8 – 10 September 2015, Judgment delivered 6 November 2015.

These were unopposed applications to stay writs of execution of arbitration awards made by the CCMA, pending review. In issue was whether the Labour Court had the jurisdiction to stay such writs, and if not, what parties could do to vindicate their rights pending review.

Phatshoane AJ held that, in general, the court had a wide discretion to stay the writs of execution of its own orders:

> "The certification of an award by the Director of the CCMA … does not convert the award into an order of the Labour Court. If this was the position it follows that the powers of the court to review the award would have been stymied because the decisions of this court are not subject to any review. What is clear from the language of s 143 is that the award of the CCMA may be enforced *as if it were* an order of the Labour Court provided a writ has been issued in respect thereof." [Paragraph 9]

Phatshoane AJ held that the CCMA had not been statutorily assigned the authority to issue writs. To the extent that the Practice Manual might suggest that, once an award was certified, it could be executed upon delivery to the sheriff, without a writ having been issued by the court, the stipulation "must be ultra vires". [Paragraph 13]

> "An application to set aside a writ can only be made to the court that issued the writ. Concomitantly, logic dictates that the application to stay the writ should similarly be made to the court that issued the writ. The CCMA is a creature of statute and is not clothed with the jurisdiction to set aside or stay its own writs. This creates an anomalous situation in that the Labour Court has jurisdiction only in respect of such matters as are specifically assigned to it by the LRA and other statutes. …" [Paragraph 15]

> "A stay of a writ issued by the CCMA or by the Magistrates' Court falls outside the ambit of this court's powers. Seen in this context, the litigants are non-suited to set aside the writs issued by the CCMA which are the subject of impending review proceedings before the Labour Court. Put differently, they are without any form of relief afforded to them. Clearly, this legal conundrum could not have been contemplated or intended by the legislature. To my mind, clarification of the practical effect of s 143 is not a judicial task but a legislative competence in view of the fact that it may necessitate some public debate and possible amendments to the existing statutory scheme." [Paragraph 16]

However, Phatshoane AJ found that as the CCMA had lacked jurisdiction to issue the writs, the writs could be set aside as a nullity.

The judgment has been criticised by Suemeya Hanif, "Fishing without a hook", *ENSAfrica* 2 March 2016, available at https://www.ensafrica.com/news/fishing-without-a-hook?Id=2127&STitle=employment%20ENSight).

The author points out that the Court found that the CCMA did not have statutory authority to issue writs, and argues that this is incorrect, and that the clear wording of section 143(1) of the LRA "indicates an intention to create a statutorily created mechanism, not for orders of the CCMA to become orders of the Labour Court in respect of which a writ has been issued, but for orders of the CCMA to be enforced as if they are orders of the Labour Court in respect of which a writ has been issued."

It is also argued that if the court's conclusion is accepted that the proper course to follow is for litigants to approach the Labour Court to issue writs of execution in satisfaction of the arbitration awards, then the words "in respect of which a writ has been issued" in section 143(1) becomes superfluous. Furthermore, the author argues that this interpretation of the amendment is "inconsistent with the memorandum of objects on the Labour Relations Amendment Bill, 2012, which states that the amendments to section 143 of the LRA seek "to streamline the mechanism for enforcing arbitration awards of the commission and to make these more effective and accessible [by removing] the need for the current practice in terms of which parties have a writ issued by the Labour Court". In essence, the court's findings in this case are contrary to what the amendments aim to achieve."

CIVIL PROCEDURE

STAR INTERNET CAFE V VUKANI GAMING NORTHERN CAPE (PTY) LTD (254/2018) [2020] ZANCHC 23 (5 JUNE 2020)

Case heard 16 March 2020, Judgment delivered 5 June 2020

This was an appeal against the dismissal of an interlocutory application by the appellant, which had sought to compel the respondent to discover certain documents. [Paragraph 1] The underlying dispute related to an attempt by the respondent to interdict the appellant and other parties from engaging in unlawful gambling activities on properties owned by the respondent. [Paragraph 3] Respondent sought to compel the respondent to produce documents and video material "purportedly referred to in the founding papers." [Paragraph 8] The court *a quo* found that the documents sought were irrelevant, and awarded costs against the appellant on a punitive scale, as the appellants had persisted with the application despite a judgment of the Free State High Court where a similar application against the respondent's counterpart, requesting the same information, was dismissed with costs on a punitive scale. [Paragraphs 13 – 14]

Phatshoane J (Mamosebo J and Stanton AJ concurring) considered whether the order of the court *a quo* was appealable. Phatshoane found that it was "remarkable" that the appellant persisted with its request that the respondent produces the mandate and brief in question "when it had been informed that those documents do not exist." "It would be *a brutum fulmen* to compel the respondent to produce a document it simply does not have." [Paragraph 29] Phatshoane J then considered the question of whether the documents sought were relevant to the proceedings, noting that a document sought to be produced under the Uniform Rules of Court had to be to the issues in the case and reasonably required by the opposing party. [Paragraphs 30 – 31]

> "There can be no question that an issue that is germane in the main proceedings is whether illegal gambling activities are being carried out by the appellant at the alleged unlicensed

> premises. The employment status and the mandate given … apart from the fact that the respondent does not place any reliance on them, are far removed and totally irrelevant to the enquiry into that main question. The least that the employment contract/consultancy agreement could show is the confirmation of the employment relationship between the respondent and these employees, an aspect which has no bearing whatsoever on the facts they deposed to." [Paragraph 37]

Phatshoane J held further that the information sought was "not decisive of the issues in the main application and would not bring finality to the impending dispute." [Paragraph 38] The appeal was therefore dismissed. [Paragraph 40] On the issue of costs, Phatshoane J considered similar decisions handed down in the Free State and North West High Courts:

> "The same counsel representing the appellant in this case moved for orders to compel discovery of, amongst others, the contracts of employment and mandates or briefs … in almost identical terms and circumstances as the present. In both those decisions the information sought was found to be irrelevant to the consideration of the issues in the main application. ... In the end, the appellant was ordered to pay costs on a punitive scale for its relentless pursuit of an ill-fated course which conduct amounted to an abuse of the court process." [Paragraph 41]

The appeal was dismissed, including in respect of the costs order. The costs of the appeal were awarded on a party and party scale.

CRIMINAL JUSTICE

P V S (CA&R812017) [2018] ZANCHC 41 (13 APRIL 2018)

Case heard 6 November 2017, Judgment delivered 13 April 2018.

The accused was convicted of rape and assault with intent to do grievous bodily harm in the Regional Court, and sentenced to 15 years' imprisonment for the rape, and 3 years' imprisonment for assault, the sentences to run concurrently. The complainant was his 13-year-old stepdaughter. This was an appeal against conviction and sentence. The grounds of appeal focused primarily on alleged contradictions between the evidence of the complainant and other state witnesses.

Phatshoane ADJP (Lever AJ concurring) held that:

> "The only incriminating evidence against the appellant on the Count of rape, the alleged insertion of his finger into the complainant's private part, is that of the complainant. It is so that the child's vulnerability and susceptibility to manipulation deserves sharp scrutiny and should be considered with great care. The complainant is a single witness whose evidence has to be approached with caution." [Paragraph 15]

Phatshoane ADJP found that a number of issues impacted negatively on the complainant's credibility [paragraph 15], and found that the magistrate's findings had been based largely on whether the complainant had reported the incidents. However, the facts and contents of a complaint in a sexual misconduct case could be used

> "only to show that the evidence of a complainant who testifies that the act complained of took place without her consent, is consistent. It is relevant solely to her credibility. The

> complaint cannot be used as creating a probability in favour of the State's case." [Paragraph 19]

The evidence of a report could not serve as corroboration. Phatshoane ADJP found that the complainant's evidence was not sufficient to sustain the rape conviction, which was set aside [Paragraph 20]. The assault was held not to be sufficiently severe to justify a conviction or assault with intent to do grievous bodily harm and was replaced with a conviction for common assault. [Paragraph 21]. The accused was sentenced to 12 months' imprisonment, wholly suspended for 5 years [Paragraph 24].

SCHALKWYK V S (CA&R 119/14) [2015] ZANCHC 5 (27 FEBRUARY 2015)

Case heard: 11 December 2014; Judgment delivered 27 February 2015

Appellant was convicted in the magistrates' court on one count of murder and one count of obstructing the course of justice. On appeal, the issue was whether the state had proved beyond a reasonable doubt that the appellant had murdered the deceased, with intention n the form of dolus eventualis.

Phatshoane J (Tlaletsi AJP concurring) dismissed the appeal:

> "The appellant was convicted of an attempt to defeat or obstruct the course of justice ... The appeal before us does not lie against that conviction because he did not succeed in obtaining leave to appeal against it. Therefore it cannot avail him to argue that the witnesses were untruthful that he urged them to subvert the truth. In any event, the evidence of the two State witnesses remained unshaken that the appellant was angry when he hit the deceased with the hay-bale hook. … [T]hese witnesses also gave evidence favourable to the appellant on certain aspects. Out of exasperation over the deceased's misconduct during the weekend of 12/13 February and the morning of 14 February 2011 the appellant struck him with the hay hook. The Acting Regional Court Magistrate's rejection of the accidental death is justifiable on the facts." [Paragraph 28]

> "Regard being had to the nature of the weapon used the possibility of the consequences that ensued would have been apparent to any person of normal intelligence. On the facts, the only reasonable and inexorable inference to be drawn is that when he gave vent to his ire it was immaterial to the appellant whether the consequences would flow from his action; put differently, he proceeded nevertheless or persisted with his conduct indifferent to the fatal consequence of his action." [Paragraph 35]

On appeal, in **Van Schalkwyk v S (680/2015) [2016] ZASCA 49; 2016 (2) SACR 334 (SCA) (31 March 2016)**, a majority of the SCA overturned the murder conviction and substituted a conviction or culpable homicide. Lewis JA (Tshiqi JA and Plasket AJA concurring) held that the state had failed to prove actual foresight of the possibility of death.

> "As the regional magistrate said, 'by striking the deceased with the hook on the left side of the chest the accused ought to have foreseen that death may occur. The accused reconciled himself with the eventuality'. The test, as noted by the full bench, was incorrectly stated by the magistrate. But it appeared not to worry the full bench since it found on the facts that the appellant had had actual foresight of the death of the deceased. No such finding was made by

> the magistrate, however, and it is far from clear to me how the full bench reached that conclusion." [Paragraph 39]

Baartman AJA and Willis JA dissented, and would have upheld the conviction for murder.

MEDIA COVERAGE

It was reported that during the sentencing stage of the trial of former ANC Northern Cape chairperson, John Block, and others in the so-called Trifecta case, Block sought a special entry and to make a complaint to the JSC over allegations that Judge Phatshoane had been influenced by her Judge President in convicting the accused:

"Earlier sentencing procedures were disrupted because of an urgent application after Block reported Phatsoane to the Judicial Services Commission. He claims she bowed to pressure to convict him in the Trifecta trial.

According to Block's legal representative, Advocate Salie Joubert SC, a judge, who is known to the defence, overheard a telephonic conversation between the presiding officer (Phatsoane) and Northern Cape High Court Judge President Frans Kgomo, indicating that she should "convict the bastards". …

"Mjila conveyed that he had received information from a reliable source where this particular judge was in the presence of the Judge President (Kgomo) when Phatsoane advised him that she had no grounds to convict Block." …

Joubert added that it was decided that this information should be disclosed to the Judicial Services Commission as the "life of his client was at stake".

"While my client was considering an application for recusal, it is clear that Phatsoane had succumbed to pressure to convict the accused. Block has no reason to doubt the validity of this information.""

- Sandi Kwon Hoo, "It's not over yet, says ANC's John Block", *IOL*, available at http://www.iol.co.za/news/crime-courts/its-not-over-yet-says-ancs-john-block-7116795

It was later reported that the Constitutional Court had dismissed an application by John Block for leave to appeal against his conviction and sentence: https://www.businesslive.co.za/bd/national/2018-11-20-constitutional-court-orders-john-block-to-go-to-jail/

ADVOCATE LAWRENCE LEVER SC

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth : 13 March 1961.

BA, Rhodes University (1986)

LLB, Rhodes University (1988)

CAREER PATH

Acting Judge

Northern Cape High Court, Kimberley (August – September, October - December 2013; March – June, July - December 2014; January – March, April – June, July - October 2015; January – June, July - December 2016; January – July, July - December 2017; December 2017 – February 2018; February – April 2018; August – September 2019; October 2020 – March 2021).

North West High Court, Mahikeng (February – April 2007; December 2007 – February 2008, February – April 2008; May – June 2009)

Advocate (2004 – to date)

Senior counsel (2016)

Member of Parliament, National Council of Provinces (1999 – 2004)

Advocate (1995 – 1999)

Lecturer, University of the North West (1994 – 1995)

Advocate (1988 – 1994)

Member, Lawyers for Human Rights (1989)

Member, Democratic Party / Democratic Alliance (1998 – 2004)

SELECTED JUDGMENTS

PRIVATE LAW

ENGELBRECHT N.O V MASTER OF THE HIGH COURT, KIMBERLY AND OTHERS (432/2020) [2021] ZANCHC 11 (8 JANUARY 2021)

Case heard 6 November 2020, Judgment delivered 8 January 2021

Applicant, the executor of a deceased estate, sought an order declaring that the right of *habitatio* granted to the second respondent in terms of the deceased's will extended over certain immovable properties. [Paragraphs 1 – 3] Respondents argued that the right had already been defined in an *ante-nuptial* contract and so it was not necessary for the testator to repeat the definition; that the surrounding circumstances explained the meaning of the clause; and that there was a latent ambiguity in the clause, considering certain evidence external to the will. [Paragraph 7]

Lever AJ first dealt with the respondents having annexed an opinion by a senior advocate, dealing with the same issues before the court, and commented:

> "This is the first time that I have ever come across such practice and it is certainly not a practice that should be encouraged. … Certainly, the opposing respondents would have been free to argue the views espoused in the relevant opinion … However, to insert such opinion into the record and by implication intimate that its source must somehow sway my views is at least inappropriate." [Paragraphs 8 – 9]

The opinion was not taken into consideration. [Paragraph 10] Lever AJ rejected the argument that the right was defined in the ante – nuptial contract, as it had not been incorporated into the will be reference. [Paragraph 17] In considering the argument about the surrounding circumstances explaining the provision, Lever AJ noted that the respondents had referred to the judgment of *Natal Joint Pension Fund v Endumeni Municipality*, which appeared "to be another context."

> "Then by sleight of hand the opposing respondents simply proceed as if the unitary approach to interpretation, where one starts with the language of the provision read in the context of the document itself and having regard to the purpose of the provision and the background to the preparation and production of the document, applies to a testamentary instrument. … The opposing respondents did not refer me to any authority where the 'unitary' approach to interpretation has been applied to the interpretation of a testamentary instrument. Nor could I find any such authority. … However, once one gets over the initial shock of seeing this leap from one context to another with no attempt to motivate it, it might not be such an unreasonable position to adopt. …" [Paragraphs 18 – 20]

Lever AJ held that a cautious approach was required for a "formal document such as a will to be interpreted with reference to extrinsic evidence which may not have been produced in a formal or controlled manner". [Paragraph 22] Lever AJ considered whether there was ambiguity in the clause justifying reference to extrinsic evidence and held that the extrinsic evidence was not admissible. [Paragraphs 24 – 26]. Lever AJ held further that the latent ambiguity argument had also not been established. [Paragraphs 28 – 30]

The application was granted.

CIVIL PROCEDURE

NICOR IT CONSULTING (PTY) LTD v NORTH WEST HOUSING CORPORATION 2010 (3) SA 90 (NWM)

Case heard 21 May 2009, Judgment delivered 21 May 2009

The plaintiff (excipient) claimed moneys allegedly due from the defendant (respondent) in terms of certain written agreements. Defendant filed a special plea and plea, alleging a failure to give notice in terms of section 3(1) of the Institution of Legal Proceedings against certain Organs of State Act (the Act). Plaintiff filed an exception to the special plea, alleging that the defendant did not qualify as an organ of state, and that, as plaintiff was claiming specific performance, the claim did not qualify as a "debt" as defined by the Act.

Lever AJ held that the definition of an organ of state in the Act was "essentially the same as that set out in s 239 of the Constitution", which included "a functionary or institution that exercises a public power or performs a public function in terms of any legislation." The definition in the Act, however, did not include such a functionary or institution. [Paragraph 7] Lever AJ held that it was necessary to "look to the Constitution to determine whether the defendant derives any power or function directly from it in order to determine if the defendant is an 'organ of State' as contemplated in the Act." [Paragraph 11]

Lever AJ rejected an argument that would have had the effect of reading the definition of "organ of State" in the Act "as if the words 'in terms of the Constitution' meant nothing more than 'set out in the Constitution' or 'contained in the Constitution'." Lever AJ found that this interpretation would "lead to anomalies and an untenable situation."

> "If, for example, a non-government organisation (NGO) had as its main objective the raising of funds for the provision of low-cost housing and in fact provides such housing to the indigent in South Africa, on the reading of the definition implied … that NGO, for the purpose of the Act, would be an 'organ of State' ..." [Paragraph 12]

Lever AJ held that the words "in terms of" had to be narrowly construed [paragraph 13], and that the words "in terms of the Constitution" meant that "both the identity of the functionary or institution and the power or function that he, she or it exercises are identified in the Constitution itself." The defendant did not derive its powers or functions in terms of the Constitution, but from its enabling Act, the North West Housing Corporation Act. The defendant was therefore not an organ of State in terms of the Act. [Paragraph 14]

Lever AJ further considered the definition of "debt" in terms of the Act [paragraph 28], and held that in terms of the Act, a debt was confined to a claim for damages. [Paragraph 30]

The exception was upheld, and the special plea struck out.

CRIMINAL JUSTICE

BOTHA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS 2014 (1) SACR 479 (NCK)

Case heard 29 October 2013, Judgment delivered 29 November 2013

This was an application to review and set aside a decision by the third respondent magistrate to allow the second respondent, the National Director of Public Prosecutions, to exhume the body of the deceased in terms of the provisions of the Inquests Act. Applicant was the son of the deceased, whose mother (the deceased's spouse) was on trial for the murder of the deceased.

Lever AJ (Kgomo JP concurring) noted that the dispute in the murder trial was whether the deceased committed suicide or was murdered. The deceased had suffered two gunshot wounds to the head, one of which did not penetrate the skull, the other which exited the skull. The issue was, if the shot which lodged between the skin and the skull was the first shot, what capacity the deceased would have had "to talk and ultimately shoot himself in the head a second time." [Paragraph 11]

Lever AJ described the interpretive approach put forward by the applicant as "pedantic and mechanical":

"It moves from one provision of the Act to the next like the workings of an old, mechanical analogue clock. This method of interpretation is no longer favoured by our courts. Our courts have now adopted the 'purposive' method of interpretation of statutory enactments. …" [Paragraph 20] Lever AJ held that the relevant sections clearly related to gathering information for the purposes of a prosecution or formal inquest. [Paragraph 21] Lever AJ found that the relevant statutory mechanism was available to the Director of Public Prosecutions at any stage of criminal proceedings up to the acquittal of the accused. After conviction, the provisions could be invoked if there was reason to believe there had been a miscarriage of justice. [Paragraph 25]

Lever AJ concluded that the magistrate did have the power to consider and grant the relevant permission [paragraph 26], and then considered an argument that the magistrate's decision was an administrative action governed by the Promotion of Administrative Justice Act (PAJA):

"… It is clear … that [the] Magistrate … reached the conclusion that further investigations into the circumstances and causes of the deceased's death were called for. ... Section 3(4) of the Act does not require notice to be given to any person. In the context of a criminal investigation or a criminal trial an ex parte application is appropriate. The exhumation of the deceased is regulated by statute. It is clear from Magistrate Wessels' reasons that he has considered and applied the relevant statute. Evidence on oath has been placed before Magistrate Wessels. ... From the reasons supplied by Magistrate Wessels, he has evaluated this evidence. From the reasons supplied by Magistrate Wessels it is clear that he has brought a judicial discretion to bear on the relevant request to exhume the body of the deceased." [Paragraph 35]

Lever AJ concluded that the act of considering and granting permission to exhume the deceased was a judicial act which was not subject to the PAJA. [Paragraph 36] The application was dismissed with costs.

S v MAFORA 2010 (1) SACR 269 (NWM)

Case heard 2 July 2009, Judgment delivered 2 July 2009

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

Lever AJ (Gura J concurring) held that the record did not support the magistrate's finding that the accused had escaped after he had been imprisoned.

> "The closest the record comes is where the accused answers a question about where they had come from before being taken to the van, and he replies, '(f)rom the courts cell'. From the record we do not know if the accused was 'lodged' in the court cell. He may simply have stood outside or next to the court cell. There is an element of doubt as to whether the accused was 'lodged' in the court cell and as a result no such finding can be made. In these circumstances the accused cannot be convicted under the provisions of s 117*(a).* [of the Correctional Services Act]" [Paragraph 7]

The question then arose whether the accused's guilty plea and answers given under section 112(1)(b) of the Criminal Procedure Act disclosed an offence under section 51(1) of the CPA. Lever AJ found that it did not appear from the record that the custody of the accused had been lawful. [Paragraph 10] However, Lever AJ found that the accused had admitted to the escape and that there was sufficient evidence on the record to show that he had the necessary *mens rea*. [Paragraph 11] Lever AJ concluded that:

> "In the circumstances of this case, where it cannot be established that the accused was 'lodged' in the court cell, no offence in terms of s 117*(a)* of the Correctional Services Act can be established. Further, where the record does not disclose that the 'custody' was lawful, no offence in respect of s 51(1) of the Criminal Procedure Act has been established. In these circumstances the conviction and sentence must be set aside and the matter is referred back to the magistrates' court to commence *de novo* before a different presiding officer." [Paragraph 13]

CHILDRENS' RIGHTS

HJC AND ANOTHER V OV AND ANOTHER (2039/13) [2015] ZANCHC 4 (27 FEBRUARY 2015)

Case heard 3 December 2014, Judgment delivered 27 February 2015

Applicants, the parents of two minor children, sought an order compelling the respondents to reveal the identity or identities of the informant(s) who reported to the second respondent the possible sexual abuse

of the applicants' two children. First respondent was a registered public school, and the second respondent was the school's principal at the relevant time.

Lever AJ ordered that the matter be heard *in camera* due to the "very young" age of the children involved and the nature of the allegations. [Paragraph 18] Lever AJ found:

"It is one of the core values of our society that children must be protected. In this context children are protected by the provisions of section 28(1)(d) of the Constitution. Similarly, section 110 of the Children's Act also evidences the value placed on the protection of children by our society. In this context where a report is made bona fide and not frivolously or maliciously a court will generally not order the disclosure of the identity of the person who made the report. To do otherwise would make it almost impossible to implement the protections set out in section 110 of the Children's Act or to give effect to the value of protecting children enshrined in the Constitution, because people will simply look the other way if they fear being put to the time, trouble and expense of defending themselves in court." [Paragraph 21]

Lever AJ found that there were "important disputes of fact" and that, on the papers filed, it could not be found that the second respondent's version was inherently improbable. Applicants had not filed a reply to the second respondent's affidavit, and Lever AJ held that in the circumstances the applicants could not dispute the second respondent's version. [Paragraph 24] Lever AJ held that it was necessary to weigh the conduct of the person who made the report, as well as the conduct of the second respondent. Lever AJ held further that:

"It cannot be disputed that the person who made the report did so in circumstances where he/she made an appointment to see the second respondent. At the material time the second respondent was the principal of the school the children attended. In the circumstances … it was reasonable for the report to be made to the second respondent. The report was made behind closed doors and the second respondent avers that in her opinion the report was made bona fide. The report was also made to the second respondent in confidence. The second respondent sought the help of two social workers in taking the matter forward. In the circumstances I consider this to be both reasonable and responsible. Second respondent sought to speak to the second applicant alone. It was the second applicant who involved other people. It is understandable that the second applicant would contact her husband … but it is neither understandable nor reasonable for the second applicant to relay the report to her employee. ..." [Paragraph 26]

Lever AJ found that the report had been made *bona fide*, and that the court's discretion should be exercised not to order the disclosure of the identify of the person who made the report. [Paragraph 27] Lever AJ ordered that there be consultation with a social worker or social welfare organisation "to cater for the establishment of sexual boundries and therapy for the children", noting that:

"In taking such approach I do not make any judgment on the applicants as parents. The fact that they readily agreed to such an Order shows that they are willing to act in the best interests of their children." [Paragraph 31]

The application was dismissed with costs.

ADVOCATE SIBONGILE NXUMALO

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 7 December 1970

Bachelor of Laws, Honours, University of Calabar, Nigeria (1997)

Barrister at law, Abuja Law School, Nigeria (1999)

Diploma in Legislative Drafting, VISTA University, Port Elizabeth (2003)

CAREER PATH

Acting Judge, Northern Cape High Court (April – September 2020)

Advocate (2006 – to date)

Senior State Law Advisor, Western Cape Provincial Administration (2004)

Senior Legal Advisor, Northern Cape Provincial Legislature (2000 – 2004)

Arbitrator, Arbitration Foundation of Southern Africa (2011)

Member, Johannesburg Bar Council (2008 – 2009; 2014 - 2015)

Member, Advocates for Transformation (2006 – to date)

Member of Executive Committee (2007 – 2013)

Member, Johannesburg Society of Advocates (2006 – to date)

Member, Nigerian Bar Association (1999 – 2000)

African National Congress

Member of Regional Executive Committee and Political Commissar, Francis Baard Region, Northern Cape (1999 – 2004)

Political Commissar (exile) (1988 – 1990)

Publicity Secretary, Northern Cape Region, United Democratic Front (1986 – 1988)

Member, Siyakha Development Foundation

Volunteer, Eldorado Park Law Clinic.

SELECTED JUDGMENTS

PRIVATE LAW

B v B (525/20) [2020] ZANCHC 52 (7 August 2020)

Case heard 19 June 2020, Judgment delivered 7 August 2020

This was an application for relief *pendente lite* (pending litigation) in a divorce action, for parental rights and responsibilities in respect of the primary care and residency of the parties' minor child to be awarded to the applicant. Furthermore, that contact rights with the minor child be awarded to the respondent, that the respondent be ordered to pay maintenance of R3 000 per month for the minor child, as well as 50% of the minor child's reasonable medical and school expenses. Applicant also sought an order that respondent pay R20 000 as a contribution towards the applicant's legal expenses incurred in the divorce action. Respondent argued that the application was characterised by "manifest irregularities" and that the court lacked jurisdiction. [Paragraphs 2 – 3, 14] The judgment dealt with the preliminary objections raised by the respondent. [Paragraph 4]

Nxumalo AJ dealt first with whether the court had jurisdiction. Respondent argued that the application had been instituted when the minor child was no longer residing within the jurisdiction of the Northern Cape High Court, and that the office of the Family Advocate in Kimberley lacked the jurisdiction to inquire into the welfare of the minor child. [Paragraph 17] Nxumalo AJ found that the jurisdiction of courts to grant interim relief in matrimonial cases in matters expressly mentioned in sections 29 and 44 of the Children's Act, and where the main dispute between parties was pending, was "not mutually exclusive." Furthermore, the Divorce Act did not "overrid[e] or clash[] with the rights of minor children under the Children's Act. [Paragraph 27] Nxumalo AJ found that the Children's Act did not provide Children's Courts with jurisdiction to grant any interim orders *pendete lite*. "That seems to be the exclusive jurisdiction of the high court whence from the divorce proceedings have been instituted." [Paragraph 28] Nxumalo AJ held that, absent urgency, applications for ancillary relief *pendente lite* should be brought in the court where the main case between the parties was pending, "and not in another court which may have jurisdiction to hear the divorce action between the parties." Nxumalo AJ found that the court had jurisdiction over matters incidental to the divorce proceedings. [Paragraph 29]

Nxumalo AJ then considered whether the application was manifestly irregular. It was common cause that the applicant had instituted the divorce proceedings while the respondent was domiciled within the jurisdiction of the court. Those proceedings remained pending before the court. It was also common cause that the respondent and the minor child were domiciled in the Western Cape, outside the jurisdiction of the court. [Paragraph 33]

Nxumale AJ dismissed an argument that the setting down of the matter constituted an irregular step, as the respondent had not been prejudiced. [Paragraph 34] An argument that the applicant's sworn statement was not commissioned was also rejected. [Paragraph 35] Nxumalo AJ held further that the respondent had not utilised the provisions of Rule 30 give the applicant the opportunity to rectify the alleged irregularities. Furthermore, respondent had not shown that he had suffered any prejudice due to the alleged irregularity, especially considering that the application was not heard on the date on which it was originally set down. [Paragraph 36] Nxumalo AJ held that "the respondent's objection to the applicant's alleged irregularities is of it selves [sic] not only irregular, but the respondent has already acquiesced to the alleged irregularity." [Paragraph 37] Finally, Nxumalo AJ found that that the applicant had made out a *prima facie* case for the relief sought. [Paragraphs 39 – 42]

The points *in limine* were dismissed, with costs awarded against the respondent.

CIVIL PROCEDURE

NEL V VAN SCHALKWYK NO AND OTHERS (207/19) [2020] ZANCHC 33 (26 JUNE 2020)

Case heard 29 May 2020, Judgment delivered 26 June 2020

Applicant sought a final mandatory interdict *inter alia* to compel respondents to hand over originals of a deed of transfer in respect of certain immovable property, as well as letters of executorship in respect of a deceased estate. [Paragraph 1] Respondent sought to strike out portions of the applicant's replying affidavit. [Paragraph 3]

Nxumalo AJ held that:

> "all matter sought to be struck out, except the third sentence in paragraph 30.1 of the replying affidavit is indeed scandalous, vexatious and irrelevant. One only has to read same *vis-à-vis* the issue for determination, to find so. I am satisfied that if such matter is not struck out, the third respondent would be prejudiced. …" [Paragraph 6]

Nxumalo AJ then considered a challenge to the *locus standi* of the applicant, identifying the issue for decision as:

> "whether the … fact that the applicant might have committed an error in transferring the impugned property some sixteen years ago *ipso facto* grants him the right or *locus standi* to launch a[n] … application to the registrar to rectify same without a mandate to do so from any person appearing from the deed or other document to be interested in the rectification?" [Paragraph 14]

Nxumalo AJ found that based on the facts and circumstances of the case, it was clear that the applicant sought "both to perform an act and/or seeks something to be performed or rectified in the deeds registry on behalf of another person", and that regulations under the Act provided that any person seeking to perform any other act in the deeds registry on behalf of any other person was required to lodge the original power under which they claimed to act. Such a person "would be acting as an agent and performing a juristic act on behalf of another." [Paragraph 23] Nxumalo AJ found that it was:

"clear that the applicant's mandate was discharged as far back as 09 March 2004, where after, in my view he instantly became *funtus officio*. Thereafter he had no authority whatsoever to attend to any aspect in relation to the impugned deed. It is so since, generically, an attorney or conveyancer can only acquire authority to conclude a juristic act on behalf of his client if his client has by word or conduct expressed his will that he has power to do so. There is no rule in law which lays down what "implied powers" attorneys or conveyancers have, other than what stands in the four corners of the power of attorney. …" [Paragraph 24]

Nxumalo AJ found that the applicant inferred his authority "solely from the fact that since he committed a *bona fide* error" in the impugned deed, and as the conveyancer who transferred the property to the third respondent, he was responsible to correct the alleged error. However, "nowhere in his founding affidavit does the applicant traverse any direct proof of an express, inferred or ostensible authority to launch the section 4 (1) (b) application or this one." [Paragraph 27]

Nxumalo AJ therefore found that the application was "fatally defective" due to the applicant's lack of *locus standi*, and there was no need to determine the merits. The application was dismissed with costs. [Paragraph 33]

CRIMINAL JUSTICE

S V BODUMELE 2020 JDR 1627 (NCK)

Case heard 22 June 2020, Judgment delivered 21 August 2020.

This was an appeal against conviction and sentence. The appellant was convicted of rape and sentenced to life imprisonment. The complainant had fallen pregnant and underwent an abortion at the age of 14. [Paragraph 1]

Nxumalo AJ (Williams J concurring) upheld the court *a quo*'s finding that the appellant's version was "highly improbable". [Paragraph 12] Regarding the complainant not disclosing the incident prior to her becoming aware of being pregnant, Nxumalo AJ held:

> "The appellant's contentions are clearly careless of the following. First, in criminal proceedings involving the alleged commission of a sexual offence, the court is precluded from drawing a negative inference only from the length of any delay between the alleged commission of such offence and the reporting thereof. … [I]t has been established that there are many factors which may inhibit a rape victim from disclosing the assault immediately and to present a facade of normality. … [R]aising a hue and cry and collapsing in a trembling and sobbing heap is not the benchmark for determining whether or not a woman has been raped. …" [Paragraph 13]

Nxumalo AJ further held that there were no substantial and copelling circumstances which would justify a departure from the prescribed minimum sentence:

> "The appellant was 46 years at the time he raped the complainant. She was only 14 years at the time and she regarded him as an uncle. The appellant placed himself in a position of trust to the complainant and her mother. The complainant looked up to him as the father figure. Appellant abused a position of trust. Instead of protecting her, he put her through trauma not only of rape but abortion and trial. The removal of the complainant from her home to the house where the offence was committed, is an indication that the offence was indeed planned by the appellant. … The personal circumstances of the appellant … cannot outweigh the seriousness of the offence and the interests of the community. …" [Paragraphs 21 – 22]

The appeal was dismissed.

MS JANINE SNYDERS

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 8 November 1980

LLB, University of the Free State (2002)

LLM, University of the Free State (2003)

CAREER PATH

Northern Cape Consumer Court

Chairperson of the Board (2018 – to date)

Member of the Board, (2015 – 2018)

Acting Judge, Northern Cape High Court (January – December 2017)

Admitted as Conveyancer (2015)

Admitted as Notary (2008)

Director, Engelsman & Magabane Attorneys (2005 – to date)

Candidate Attorney, Jooste, Robertson & Du Toit Attorneys (2003 – 2005)

Member, Governing Body, Northern Cape High School (2016 – 2018)

Member, Governing Body, Newtown Primary School (2016 – 2018)

Rotary Club of Kimberley

President (2016 – 2017)

Member (2015 – 2016)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

ALPHA PRIMARY SCHOOL AND ANOTHER V HEAD OF DEPARTMENT, DEPARTMENT OF EDUCATION, NORTHERN CAPE AND OTHERS (1120/2017) [2018] ZANCHC 10 (12 FEBRUARY 2018)

Case heard 2 November 2017, Judgment delivered 12 February 2018

Applicants brought a claim under the Promotion of Administrative Justice Act (PAJA) to review and set aside decision by the first and second respondent to instruct the first and second applicant to re-advertise posts for Principal, Deputy Principle and HOD (Afrikaans first language Grade 1- 7). Alternatively, the applicants sought to have the first respondent's failure to appoint educators in those posts reviewed and set aside. [Paragraph 1]

Snyders AJ (Williams AJ concurring) first dealt with an issue of the composition of the School Governing Body (SGB). It was common cause that a parent member of the SGB had ceased to be a member of the SGB when her child completed primary school, and that no other parent had been co-opted to replace her during the period leading up to the application. The respondents argued that the SGB had therefore conducted their activities unlawfully during this period. [Paragraph 16] Snyders AJ held that, whilst the SGB was not properly constituted, the respondents were aware of the situation, and that:

> "it is unfair of the respondents who initially apparently condoned the state of affairs now take issue with the composition of the SGB generally. The position is, however, that although the SGB may have conducted their business and made decisions unlawfully during this period, such decisions are not automatically invalid and its consequences stand until such decision is set aside by a competent Court…." [Paragraph 19]

Similarly, Snyders AJ found that the SGB's constitution provided a quorum for any meeting of the SGB comprised a majority of SGB members. The SGB meeting to consider and discuss the recommendations of the interview committee had only three members of the SGB present, and as a result the meeting "did not quorate." [sic] The recommendations to the Head of Department lowing from the meeting were therefore unlawful, but the respondents had again acquiesced in the situation. [Paragraph 20]

Synders AJ found that the Schools Act and the SGB's constitution required a member of a governing body to withdraw from a meeting "for the duration of the discussion and decision-making on any issue in which the member has a personal interest." Five members of the SGB present at the meeting where it was decided to institute legal proceedings had applied for the posts in dispute. [Paragraphs 22 – 23]

> "The applicants state … that the process of short-listing and interviewing had been completed at the date upon which the decision to institute legal proceedings was taken and that the affected SGB members … did not have any material interest in the matter, save that they were not appointed in the posts in question. This argument is untenable. The resultant legal action flowing from the resolution directly affects these members and their presence at such discussion is contrary to the statutory prescripts and their own constitution and is unlawful. The SGB was not properly constituted and therefore did not have the authority to institute proceedings herein." [Paragraph 23]

The application was dismissed, with each party to pay their own costs. Snyders AJ emphasised the need to ensure "that the vacant posts are re-advertised as a matter of priority to ensure that the best interests of the affected children are protected and advanced." [Paragraph 25]

DIPPENAAR V MINISTER OF CORRECTIONAL SERVICES AND OTHERS (596/2015) [2017] ZANCHC 44 (31 MARCH 2017)

Case heard 1 February 2017, Judgment delivered 31 March 2017

Applicant, a sentenced prisoner, brought a review under the Promotion of Administrative Justice Act (PAJA) to set aside a decision to transfer him from the Correctional Centre: Upington to the Correctional Centre: Tswelopele. [Paragraph 1]

Snyders AJ (Lever AJ concurring) found that the applicant had only been informed of the proposed transfer the day before final approval for the transfer was given. Snyders AJ held further that the applicant had not been informed of the reason for the transfer before the decision was taken, had not been granted an opportunity to make representations before the decision was taken, and his representations were not considered before the decision was taken. [Paragraph 25]

Snyders AJ held further that in terms of case law, the applicant was entitled to be heard before a decision was taken.

> "It is also clear that applicant was not afforded an opportunity to make formal or informal submissions before the decision was taken. The respondent views the date of the decision as 24 February 2015. This is the date upon which feedback was given to applicant's representations. This statement cannot be correct, is disingenuous and stands to be rejected. This is substantiated by the fact that the final approval was granted on 13 February 2015." [Paragraph 29]

Snyders AJ held that while the court would be reluctant to "inhibit the respondent, as an organ of state, from effectively implementing policy" there was a limit as to how far the respondent could "stretch the flexibility of the *audi alteram partem* rule", and the respondent had not properly followed the *audi alteram partem* rule. [Paragraph 31] Snyders AJ found that the decision maker was obliged to consider representations, which had not been done in this case as the final approval pre-dated the responses received, and there was no indication that the final decision maker had rejected the applicant's representations at the time they took the final decision. [Paragraph 33]

Snyders AJ found that the transfer decision was substantively unfair, as consideration had not been given to the personal circumstances of the applicant. The respondent had also dealt with the representations on a piecemeal basis, with some of the applicant's objections being dealt with in correspondence, and some only in court papers. Snyders AJ held that a relevant consideration had therefore been ignored when taking the decision. [Paragraph 35]

The decision was therefore found to be procedurally and substantively unfair, and was remitted to the respondents for reconsideration.

CRIMINAL JUSTICE

SELALETSI V S (KAP08/15) [2017] ZANCHC 55 (2 JUNE 2017)

Case heard 29 May 2017, Judgment delivered 2 June 2017

The appellant was convicted in the Regional Court of assault with intent to do grievous bodily harm, pointing a firearm, and rape. He was sentenced to an effective term of 15 years' imprisonment. The appeal was against sentence and conviction. On appeal, it was common cause that the record was incomplete, in that entire plea proceedings and the testimony of the complainant, who was a single

witness, were not transcribed, and the examination - in - chief and a portion of the cross - examination of the appellant were not included in the record. [Paragraphs 1 – 3]

Snyders AJ (Pakati J concurring) found that the clerk of the court had stated under oath that the Magistrate had subsequently resigned and left the province. The prosecutor had passed away and the defence attorney had left the Legal Aid Board and was untraceable. The defence attorney also had no written notes on the case.

"A further factor that impedes re-construction of the record is the 7 year delay between the conviction and when the application for leave to appeal was heard. It is clear that reconstruction of the record herein is impossible and blame cannot be attributed to the appellant." [Paragraph 8]

Snyders AJ considered the decision of the SCA in *S v Chabedi*, in terms of which the record had to be "adequate for the consideration of the appeal and not a perfect recordal of everything that was said at trial." [Paragraph 10] Snyders AJ held:

> "[T]he appellant avers that his conviction should be set aside as the state did not prove its case beyond reasonable doubt. He also alleged that the sentence was inappropriate and induced a sense of shock. No assistance was given by the Magistrate in his judgment. The acceptance of the complainant's testimony as a single witness was not explained. The testimony of the witnesses was not properly evaluated having regard to the probabilities and improbabilities thereof. No rationale was given for rejecting the appellant's version as not reasonably possible. … Although both counsel addressed the merits of the appeal, I cannot adjudicate thereon in the absence of the complete record. The nature of the defects in the record are such, that I cannot make a finding on the issues to be decided. Further to this, in the absence of a record of the proceedings, it is clear that there cannot be a fair trial at appeal stage." [Paragraphs 13 – 14]

The appeal was upheld, and the convictions and sentences were set aside.

MR MATTHEW FRANCIS

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 20 November 1962

BA, University of the Western Cape (1984)

BA Honours, University of the Western Cape (*cum laude*) (1985)

MA, Political Science, University of Natal, Pietermaritzburg (1988)

LLB, University of Natal, Pietermaritzburg (*cum laude*) (1990)

Postgraduate Diploma, Environmental Law, University of Natal, Pietermaritzburg (1999)

CAREER PATH

Acting Judge, Western Cape High Court (January – March, April – June, July – September, October – December 2019; January – March, April – June, July – September, 27 – 29 October, 11 November 2020).

Director, Matthew Francis Inc (2011 – to date)

Venn Nemeth & Hart

Director and Chair (2006 – 2011)

Director and Deputy Chair (2006)

Director (1996 – 2005)

Professional assistant (1993)

Director, Garlicke & Bousfield (2005 – 2006)

Senior Lecturer, University of Natal, Pietermaritzburg (1994 – 1996)

Member, Black Conveyancers Association (2012 – to date)

NADEL

Co-opted executive member, Pietermaritzburg branch (1994 – 1996)

Member (1998 – to date)

Member, Public and Local Government Committee, KwaZulu – Natal Law Society (until 2018)

Branch member, African National Congress (1992 – to date)

Member, Scottsville School Governing Body

Member, Pietermaritzburg Chamber of Commerce

SELECTED JUDGMENTS

CIVIL PROCEDURE

SA v JHA AND OTHERS 2021 (1) SA 541 (WCC)

Case heard 10 November 2020, Judgment delivered 10 November 2020.

Applicant and first respondent were divorced, with a consent paper dealing with issues of guardianship, care and contact, and maintenance. The applicant failed to pay the cash maintenance portion agreed to in the consent paper from the time of divorce in 1993 until January 2019. The first respondent did not demand payment of the arrear maintenance until December 2018. First respondent caused a writ of execution to be issued against the applicant for the arrear maintenance. The issue to be determined by the court was whether prescription applied, and "whether an undertaking to pay maintenance in a divorce consent paper which is made an order of the High Court gives rise to a 'judgment debt' or 'any debt' contemplated in ss 11*(a)*(ii) and 11*(d)* of the Prescription Act." [Paragraphs 1 – 6]

Francis AJ considered case law and held:

> "[A] consent paper that is made an order of court must be construed as a judgment of the court and, as such, is a judgment debt. Accordingly, the 30-year prescription period applies to such an agreement." [Paragraph 15]

The issue that then arose was whether the maintenance portion of the consent paper also qualified as a judgment debt, "given the fact that such an order does not have the character of a final judgment." [Paragraph 15] Francis AJ held:

> "In my view, the maintenance order which forms part of a consent paper should be treated no differently to any other part of the order. A maintenance order is final and enforceable until varied or cancelled and the order, like any other order, must be carried out immediately… The settlement agreement, and the resultant consent order, disposes of the underlying dispute, and any subsequent litigation that may ensue in respect of compliance with the settlement order does not have to traverse the merits of the original underlying dispute. Thus, any rescission, variation or a suspension of the maintenance order granted earlier becomes a new dispute between the parties where the original order granted may form the basis of any new contemplated action." [Paragraph 16]

Francis AJ held further that there was also "a strong policy element" underpinning the power to vary maintenance orders, which was

> "necessary in order to accommodate changes in conditions that existed when the original order was made and that it would be unfair if such an order was allowed to stand in its original form. It would certainly redound to the prejudice of all the parties, especially children, if maintenance orders were final and immutable. …" [Paragraph 17]

Francis AJ thus held that once a maintenance order forming part of a consent paper was made an order of court, it was "a judgment like any other", and because it imposed a monetary obligation, it was a judgment debt for the purpose of section 11*(a)*(ii) of the Prescription Act. [Paragraph 18] Francis AJ further rejected an argument that policy considerations underlying the Prescription act were not served by interpreting "any judgment debt" to include a maintenance order. [Paragraphs 29 – 31]

An order was granted declaring that the maintenance obligations in the consent paper were subject to a 30-year period of prescription in terms of section 11*(a)*(ii) of the Prescription Act.

CRIMINAL JUSTICE

SMIT v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2019 (2) SACR 516 (WCC)

Case heard 16 August 2019, Judgment delivered 16 August 2019.

Applicant, a South African citizen, was accused of having committed various cannabis related offences in the United Kingdom. The United Kingdom issued an extradition request for him to stand trial for the alleged offences. The Minister issued a notice in terms of the Extradition Act, requesting the magistrate, Pretoria (fifth respondent) to issue a warrant for the accused's arrest prior to the conducting of an extradition enquiry. The warrant was issued, and the applicant was arrested. [Paragraphs 1 – 2]

The applicant challenged the process on several grounds, arguing that the schedule to the Drugs and Drug Trafficking Act, which proscribing the possession of and dealing in cannabis, was unconstitutional as the drug had been prohibited the Minister exercising a legislative power conferred by the Drugs Act, in breach of the doctrine of separation of powers. Applicant therefore argued that the while the possession of cannabis may be prohibited in the United Kingdom, it was not so in South Africa, and the double criminality rule was therefore not satisfied. [Paragraph 9] Applicant further challenged section 5(1)(a) of the Extradition Act, in terms of which the warrant was issued, arguing that the magistrate was "merely directed to do so by the Minister." [Paragraph 10]

Francis AJ first considered a challenge to the applicant's standing to challenge the constitutionality of the Drugs Act. [Paragraphs 14ff] Francis AJ held that as the applicant did not only challenge the cannabis prohibition, but also the statute and the schedules on the basis of the rule of law and the principle of legality, he had standing "in respect of those objective criteria alone." Applicant's challenge was not limited to cannabis but related to the alleged violation of the separation of powers. [Paragraphs 18.1 – 18.2] Francis AJ found that the applicant had sufficient interest in the subject-matter of the dispute to have standing. [Paragraph 19]

Francis AJ then considered the challenge to section 63 of the Act and the schedules published in terms thereof. Francis AJ held that the section clearly contemplated "the Minister exercising a plenary legislative power", such that the legislature had "delegated its plenary lawmaking power to the executive." [Paragraph 21] Francis AJ considered the doctrine of separation of powers, and found that:

> "s 63 of the Drugs Act constitutes an impermissible delegation of plenary legislative power to a member of the executive, the Minister (after consulting with the second respondent). When the Minister takes a decision to include or delete a substance in the schedule to the Drugs Act, he is in fact amending plenary legislation. This amendment takes place unilaterally (the second respondent only has a consultative role) and certainly does not follow the manner-and-form provisions relating to the enactment of legislation. The decision of the Minister is not exercised with the oversight of Parliament and there do not appear to be any statutory limits on how the Minister ought to exercise his discretion. Instead of public participation, one Minister in consultation with another is entitled to determine which substances are proscribed. … [T]his offends the manner and form in which legislation is enacted in South Africa's deliberative constitutional democracy." [Paragraph 25]

Francis AJ held that the section was also impugned for failing to impose limits on the Minister's discretion when determining which substances where included, removed, or retained on the schedule. [Paragraph 26] Furthermore, the amendments to the schedule made by the Minister in terms of the powers under section 63 were also invalid. However, "[s]ince cannabis was not inserted into the schedule to the Drugs Act under s 63, the initial schedule proscribing cannabis cannot be impugned." Constitutional invalidity only applied to amendments to the schedules. [Paragraph 28]

Francis AJ rejected the challenge to section 5(1)(a) of the Act, finding that a warrant under the section was issued "on the basis of a notification received from the Minister acting in fulfilment of the country's international obligations", and that there were sufficient safeguards in the extradition enquiry to ensure a procedurally fair enquiry for those against whom an extradition order was sought. [Paragraph 40]

Section 63 and various amendments to the schedules made under it were declared to be unconstitutional. The remainder of the application was dismissed.

S v MATROSS 2019 (2) SACR 331 (WCC)

Case heard 13 June 2019, Judgment delivered 13 June 2019.

This was a special review, the accused having been convicted following the payment of an admission of guilt fine for the unlawful possession of dagga. [Paragraphs 1 – 3]

Francis AJ (Henney J concurring) held that the relevant section of the Criminal Procedure Act required a notice to be given to the accused after the peace officer had explained the import of the notice to the accused. Francis AJ held that this required

> "that the peace officer must explain the implied meaning and the importance or significance of the written notice to the accused. This must of necessity include the consequences of the notice in the event that the accused chooses not to appear at court, but instead to pay an admission-of-guilt, fine in lieu of having to go to trial." [Paragraph 4]

Francis AJ held further that:

> "The consequences of a previous conviction can be devastating to an accused who is in fact not guilty, but is under the mistaken apprehension that the payment of the fine will get rid of a 'nuisance' and will not result in a previous conviction. If a police officer tells an accused person that the payment of an admission-of-guilt fine will result in a criminal record, it is highly unlikely that an accused would pay such a fine if he or she genuinely believes that he or she has a defence. Quite simply … the plain wording of s 56(1)*(d)* of the CPA imposes a duty on the police officer to disclose to an accused the serious consequences of paying an admission-of-guilt fine. Accordingly, I respectfully disagree with the judgment of the court in *S v Rademeyer* … where the court expressed a contrary view and held that there was no duty on a police officer to warn the accused of the full consequences of paying an admission-of-guilt fine." [Paragraph 5]

Francis AJ held that an explanation of the full consequences of an admission-of-guilt fine was "part of a fair procedure which the courts, especially after the advent of the Constitution, have insisted be followed where an accused is invited to consider paying an admission-of-guilt fine." [Paragraph 6] In this case, the true import of the written notice had not been explained to the accused. [Paragraph 7]

The admission of guilt was set aside, and the entry in the criminal record book expunged. [Paragraph 8]

S v GARLAND 2019 (2) SACR 162 (WCC)

Case heard 27 February 2019, Judgment delivered 27 February 2019.

This matter was referred to the high court by a magistrate, with a recommendation that an admission-of-guilt fine paid by the accused when he was still a minor, and the resultant deemed conviction in terms of section 57(6) of the Criminal Procedure Act, be set aside. [Paragraph 1] The accused had been arrested for the unlawful possession of cannabis, and was taken to a police station, where he and his mother were advised that if an admission of guilt fine was paid, he would be released. [Paragraph 2]

Francis AJ (Nuku J concurring) held:

> "… The accused was given a written notice making provision for the payment of an admission-of-guilt fine in terms of s 56(1)*(c)* of the CPA, his mother paid the fine of R40, and the accused was then released from custody. At no stage was either the accused or his mother made aware of the full consequences of paying an admission-of-guilt fine. Nor were the provisions of s 18 of the Child Justice Act … applied — in terms of this section, it was obligatory to hold a preliminary inquiry relating to the nature of the allegations, and the ensuing consequences thereof for the accused, prior to any sanction being imposed." [Paragraph 2]

> "The courts, especially after the advent of the Constitution, have insisted that a fair procedure be followed where an accused is invited to consider paying an admission-of-guilt fine … this court, with particular emphasis on constitutional values, has held that an accused person should be properly warned of the consequences of signing an admission-of-guilt fine." [Paragraph 6]

Francis AJ held that this irregularity should have been picked up by the magistrate who subsequently examined the documents:

> "If the magistrate had done their job properly, it would have been noticed that the accused was a child and the payment of an admission-of-guilt fine by him was proscribed by s 18(2) of the Child Justice Act. The failure of justice was compounded by the fact that the accused was a minor at the time of his arrest and the arresting officer was aware of this fact, but nonetheless continued with the issue of a s 56 notice." [Paragraph 6]

The admission of guilt was set aside, and the entry in the criminal record book expunged. [Paragraph 9]

MEDIA COVERAGE

The candidate is mentioned in media coverage of the complaint and counter complaint by Deputy Judge President Patricia Goliath and Judge President John Hlophe regarding the appointment of acting judges in the Western Cape High Court.

"Another acting judge was an attorney from Pietermaritzburg who, "for no apparent reason and at great expense to the state", had been in this position for over a year, Goliath's affidavit reads.

She said it was rumoured that the wife of the judge, who she did not name, had a connection to Hlophe, although she conceded she had been unable to verify it.

Hlophe confirmed in his papers that he knew Acting Judge Matthew Francis, as he had been one of his students.

He had also known his wife, who "has been deceased for some time" as she was an academic who took over from him as the head of the Labour Department at Natal University law school …

"The acting judge from Pietermaritzburg was lawfully appointed following my recommendation based on his impressive record as a legal practitioner and nothing else. …"

Hlophe, in his affidavit, said Francis' appointment had not been at great state expense, calling the claim "simply not true."

A letter from the court manager confirmed that the High Court had not incurred any accommodation costs during his stint.

A pool car had initially been allocated to him during his first term … but he had opted to use his own vehicle after being reappointed.

A total of R21 666 had been spent on three flights to Durban for approved home visits …

Francis told News24 that there was "in essence no factual basis" to Goliath's complaint.

"That the Judge President knows my wife … I have been divorced for 25 years and my ex-wife died last May. Why this was brought up I don't know." He said the deputy judge president had never raised her concerns with him before, saying it was "unfortunate and disappointing" that he was being "drawn into this"."

- **Tammy Petersen, "Hlophe vs Goliath: War of words as Judge President hits back at criticism of his acting judge selections", *News24* 16 February 2020 (available at https://www.news24.com/news24/SouthAfrica/News/hlophe-vs-goliath-war-of-words-as-judge-president-hits-back-at-criticism-of-his-acting-judge-selections-20200216)**

ADVOCATE BRYAN HACK

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 3 November 1956

BA, University of Cape Town (1979)

LLB, University of South Africa (1994)

CAREER PATH

Acting Judge, Western Cape High Court (July -September 2016; April – June 2018; January – March, April – June, July – September 2019; January – March, April – June, July - September 2020)

Advocate (194 – to date)

Verhoef and Krause Estates (Pty) Ltd

Director and Manager (1986 – 1994)

Public Relations Officer and Labour Relations Officer (1989 – 1994)

Property Administrator, Medical Centre (Pty) Ltd (1980 – 1986)

Honorary Member, Association of Arbitrators (2017 – to date)

Member, Cape Bar (1994 – to date)

SELECTED JUDGMENTS

COMMERCIAL LAW

UNIVERSITY OF STELLENBOSCH LAW CLINIC AND OTHERS v NATIONAL CREDIT REGULATOR AND OTHERS 2020 (3) SA 307 (WCC)

Case heard 13 December 2019, Judgment delivered 13 December 2019

Applicants sought a declaratory order to determine the interpretation of the definition of "collection costs" in section 1 of the National Credit Act, as well as the application of the provisions in ss 101(1)*(g)* and 103(5) of the Act, in terms of which amounts accruing during the time a consumer was in default in terms of a credit agreement could not, in aggregate, exceed the unpaid balance of the principal debt. Applicants sought to establish that the collections costs defined in the Act be read to include legal fees, regardless of whether the fees were charged before, during or after litigation; that the section 103(5) limitation must apply at all times, regardless of whether a judgment had been granted; and that legal fees could not be claimed until agreed or taxed. Subject to the declaratory orders, the applicants sought to have the indebtedness of several applicants recalculated. [Paragraphs 1 – 6]

Hack AJ held:

> "The contention of the applicants is that this interpretation of the Act will give true effect to the provisions of the Act whereas at present the exclusion of legal fees is undermining the protection which the Act was intended to afford consumers, the contention being that credit providers, while having their recovery of costs curtailed in terms of the Act, are nevertheless enjoying the protection of recovering legal fees, resulting in a failure to prevent the exploitation of the consumer. Or to put it in alternative terms, the credit providers have no incentive to look after consumers or … not to exploit consumers because they can utilise their resources to pursue consumers who default with a degree of impunity, knowing that they will ultimately, even if it takes a considerable time, recover all that is owed to them, including their very substantial legal costs incurred." [Paragraph 7]

Hack AJ then considered arguments by the respondents, against the applicant's position that it could not have been the intention of the legislature to include legal costs within the definition of collection costs. Respondents argued that the applicant's interpretation would infringe on the court's discretion in making costs orders. Hack AJ held that the legislature had always "imposed significant limitations on courts", and courts had never had an unfettered discretion relating to costs. [Paragraph 18] Hack AJ further rejected an argument that applicant's interpretation would result in consumers stopping making payments once the cap was reached, as it was "a reasonable conclusion to make, that consumers will pay as and when they can, to clear their name so as to once again receive credit". [Paragraph 19] Hack AJ found that there had not been an express decision to exclude legal costs, but that they had been included. [Paragraph 21] Hack Aj then considered the respondents' argument that, when a judgment was granted after a summons or application had been issued and served, it constituted a new cause of action, and therefore all further costs incurred were not collection charges. [Paragraph 24] Hack AJ rejected the argument as "contrived and wrong":

> "It is contrived to try to distinguish legal fees which are part of collections costs and legal fees which are part of ligation costs …. When a summons or application is issued and served, and thereafter a judgment is granted, it does not constitute a new cause of action against the defendant or respondent. It is a continuation of one cause of action and is simply a further procedural step to enforce the claim. The claim retains exactly the same character that it

> always had ... I agree with the sentiments expressed by applicants, that it makes no sense that the Credit Act should be of less value and provide fewer rights after a judgment is granted." [Paragraph 25]

Hack AJ considered case law on the approach to be followed in interpreting legislation, and held:

> "In a series of cases there has been an emphasis on equity and fairness. It has repeatedly been said that the National Credit Act's intention or purpose is principally to protect the consumer. However, it has equally been restated that the credit provider's rights should be respected and protected as well. ... In each instance there is, however, a reliance on the credit providers' willingness to be socially conscience and behave fairly. The question before me is, is that happening? The facts in this matter suggest the answer is no. … The escalation of the indebtedness as a result of costs set out in the founding affidavit … suggests the credit providers are not even paying lip service to the need for fairness and equity. They are running up costs with what appears to be no concern for the consumer." [Paragraphs 31 - 32]

Hack AJ held further that:

"If equality requires all persons an equal right to access to credit, but consumers are not equal in their ability to pay, then it must equally mean that the cost of credit must be adapted accordingly. In reality, the converse has happened, and the cost of credit for small loans is disproportionately higher than for large loans." [Paragraph 37]

Hack AJ upheld the applicant's argument that the interpretation contended for would lead to responsible lending by ensuring that the credit provider properly vets its clients. [Paragraph 39] Hack AJ further granted the relief that individual applicant's accounts be recalculated. [Paragraph 40] Applicants were granted the orders sought. [Paragraph 42]

ABC PROPRIETARY LIMITED V COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES (14287) [2019] ZATC 9 (12 JUNE 2019)

Case heard 18 – 19 March 2019, Judgment delivered 12 June 2019.

This case related to the application of double taxation agreements (DTA). Appellant resided and was a registered taxpayer in South Africa, and the owner of its shares was a company that was resident and a taxpayer in the Netherlands. Appellant declared dividends and the shareholder made a declaration that it owned 5% tax, which was paid to the respondent. The shareholder subsequently took the view that this was incorrect, and that the tax rate was 0%. Respondent refused to refund the payment. [Paragraphs 1 – 2] Appellant argued that it was not liable to pay tax to South Africa on dividends paid to its Netherlands shareholder, in terms of the double taxation agreement between the two countries, specifically because of a "most favoured nation" clause in the treaty. [Paragraphs 7, 9]

Hack AJ identified the core argument of the respondent as being that:

> "South Africa made a decision to change its tax system in regard to the payment of tax on dividends. This was properly and legitimately motivated to bring it in line with other countries including in particular its principle trading partners. It studiously, timeously and with considerable effort renegotiated the terms of existing DTA agreements. The various amending protocols or new agreements contained terms which are virtually identical but some countries sought minor variations. When negotiations on all such amendments had been finally

> concluded South Africa amended its law. It anticipated that the countries, and in particular Kuwait, who had concluded agreements with South Africa would imminently ratify the agreements despite the fact that this had not yet happened. The oral evidence was that South African has vigorously used all possible avenues to remedy the situation. Respondent … argued that the appellant is now exploiting what is an entirely unanticipated, unforeseen and unfortunate occurrence to refuse to pay tax in South Africa despite the fact that the contracting parties (South Africa and the Netherlands) never meant this to happen. The consequences are potentially financially disastrous for South Africa. Respondent[] … relies on persuading the court that it needs to emphasize the true intentions of South Africa in entering into the agreements and act to prevent the consequences of what has or will occur as a result of the failure of Kuwait to ratify the protocol [sic].” [Paragraph 23]

Hack AJ upheld the appellant’s argument, based on Supreme Court of Appeal authority, that the court should not take into account evidence led by the respondent regarding the intention of South Africa, the Netherlands, Sweden and Kuwait in considering whether the appellant was liable to pay tax in South Africa. Hack AJ accepted that the provisions of the Netherlands agreement were clear, and provided that if another state receiving preferential treatment from South Africa in the future, the Netherlands resident had to be given the same preference. [Paragraph 30]

> “[T]here are therefore no grounds upon which this court can find that certain words were missing from the Netherland’s agreement unless the court jettisons the parol evidence rule. This court cannot do so. It is bound by the rule and prevailing decision of the Supreme Court of appeal. …” [Paragraph 30]

Respondent was ordered to refund the overpaid dividends tax. [Paragraph 34]

MEDIA AND OTHER COVERAGE

The candidate makes the following disclosure under section 4.1 of his application form:

"While a member of the [University of Cape Town] SRC I was a co-accused in a case when a shot was fired through the door of the residence of a member of parliament. I was charged and tried on various counts. It is a matter of public record that I was acquitted in the High Court, Cape Town of all charges."

The candidate is mentioned in media coverage of acting appointments to the Western Cape High Court, particularly in the context of the complaint and counter complaint between Deputy Judge President Goliath and Judge President Hlophe:

"Another acting appointment Goliath cited was that of Bryan Hack, who Goliath alleged was a friend of Hlophe's wife, Judge Gayaat Salie-Hlophe.

Hack was a member of a right-wing student group in 1979 and had been implicated in the attempted shooting of then Democratic Party MP Colin Eglin outside his home. Hack was later acquitted but was known, said Goliath, to be "extremely conservative".

Hack has confirmed he is a friend of the Hlophes and attended their wedding. …"

- **Marianne Thamm, "New Western Cape acting judges list: same-old, same-old 'permanent casuals' and no black Africans", *Daily Maverick* 16 April 2020 (available at https://www.dailymaverick.co.za/article/2020-04-16-new-western-cape-acting-judges-list-same-old-same-old-permanent-casuals-and-no-black-africans/)**

"In another instance, according to Goliath, Hlophe had re-recommended a friend of Salie-Hlophe to act, despite her informing him that the acting judge had caused some consternation among the older judges.

This as the unnamed acting judge – whom News24 understands to be Judge Bryan Hack – had in his student days been implicated in the attempted shooting of Democratic Party MP Colin Eglin, a charge of which he was later acquitted. He was also said to be "extremely conservative."

According to Goliath, "his presence underlines the power which Judge Salie-Hlophe wields". …

In response to complaints, Hack wrote to the Judge President confirming that he had been involved in student politics as part of the Conservative Student Alliance, a name he had chosen as he felt it was "an appropriate term in the context of the University of Cape Town".

"I did not anticipate that the label would follow me for 40 years. I am not a conservative. Anyone who knows me, whether socially or professionally in my capacity as an advocate or an acting judge, will confirm this." …

Hack confirmed that he and Salie-Hlophe were friends, a fact he said was common knowledge in the legal fraternity, and that he had been invited to the Hlophe wedding.

He had considered acting about five years ago after the Bar Council circulated a request form [sic] the Judge President that members consider making themselves available to serve as acting judges.

The Judge President had directly asked Hack in 2015 … but he had told him he was concerned about the impact on his practice …

He was told to consider it, and later informed the Judge President he was available if required.

He said he had not requested Salie-Hlophe for assistance. …"

- **Tammy Petersen, "Hlophe vs Goliath: War of words as Judge President hits back at criticism of his acting judge selections", *News24* 16 February 2020 (available at https://www.news24.com/news24/SouthAfrica/News/hlophe-vs-goliath-war-of-words-as-judge-president-hits-back-at-criticism-of-his-acting-judge-selections-20200216**

MR SELWYN HOCKEY

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 30 September 1962

BA (Soc. Sc), University of Cape Town (1984)

BA (Law), University of the Western Cape (1986)

LLB, University of the Western Cape (1988)

Advanced Diploma in Labour Law Practice, Pochesfstroom University / Law Society of South Africa (2003)

CAREER PATH

Acting Judge, Western Cape High Court (2nd term 2004; April – May, July – September, October – December 2020)

Partner, Webber Wentzel (2007 – 2020)

Partner, Moosa Waglay and Petersen (1993 – 2007)

Professional Assistant, Moosa and Associates (1991 – 1993)

Articled Clerk, Moosa and Associates (1991 – 1993)

Member, Cape Law Society / Provincial Council of Legal Practice Council (1989 – to date)

NADEL

"Various executive positions" (1989 – 2007)

Executive member representing candidate attorneys (1989 – 1992)

Member (1989 – to date)

Committee member, Human Rights and Constitutional Law Committee, Cape Law Society (2006 – 2020)

Azanian Students Organisation (1992 – 1998)

Silvertown Youth Movement (1992 – 1997)

Member, African National Congress (1992 – 1995)

Committee member, University of Cape Town Law Faculty Development Committee (2009 – 2012)

Board member, Accelerate Cape Town (2008 – 2012)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

PLAASLIKE BESORGDE INWONERS (PBI) AND OTHERS V GEORGE MUNICIPALITY AND OTHERS (7529/2020) [2020] ZAWCHC 102 (24 AUGUST 2020)

Case heard 7 August 2020, Judgment delivered 24 August 2020.

Applicants sought to set aside a mayoral election for the George municipality. At issue was whether the whether the speaker, who together with the elected mayor was a member of the Democratic Alliance, had deliberately manipulated the timing of scheduled council meetings by cancelling or postponing them until he was sure of the successful election, and whether the meeting when the election took place and the election process were marred by irregularities. [Paragraphs 1 – 6]

Hockey AJ considered the applicable legislative framework and noted that the events in questions had taken place during the COVID – 19 pandemic. [Paragraph 22] Hockey AJ noted that the impugned election took place during Alert level 4 of the national lockdown, when in terms of the applicable Ministerial directive, meetings of councils had to be convened "using media platforms such as teleconferencing and videoconferencing", and that municipalities and municipal entities were directed "to convene meetings to consider any council-related business." [Paragraph 29]

Hockey AJ analysed the timeline of events leading up to the meeting, noting that the municipality had cancelled two council meetings during March 2020 due to the prohibition in terms of the 25 March directives. Furthermore, two meetings had been postponed or cancelled during May 2020 due to the infection of two employees shortly before the meetings were due to take place, which had required deep sanitising of the venues. [Paragraph 65] Hockey AJ found that whilst the applicants alleged that "the cancellation of these meetings were sinister in order to afford the DA an unfair advantage during motions and mayoral elections", they had cited "no objective facts" from which the court could conclude that the inference was reasonable. [Paragraph 66] On the contrary, good reasons existed for the postponement or cancellation of the meetings in question. [Paragraph 68]

Hockey AJ then considered a potential irregularity where a councillor was allowed to vote in possible violation of Rule 15.2, which forbade any councillor from leaving or entering the council chamber while voting was in progress. [Paragraph 72] Hockey AJ held:

> "Enfranchisement is an important foundation on which our democracy is built. This entails the right of not only the electorate to cast their votes, but also those who has been democratically elected by the electorate to represent them. …" [Paragraph 73]

Hockey AJ held that numerous cases had found that "non-compliance with statutory or other legislative provisions is not always fatal" [paragraph 75], and that the Rule was "more tailored where voting happens in chambers by the show of hands." There was "no logical purpose for strict compliance … where voting takes place by secret ballot." Hockey AJ therefore held that even if there had not been strict compliance with Rule 15.2, this did not render the whole voting process invalid.

> "In any event, we must be mindful of the circumstances under which the impugned meeting and voting took place, relating to the state of disaster and the resultant lockdown regulations and directives applicable. Allowing Kritzinger to vote after others had casted there votes was a rational measure put in place by the speaker to avoid possible contamination." [Paragraphs 77 – 78]

The application was dismissed with costs.

CRIMINAL JUSTICE

ASP ELITE PROTECTION SERVICES CC V MINISTER OF POLICE AND OTHERS (6489/2020) [2020] ZAWCHC 142 (2 NOVEMBER 2020)

Case heard 6 October 2020, Judgment delivered 2 November 2020.

This was an application based on the common law remedy of *rei vindicatio* for the return of firearms and ammunition seized by the South African Police Service. Respondents opposed the application on the grounds that there had been "continuous transgressions relating to the possession and handling of the firearms", that SAPS were conducting a high-profile investigation involving the firearms, that the firearms had been sent for ballistic testing, and that the firearms and ammunition were required as evidence at the trial of the managing member of the applicant. [Paragraphs 1 – 5]

Hockey AJ noted that the aapplicant had brought the proceedings based on the *rei vindication* rather than section 31(1)(a) of the Criminal Procedure Act

> "The election to do so … is important as far as the discharge of onus is concerned. In the case of *rei vindicatio*, the applicant bears the onus to proof ownership, that the item claimed is in existence and identifiable, and that the respondent is in possession. Once these requirements have been met, the onus shifts to the respondent to show justification of its continued possession of the item concerned." [Paragraph 54]

The ownership of the firearms, and their possession by the SAPS, was not disputed. The issue was whether the respondents could justify their continued possession of the firearms. [Paragraph 55] Hockey AJ found that the respondents' evidence showed "a clear indication" of "multiple and continuous transgressions" of the Firearms Control Act and the Private Security Industry Regulation Act. [Paragraph 56] Hockey AJ found that the respondents had justified the continued possession of the firearms. [Paragraph 58]

> "Since licenses were issued to the applicant, the licensed firearms were issued on multiple occasions to persons who were not registered security officers and who were not even employees of the applicant. Also, Poggenpoel, who is and remains the responsible person in terms of s 7 of the FCA, purported to have delegated his functions to Davids and Booyse, even before they were employees of the applicant. The Registrar was never informed of any replacement of the responsible person, which is required in terms of s 7(4) of the FCA, which has the consequence that Poggenpoel remains the responsible person. As a result, both Booyse and Davids were never lawfully authorised to issue firearms to any employees of the applicant, let alone non-employees (the latter, which under any circumstance, is illegal)." [Paragraph 59]

> "[I]t is not necessary for me to accept as fact that a case has been made out for the prosecution of the applicant and others ... All that is required is that SAPS should have shown that there is a *prima facie* case against the applicant. There is no doubt in my mind that such a case has been made out, and that the firearms will be required as evidence in a trial that may follow." [Paragraph 61]

The application was dismissed with costs.

S v VOLKMAN 2005 (2) SACR 402 (C)

Case heard 21 – 22 June 2004, Judgment delivered 6 August 2004.

The accused, facing a charge of murder, had indicated that he would raise a defence of non-pathological incapacity. The state then applied for the accused to be referred for observation at Valkenberg Hospital in terms of section 78(2) of the Criminal Procedure Act. [Paragraph 1]

Hockey AJ considered the provisions of section 78(2), and held:

> "Clearly, the Legislature made a distinction between allegations of criminal incapacity based on mental illness or mental defect, on the one hand, and such incapacity based on 'any other reason' on the other. Where there is an allegation or appearance of mental illness or mental defect, the court is obliged ('the court shall') to direct that the accused be referred for observation in terms of s 79 of the Act. If, however, there is an allegation of lack of criminal responsibility for any reason other than mental illness or mental defect, the court has a discretion whether to refer the accused for observation or not. Non-pathological incapacity falls within the latter category. Entrusting the court with discretion in cases of non-pathological incapacity is not surprising." [Paragraph 8]

Hockey AJ found that in exercising his discretion as to whether to refer the accused for observation or not, he was required to take into account that while psychiatric evidence was "not indispensable", "the Court must remain mindful of the helpful role that such evidence plays in these matters." [Paragraph 13] Hockey AJ held further that it was necessary to take into account the conditions at the Valkenberg Psychiatric Hospital, where the accused would be sent, and noted that a witness for the state had "acknowledged that the conditions in the ward (where the observations take place) are 'appalling and abject'." [Paragraphs 17 – 18] The conditions the patients were subjected to at night were described as "inhumane." [Paragraph 20]

Hockey AJ held:

> "The main consideration … is whether it would be in the interests of justice to order that the accused be referred for observation … for 30 days (including nights) as requested by the State. Interposed with this consideration is the question whether granting an order as requested by the State would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (see s 36(1) of the Constitution). These issues should be decided in the light of the appalling and inhumane conditions at Valkenberg." [Paragraph 23]
>
> "[W]e are not dealing with a sentenced prisoner. The accused is still to be tried … and is presently on bail. He has a constitutional right to be presumed innocent (s 35(3)*(h)* of the Constitution), in addition to his right to human dignity." [Paragraph 25]

Hockey AJ held that granting the order would "no doubt" infringe the accused's rights to dignity and freedom, and particularly his rights "to be detained under conditions that are consistent with human dignity, including adequate accommodation as afforded by s 35(2)*(e)* of the Constitution." [Paragraph 26] Hockey AJ concluded that since psychiatric evidence to counter the accused's prospective defence was not indispensable, and "the extremely unpleasant and degrading conditions" to which the accused would be subjected if the order was made, it would not be appropriate to exercise the court's discretion in the State's favour. [Paragraph 30]

The application was dismissed.

ADVOCATE PENELOPE MAGONA – DANO

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 10 May 1975

B Iuris, University of the Western Cape (1998)

LLB, University of the Western Cape (2001)

LLM, UNISA (2005)

CAREER PATH

Acting Judge, Western Cape High Court (July – September, October – December 2015; April – June, July – September, October - December 2016; January – March, April – June, July – September, October – December 2017; January – March, April – June 2018; May – June, July – September, October – December 2020)

Commissioner, Small Claims Court, Cape Town Magistrate's Court (2014 – 2020)

Advocate (2009 – to date)

State prosecutor / State Advocate / Senior State Advocate, National Prosecuting Authority (1999 – 2007)

Member, Legal Practice Council (2018 – to date)

Member, Cape Bar (2009 – to date)

Member, Advocates for Transformation (2009 – to date)

Member, Black Lawyers' Association (2000 – to date)

Member, Institute of Directors of South Africa (2017 – 2020)

Council Member, Afrikaanse Taal Museum en Monument (Acting Deputy Chairperson) (2017 – 2020)

Member, Every Nation Church (2006 – to date)

SELECTED JUDGMENTS

PRIVATE LAW

BWANYA V MASTER OF THE HIGH COURT, CAPE TOWN AND OTHERS (20357/18) [2020] ZAWCHC 111; 2020 (12) BCLR 1446 (WCC); 2021 (1) SA 138 (WCC) (28 SEPTEMBER 2020)

Applicant sought an order declaring provisions of the Intestate Succession Act (ISA) and the Maintenance of Surviving Spouses Act (MSSA) unconstitutional, as they did not recognise or provide for her claims against the estate of the deceased. [Paragraph 1] The deceased had passed away leaving a will, but the will nominated his mother, who had died intestate three years earlier, as heir to his estate. [Paragraph 42]

Magona AJ set out the history of the relationship between the applicant and the deceased, noting that the applicant claimed that the couple had been in a permanent life partnership [paragraph 13], and intended to have a child together. [Paragraph 16] Applicant further asserted that the deceased had asked her to marry him, and that they had intended to get married. [Paragraph 23] Magona AJ noted that the evidence of people close to the couple supported the commitment to get married, and they had planned to travel to Zimbabwe so the deceased could meet the applicant's family. [Paragraph 24] Applicant therefore argued that the deceased was her life partner and fiancé, and that the couple were living in a permanent, stable relationship, and were engaged to be married once lobolo negotiations were completed. They were living together in a relationship analogous to a marriage. [Paragraph 25]

Magona AJ noted that "some of the differences between married and unmarried people and permanent life partners have already been abolished, but many remain - particularly in the a rea of opposite -sex life partners. That which forms the subject of this application is one of them." [Paragraph 45] Applicant argued that the ISA's exclusion of life partners in permanent opposite- sex life partnerships from inheriting was unconstitutional and sought a reading in of the words "or a partner in a permanent opposite-sex life partnership in which the partners had undertaken reciprocal duties of support and had been committed to marrying each other" wherever the word "spouse" appeared in the section. [Paragraph 46]

After discussing the constitutional and legislative framework, Magona AJ considered the "plethora of cases which show the development of the law and inclusivity approach for the relationships … which in my view may be considered towards what ought to be the outcome of the relief sought by the Applicant." [Paragraph 91] Magona AJ then granted an application for the late filing of the application [paragraphs 116 – 123], holding that "it would limiting the right of access to court if one would strictly apply the 30 day time limit in the circumstances." [Paragraph 121] Magona AJ held that a settlement agreement entered into between the applicant and certain of the respondents did not render the matter moot:

> "[T]he legal points whether the Applicant ought to be recognised as the deceased' s opposite sex permanent life partner, the constitutional challenge involving whether there should be a reading in and a different interpretation that is required to the ISA or MSSA remains alive and not merely academic question." [Paragraph 131]

Magona AJ found that the applicant and the deceased were permanent life partners who had undertaken reciprocal duties of support to one another. [Paragraph 142] Magona AJ found that there was differential treatment between same -sex couples, who stood to benefit from the ISA even if they were not married, and there was "no legitimate purpose why the heterosexual permanent life

partnerships are not having a similar benefit". [Paragraph 168] After noting that women were traditionally prejudiced "after years of dedication and support to the livelihood of a permanent life partnership" [paragraph 171], Magona AJ found that there was an infringement of the applicant's rights to equality and dignity, "as they are being treated differently to their same-sex life partnership, the latter do inherit even if they are not married. This discrimination is on specified grounds of marital s tatus, sexual orientation, sex and gender …" [Paragraph 172] Magona AJ found further that this differentiation amounted to discrimination [paragraphs 174 – 176], and that the discrimination was unfair. [Paragraphs 177 – 179] There was no evidence to provide any justification for the discrimination. [Paragraph 184]

On the challenge to the constitutionality of the ISA, Magona AJ therefore concluded that:

> "the failure to include the hetero sexual partnerships within s 1(1) of the ISA is unconstitutional to Ms Bwanya's rights and the rights of all those similar in her circumstances as described by the WLCT, particularly their rights to equality and dignity in terms of sections 9 and 10 of the Constitution. The impact of the impugned provision unfairly discriminates and cannot be justified in our constitutional order." [Paragraph 191]

Magona AJ found that the doctrine of precedent precluded the challenge to the MSSA. [Paragraph 209] The application therefore succeeded in respect of the challenge to the constitutionality of the Intestate Succession Act.

The judgment has been welcomed as "an important development of the South African jurisprudence on the rights of opposite-sex permanent life partnerships. Often women in such relationships are vulnerable and suffer discrimination when the relationship is terminated by death. The decision is therefore a welcome development in advancing the rights of women to equality and dignity specifically in relationships." **Legal Resources Centre, *Victory for opposite-sex life partners as court recognizes their right to inherit from each other"*, 15 September 2020 (https://lrc.org.za/victory-for-opposite-sex-life-partners-as-court-recognizes-their-right-to-inherit-from-each-other/).**

CIVIL PROCEDURE

VOS V FYNBOSLAND 304 CC (2864/2016) [2017] ZAWCHC 20 (27 FEBRUARY 2017)

Case heard 23 November 2016, Judgment delivered 27 February 2017

Applicant sought an order holding the second respondent in contempt of an earlier court order. In terms of that order, first respondent was required to make a payment of R770 000 to the applicant and deliver a building plan to the offices of the applicant's attorneys. [Paragraphs 1 – 2] The order was not complied with. Second respondent was the sole member of the first respondent. Applicant and second respondent had entered into an agreement to construct a house. [Paragraph 5] Due to a dispute between the first respondent and the company which owned the land on which the house was to be built, first respondent was not able to comply with its obligation to the applicant in terms of the building agreement. [Paragraphs 7 – 8]

Magona AJ considered an argument that the original order bound only the first and not the second respondent:

> "It is unclear why the … order was taken to bind only the First Respondent and not also the Second Respondent jointly and severally if that was the intent, as both were cited as Respondents in the main application. In any case the parties reached an agreement and took an order binding only the First Respondent." [Paragraph 52]

After finding that there was no ambiguity, absurdity or inconsistency in the original order regarding "which party was expected to pay the money and perform in this instance" [paragraph 54], Magona AJ held further:

> "It bears to mention that all the relevant clauses of the order, the First Respondent is the only party mentioned as being the liable party. Nowhere does it bind the Second Respondent jointly and severally and such cannot simply be read in. … I find that the order was made as against only the First Respondent as that is clear from the literal reading and meaning of the words used ... Therefore as stated above, the … order is unambiguous as to which party was due to be held liable, and no other party can simply be read in to be added so they may be jointly and severally liable when nowhere was that part of the order." [Paragraphs 55 – 57]

Magona AJ found that the order not only related to the First Respondent but concerned payment of money *pecuniam solvendam* which was "unenforceable by committal and contempt proceedings." The first Respondent "in any respect is no longer a party to these proceedings." The court was there "left with no party liable before it", and a claim that was "unenforceable by any of contempt proceedings." [Paragraphs 62 – 63]

The application was dismissed.

ADVOCATE NOBAHLE MANGCU – LOCKWOOD

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Date of birth: 20 February 1977

BA, University of Cape Town (1997)

LLB, University of Cape Town (2000)

CAREER PATH

Acting Judge, Western Cape High Court (October – December 2019, January – March 2021)

Advocate (2006 – to date)

Attorney, Cheadle Thompson & Haysom Inc (2002 – 2004)

Candidate attorney, Cheadle Thompson & Haysom Inc (2000 – 2002)

Member, Bar of England & Wales (2019 – to date)

Member, Society of the Middle Temple (2018 – to date)

Member, Advocates for Transformation (2006 – 2016)

Member, Cape Bar (2006 – to date)

Member, Cape Law Society (2000 – 2004)

Member, His People Church, Dunoon Chapel, The Boat Church (1994 – to date)

SELECTED JUDGMENTS

COMMERCIAL LAW

MOODLIAR NO. V FREESE 2021 JDR 0133 (WCC)

Case heard 28 October 2019, Judgment delivered 6 November 2019

Applicants, the joint provisional liquidators of Trilinear Capital (Pty) Ltd, sought to set aside an impeachable disposition in terms of section 26(1) of the Insolvency Act. Applicants sought to have set aside a payment of R4 500 000 by Trilinear Capital to the respondent, as a disposition without value. [Paragraphs 1 – 4]

Mangcu – Lockwood AJ found that Trilinear was insolvent at the time the payment was made, and immediately afterwards. [Paragraphs 20 – 23] Mangcu – Lockwood AJ then considered whether the payment constituted a disposition and considered an argument by the respondent that the transaction was not a disposition of property because Trilinear did not have any rights over the funds. It was argued that the funds belonged to the Cape Clothing Industry Provident Fund (CCIPF), which had paid the money to Trilinear for the purposes of investment. Trilinear Capital was thus "merely a conduit, acting as a mere agent." [Paragraph 26] Mangcu – Lockwood AJ analysed case law and found that Trilinear had made a disposition as contemplated by the Insolvency Act. [Paragraph 33]

> "*De Villiers NO v Kaplan* and *Fuhri v Geyser* appears to support the applicants' argument that the payment of R4,5 million was made from the bank account of Trilinear Capital, to which Trilinear Capital had a right. In respect thereof, Trilinear Capital had a claim against its bank, Nedbank. Therefore, any money paid into Trilinear Capital's bank account became money in respect of which it held a claim against its bank." [Paragraph 29]

Mangcu – Lockwood AJ then dealt with the issue of whether the disposition was not for value:

> "[S]ome ascertainable commercial advantage will suffice in order for a disposition of property not made for value to be set aside by a court. In this case, the evidence is Trilinear Capital gained no commercial advantage from the disposition, and was instead impoverished without receiving any present or contingent advantage in return. It was supposed to be investing the money on behalf of the SACTWU workers, but there were no returns, and that money was lost to the workers and to Trilinear Capital. Trilinear Capital was under no obligation to make the payment of R4,5 million to the respondent. …" [Paragraph 35]

Mangcu – Lockwood AJ found that there were "numerous irreconcilable, unsatisfactory and inherent improbabilities raised by the respondent's version of the alleged loan agreement" [paragraph 37], and found that the disposition was not for value. [Paragraph 42] Mangcu – Lockwood AJ finally rejected an argument based on section 33(1) of the Insolvency Act, which provided that where a person who had parted with any property or security, if they acted in good faith, would not be obliged to restore any property or other benefit they had received under the disposition:

"It is difficult to find that the respondent has shown good faith, given the numerous irreconcilable issues raised by his defence to this case. …. I am of the view that the respondent has failed to show good faith as required in terms of section 33(1) of the Insolvency Act." [Paragraph 54]

It was declared that the payment was a disposition without value. The payment was set aside and the respondent was ordered to pay back the amount of R4 500 000, together with interest. [Paragraph 56]

CONSTITUTIONAL AND STATUTORY INTERPRETATION

EXEC COUNCIL OF THE WESTERN PROVINCE COUNCIL AND OTHERS V KANNALAND LOCAL MUNICIPALITY AND OTHERS (229/2021) [2021] ZAWCHC 50 (19 MARCH 2021)

Case heard 1 March 2021, Judgment delivered 19 March 2021.

The Kannaland Municipality was experiencing a serious financial crisis, to the extent that it was unable to provide municipal services. The municipal council therefore resolved to request the Provincial Executive to intervene in its affairs in terms of section 139(5) of the Constitution of the Republic of South Africa 108 of 1996 ('the Constitution'), and the provincial executive resolved to accept the invitation. [Paragraphs 3 – 4] The provincial executive imposed a comprehensive recovery plan on the municipality, which was implemented by an Administrator. [Paragraph 5] The respondents subsequently purported to terminate the provincial intervention, and to remove the Administrator from office. Respondents further to steps to conclude a contract for the provision of energy, water services and infrastructure which the applicants contended violated municipal procurement standards and was unaffordable. Respondents additional attempted to establish an organizational structure which the applicants argued was wasteful, unnecessary and unaffordable. [Paragraph 8] Applicants sought an interim interdict against the respondents. The respondents opposed the application and launched a collateral challenge, contending that the intervention had been void *ab initio* and was a nullity. [Paragraphs 28 – 29]

Mangcu – Lockwood AJ considered the requirements for an interim interdict. In respect of the requirement of a *prima facie* right, Mangcu – Lockwood AJ found that it was common cause that the requirements for a mandatory intervention in terms of section 139(5) of the Constitution had been present. The Municipality had admitted at the time that it was unable to meet its obligations and financial commitments, and it was at the insistence of the Municipality that the mandatory form of intervention had been undertaken. [Paragraphs 44 – 45]

> "The facts show that, after the Provincial Executive started with a less intrusive form of intervention, the Municipality requested to be placed under 'full administration'. This belies the argument that the Provincial Executive could have undertaken a less drastic form of intervention. It was the Municipality that insisted to be placed under 'full administration'. In any event, whether the Provincial Executive could have undertaken a less drastic form of intervention does not detract from the fact that the jurisdictional requirements for the mandatory intervention were present at the start of the intervention." [Paragraph 45]

Furthermore, the conditions for a mandatory intervention continued to exist. [Paragraph 46] Mangcu – Lockwood AJ rejected the respondents' collateral challenge, finding that upholding the challenge would have the effect "of disrupting what the parties have agreed are positive strides made since the intervention, and create instability in the Municipality." Mangcu – Lockwood AJ emphasized that "ultimately, it is the citizens that are affected by the conduct of the organ of states." [Paragraph 56]

Regarding the contract, Mangcu – Lockwood AJ found that the respondents had "not seriously disputed" that the project would have "significant and long-term effects on the Municipality's financial position", and the manner in which it provides basic services over the next three decades." The Municipality had "committed itself to a path of unlawfulness by seeking to accept an unsolicited bid of this magnitude, whilst under mandatory intervention", and had "ignored a whole range of legal requirements and considerations". [Paragraphs 60 – 61] Mangcu – Lockwood AJ found that the municipality's decisions:

> "if followed through, will no doubt have a significant impact on the Municipality's finances. They also undermine the Municipality's financial recovery, and are inconsistent with the Plan. If unabated, and on an urgent basis, the respondents' conduct will have the effect of undoing the good work that has been achieved through the intervention …" [Paragraph 68]

The interim interdict was granted, and the respondents' collateral challenge was dismissed. [Paragraph 86]

CRIMINAL JUSTICE

S v ROCHE-KELLY 2020 (2) SACR 649 (WCC)

Case heard 2 November 2019, Judgment delivered 28 November 2019.

The appellant was subject to an extradition inquiry. The appeal was against the rejection of three points in *limine* by the presiding officer. The points raised challenged an affidavit and statement of offences included in the application. Appellant argued that the affidavit did not constitute a certificate in terms of s 10(2) of the Extradition Act, that the affidavit was based on hearsay evidence, and that the statement of offences is not an affidavit. [Paragraphs 1 – 2] Appellant, an 81 – year – old male South African citizen, was charged in Ireland with several counts of indecent assault, rape, and attempted rape in respect of his daughter. The appellant failed to appear on date of his trial, and a warrant of arrest was issued against him. [Paragraph 3]

Mangcu – Lockwood AJ (Ndita J concurring) first dealt with the question of whether the affidavit constituted a certificate in terms of the Extradition Act, noting that the Act did not prescribe what format the certificate must take. [Paragraph 12]

> "[A] certificate can be of an attesting nature, and not merely be recording information. In applying this definition, there is no doubt that Briscoe's affidavit is an official document attesting to facts or events and to the fulfilment of a legal requirement. … It appears to this court that the thrust of the appellant's challenge is based on a belief that a certificate should merely record information …. Furthermore, it is argued on behalf of the appellant that a certificate issued for purposes of s 10(2) should refer to s 10(2) of the Extradition Act and use the word 'certificate'. However, there is no legal or statutory basis for these assertions. …" [Paragraphs 12 – 13]

Mangcu – Lockwood AJ held that the content of the affidavit met the requirement of s 10(2). The question the was whether it should be rejected because of its form. Mangcu – Lockwood AJ held that "the form of the document should not be the determining factor of whether or not a document is a certificate", and that "[w]hat is required … is a sensible approach, not an overly technical one that undermines the apparent purpose of the statutory regime.

"The legislative intention … was to simplify the procedure of determining extradition. It could not have been the intention of the legislature for the format of such document to be an impediment to the process of an extradition enquiry." [Paragraph 16]

Mangcu – Lockwood AJ found that the affidavit was admissible [paragraph 20], and further rejected the hearsay argument, finding that the purpose of extradition proceedings was "to determine extraditability and not the guilt of the requested person, and the forum is therefore not required to arrive at any definitive evidentiary findings in relation to culpability." [Paragraph 25] Mangcu –

Lockwood AJ further dismissed the challenge to the statement of offences, finding that it had been incorporated into the relevant documents by reference. [Paragraph 34]

The appeal was dismissed.

ADVOCATE FRED SIEVERS SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 17 July 1958

BA, University of Cape Town (1981)

LLB, University of Cape Town (1984)

CAREER PATH

Acting Judge, Western Cape Division (10 consecutive terms April 2018 – September 2020)

Advocate, Cape Bar (1990 – to date)

Senior Counsel (2019)

Legal Advisor, Metropolitan Life (1988 – 1990)

Attorney, Herbsteins Attorneys (1988 – 1989)

Articled Clerk, Herbsteins Attorneys (1986 – 1988)

Member, Cape Bar (1990 – to date)

Founding member, Advocates for Transformation (lapsed)

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

WILLEMSE V DEMOCRATIC ALLIANCE 2020 JDR 0507 (WCC)

Case heard 12 March 2020, Judgment delivered 12 March 2020

The applicant was a member of the Democratic Alliance, a ward councillor of the Knysna municipality, and the mayor of Knysna. The DA's Knysna caucus passed a motion of no confidence in the applicant and asked him to step down as mayor. The applicant refused. By operation of the DA's constitution, he lost his membership of the DA and by operation of the Local Government: Municipal Structures Act he lost his seat on the council and his position as mayor. Applicant challenged the termination of his party membership on the grounds that the provisions of the DA constitution used to terminate his party membership were unconstitutional and unlawful and that the the provisions were unlawfully applied to him. [Paragraphs 1 – 2]

Sievers AJ rejected the applicant's arguments that the recall clause was unconstitutional, finding that:

> "A person does not have an absolute right to retain membership of a political party and a party is entitled to terminate a person's membership in accordance with its contract with the member, which includes the terms of its constitution." [Paragraph 32]

Regarding the application of the recall clause, Sievers held that there had been good reasons for the motion of no confidence against the applicant:

> "Mr Willemse did not respect the party structures or his own caucus, which lost confidence in him. He was repeatedly asked to step down and he repeatedly refused. Mr Willemse brought down a DA mayor ... by voting against her with parties in opposition to the DA in a motion of no confidence, and then had himself installed as mayor. It is absurd to claim that a political party cannot bring an internal motion of no confidence against a party member that voted to oust an elected representative of that party." [Paragraph 55]

Sievers AJ rejected an argument that statements by members of the DA's Federal executive gave rise to a reasonable apprehension of bias:

> "[B]ias cannot be a ground of review in relation to the type of decisions taken by the Federal Executive. Both the Federal Executive and caucus were political bodies making political decisions, not adjudicative bodies making disciplinary decisions. Such decisions inevitably rest on political judgements as to the person in question and may be motivated entirely by political disagreements. A motion of no confidence is almost always motivated by a degree of political

animus against its subject. Were bias to be a ground of review, motions of no confidence would be legally impossible." [Paragraph 64]

The application was dismissed.

ADMINISTRATIVE JUSTICE

BASSON V ASSOCIATED PORTFOLIO SOLUTIONS (PTY) LTD AND OTHERS (16224/2018) [2018] ZAWCHC 184 (14 DECEMBER 2018)

This was an application to review and set aside a decision taken by the First and Second Respondent to debar the Applicant as a representative and key individual of Associated Portfolio Solutions (APS) and Pentagon Financial Solutions (Pentagon), in terms of section 14(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act). The decision to debar the Applicant was put to a vote before the board of directors. An independent chairperson conducted a disciplinary enquiry.

Sievers AJ concluded that the majority directors of APS and Pentagon were not independent or impartial when they took part in the decision to debar the applicant. [Paragraph 40] Furthermore, Sievers AJ held that under such circumstances, the majority directors should have declined their debarment powers in terms of the FAIS Act, and should have referred the matter to the Financial Services Board (FSB), or ought have appointed an impartial chairperson. [Paragraph 42] In this context, Sievers AJ pointed out that the directors were not impartial and took over the position of the complainant, prosecutor, witness and judge in cooperation with the independent chairperson in terms of the debarment proceedings. [Paragraph 48]

Against this backdrop, Sievers AJ concluded that the decision to debar the Applicant fell to be set aside. [Paragraphs 51-52]

CIVIL PROCEDURE

FINE AND ANOTHER V CHAPLIN, UNREPORTED JUDGMENT, CASE NO: 5376/2018 (WESTERN CAPE HIGH COURT)

Judgment delivered 12 September 2018

This was an application for the Respondent to be found in contempt of two orders of the High Court, and sentenced to six months direct imprisonment. In 2011, the High Court had ordered that neither party should contact each other. In 2017, a *rule nisi* was granted against the Respondent not to contact

the Applicants or to publish anything related to the Applicants via the internet, social media or email. The Applicants claimed that the Respondent breached the terms of the aforementioned orders by having authored seven anonymous letters in the first quarter of 2018.

Sievers AJ found that the evidence established that the author of the letters was the Respondent. [Paragraph 49] Sievers AJ held that the Applicants had to establish a wilful and *mala fide* disregard of the 2011 and 2017 orders on the part of the Respondent. [Paragraph 55]. Sievers AJ held that the applicants had established the existence of the orders, proper notice to the Respondent, and the Respondent's contempt of the orders. The evidentiary burden then shifted to the Respondent to establish a reasonable doubt as to whether his conduct could be characterised as wilful and *male fide*. [Paragraph 57].

"It is clear that by attempting to conceal his identity the Respondent confirms that he appreciates that his conduct is unlawful. Unlawfulness and *male fides* flow naturally from the Respondent's conduct in that he has professed a desire to continue to conduct himself in contempt of the 2011 and 2017 orders …" [Paragraph 58].

The Respondent was found to be in contempt and sentenced him to six months direct imprisonment. Respondent was also ordered to pay the costs of the application on the attorney and client scale.

CRIMINAL LAW

BEALE V S (283/18) [2019] ZAWCHC 47; 2019 (2) SACR 19 (WCC) (3 MAY 2019)

Case heard 22 March 2019, Judgment delivered 3 May 2019

(Judgment written by Steyn J and Sievers AJ)

The Appellant, a 39-year-old unmarried man, was convicted for possession of child pornography under section 24B(1) of the Films and Publications Act. He was sentenced to 15 years imprisonment, and appealed against the sentence. The appellant had one previous conviction, for possession of cannabis.

Steyn J and Sievers AJ found that the appellant had paedophilic disorder. [Paragraphs 27 - 28] The Court further described the seriousness of the crime, stating that every image of child pornography constituted an impairment of the dignity of a child, and that it could not be disputed that those victims would bear the emotional scar of their abuse for life. [Paragraph 15].

Based on an analysis of relevant case law including *AR*, *S v Botha, S v Binneman* and *Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi*, the Court concluded that sentences in comparable

matters were merely a guide, and emphasised that an appeal court would only interfere in case of a misdirection by the court a quo. [Paragraph 44]

The Court noted that the counsel for the Appellant had difficulty in pointing out any convincing material misdirection on the part of the court a quo. Based on the circumstances of this matter, the history of abuse suffered by the Appellant in his younger days, as well as the interest of the community and ultimately the interest of children and their protection, a sentence of 10 years of imprisonment was more appropriate. [Paragraph 47] Therefore, the Court set the sentence of 15 years of imprisonment aside.

MEDIA COVERAGE

Criticism of a decision by the candidate uphold the eviction of farm dwellers and to order the City of Cape Town to provide temporary emergency shelter to them at the emergency housing site known as "Kampies"

"Wendy Pekeur of the Ubuntu Rural Women and Youth Movement was critical of the judgment. "Kampies is another dumping site like Blikkiesdorp and Wolwerivier … How will these children get to school? It is almost exam time."

"Community leader Tanya Bowers said, "The judgment doesn't understand the reality confronting the people of Klein Akker Farm." She said relocating to Kampies meant a "shift from a peaceful mixed race community to a more high risk and violent surrounding".

"Children will be forced to change schools with no guarantee of enrolment given the current situation with the Western Cape education department," she said.

Bowers said the relocation would also affect current employment and job prospects. …"

- **Vincent Lali, "Court orders hundreds of Kraaifontein farm dwellers to be relocated to Philippi", *TimesLive* 24 August 2019 (Available at https://www.timeslive.co.za/news/south-africa/2019-08-24-court-orders-hundreds-of-kraaifontein-farm-dwellers-to-be-relocated-to-philippi/)**

The candidate is mentioned in media coverage of the complaint and counter complaint by Deputy Judge President Patricia Goliath and Judge President John Hlophe regarding the appointment of acting judges in the Western Cape High Court.

"One of Goliath's complaints was the appointment of the husband of her former registrar, who she accuses of micromanaging her and being coached to conduct court business in a manner which excludes her.

Acting Judge Frederick Sievers served for three terms in 2018 and I currently still acting. …

[Hlophe] also hit back at Goliath questioning whether Sievers' long appointment was at the insistence of Hlophe's wife, Judge Gayaat Salie – Hlophe, or even at his own insistence. …

"The acting judge is a very senior member of the Cape Bar who now holds the status of Senior Counsel. He is an incredibly talented lawyer who has played a tremendous role in helping with judicial work at the court" …

"The fact that he is the husband of a registrar is not a disqualifying factor. It is irrelevant to whether he is qualified to act as a judge … The appointment was made, on my recommendation, by the Minister of Justice. The registrar who is the acting judge's wife had nothing at all to do with the appointment of this acting judge. …""

- **Tammy Petersen, "Hlophe vs Goliath: War of words as Judge President hits back at criticism of his acting judge selections", *News24* 16 February 2020 (available at https://www.news24.com/news24/SouthAfrica/News/hlophe-vs-goliath-war-of-words-as-judge-president-hits-back-at-criticism-of-his-acting-judge-selections-20200216**

MR DANIEL THULARE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 21 June 1970.

B Iuris, UNISA (1996)

LLB, UNISA (1998)

LLM, UNISA (2002)

CAREER PATH

Acting Judge

Western Cape High Court (last term 2017, all 2018, third and 4th term 2019, first term 2020).

Gauteng High Court (January – February 2014, April – May 2016).

Magistrate

Chief Magistrate, Cape Town (2016 – to date)

Senior Magistrate (2005 – 2016)

Magistrate (1999 – 2005)

Admitted as Advocate of the High Court (2002)

Candidate Attorney, Du Preez & Nkosi Inc (1999)

Prosecutor, Department of Justice (1996 – 1999)

Representative, Africa Regional Group of the International Association of Judges (2019 -)

JOASA

President (2017 - 2019)

Provincial Chairperson (2004 – 2006)

Member (2005 – 2017 ; 2000 – 2003)

Member, African National Congress (1990 – 2006).

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

INZINGA RANCH CC V MASHIYI (A265/17) [2018] ZAWCHC 108 (23 AUGUST 2018)

This was an appeal against a decision of the Equality Court. Respondent had complained of unfair discrimination on the basis of race and gender, as well as harassment. The issues arose out of disagreements over maintenance, rental payments and other issues in respect of a property the respondent rented from the appellant.

Thulare AJ (Samela J concurring) held:

"In my view, race as envisaged in section 7(b) [of the Promotion of Equality and Prevention of Unfair Discrimination Act] refers to a concept which is built on a set of ideas working together as part of a mechanism which have an interconnecting network resulting in a composite and complex whole. The constituent parts of this concept of race include being built on structures, systems, knowledge, skills and attitudes. In its attitudes, it includes the state of mind, heart, meaning, appreciation, judgment and purpose. It refers amongst others to the intellect in the head, the emotional intelligence in the heart, the humanity in conduct, the sensibility in conclusions, recognition of the good qualities of others and the reasons for which something is done. It is this constituent part, to wit, attitudes, which the facts of this case place under the judicial microscope on this concept of race." [Paragraph 30].

Thulare AJ held that the test for unfair discrimination on the basis of race required that "the attitude of the appellant should be looked at in the context in which the appellant thought of and felt about the respondent", and that the test was an objective one, of "whether a reasonable, objective and informed person, on hearing what happened, would perceive that to be unfair discrimination based on race." [Paragraph 31]. Thulare AJ found that the sole member of the appellant (Watkins) had formed unexplained misgivings about the respondent before the lease was signed, "which were not based on facts that would ordinarily give a reasonable prospective landlord reason to hold." [Paragraph 34].

"Watkins had an inflated sense of being more equal than the respondent as parties to the agreement. His feelings of self-importance caused him to believe that he could see, think and do better than the respondent. His excessive arrogance was displayed by his disregard of the agreed terms of the lease. In his outlook and frame of mind, the respondent was not worthy of any privacy which the lease agreement envisaged in its inspection provisions, and did not deserve his consideration and respect as her humanity commanded. She did not deserve private and undisturbed use of the property." [Paragraph 39].

"The attitude of Watkins was subtle and had a semblance of innocence and a pretence of sensitivity for social expediency. It was brutal to the dignity of the respondent. It was an attack on the integrity and humanity of the respondent. The insincerity that was so trite and obvious was hidden in the absurd pretence intended to create a pleasant impression that all was above board and all was well. The sad reality and tragedy of humanity is that racists themselves believe their own charade." [Paragraph 44].

Thulare AJ found that Watkins had "haunted the respondent's residence", "tracked and chased the respondent like a prey", and "had no conscience capable of appreciation for his shameful conduct as he haunted and hounded the respondent out of his property." [Paragraph 49].

"The underlying, murking and shrouded truth is that Watkins was disquiet and dismayed, which means he had a feeling of worry and cause for concern and distress, extreme anxiety, sorrow and pain in having a lease agreement with and have an African woman in his property. … Racists prefer the supreme test for exclusion to be a mystery. It is driven by greed, self-gain and self- gratification. It seeks to render its victims vulnerable and helpless. …" [Paragraphs 53 - 54].

Thulare AJ held that the case was "a run-of–the–mil [sic] claim for equal worth" and dismissed the appeal.

ADMINISTRATIVE JUSTICE

DYER EILAND VISSERYE (PTY) LTD V MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND ANOTHER (11914/17) [2018] ZAWCHC 162 (13 NOVEMBER 2018)

The second respondent had revoked the applicant's fishing right, a decision upheld by the first respondent following an internal appeal. The applicant sought to set aside the decision. The key issue was held to be whether the applicant had exceeded its fishing quota for the 2015 season [Paragraph 3].

Thulare AJ held that:

"The applicant was entitled to have the second respondent set out the allegations that creates the basis for a section 28 notice. The applicant was entitled to be informed by the charges against it with precision, or at least with a reasonable degree of clarity, what the case is that it had to meet – [*S v Hugo* 1976(4) SA 536 (AD) at 540E]." [Paragraph 6].

Thulare AJ found that the applicant had raised alternative facts when appealing the decision to the first respondent, rather than raising them with the second respondent. As a result, the second respondent had not ruled on the issues put before the first respondent [Paragraphs 8 - 11].

"In my view, once the applicant had filed their papers on appeal, it was incumbent upon the second respondent to consider the grounds of appeal and then amongst others file a statement in response to the appellant's allegations. Nowhere does second respondent set out the issues between the parties, which were already clear and known at the time of the compilation of the report. It does not demonstrate any intelligible engagement with the issues between the parties. The report shows no understanding of the facts and advanced no reasons to guide the Minister in understanding why the Department arrived at the decision it did and why that decision was to be preferred and accepted and the case of the applicant rejected. … The report represents a classic case of failure by a senior official of a Department to guide a Minister on an appeal against an administrative decision. After seven (7) pages of writing, not a single syllable is facile enough to convey the reasons for the conclusion …" [Paragraphs 12 – 13].

"… The record of the decision of the Minister should evidence a detailed examination of the elements and structure of the dispute. The process through which the Minister separated the constituent parts of the whole case, contrasting the striking difference between the cases of the Department and the appellant before him, and the reasons for the acceptance of one case or legal argument over another must appear from the record. ... There has to be a demonstrable record that the Minister reviewed the controlling issues in the dispute. I am unable to find any evidence of such industry on the record of the decision of the Minister on appeal. I am unable to conclude that the applicant's case was properly considered, if at all by the Minister." [Paragraph 14].

"Some of the reasons advanced by the applicant to upset the decisions of both the Department and the Minister did not deserve the dignity of a comment, but for the entitlement to lawlessness which they advocate for. The applicant appears to pride itself and many other rights holders in the fishing industry to conduct which in my view is unconscionable. …" [Paragraph 15].

The decisions of the first and second respondents were set aside, and the case was remitted to the second respondent to consider the applicant's responses to the allegations made against it, and re-determine the matter.

CRIMINAL JUSTICE

S V MADHINHA 2019 (1) SACR 297 (WCC)

Case heard 7 December 2018, Judgment delivered 7 December 2018

The accused attempted to obtain a police clearance certificate, and in so doing discovered that he had a criminal record due to an admission of guilt fine paid 8 ears previously. The accused had been arrested, detained and given a written notice which included a provision for payment of an admission of guilt fine without appearing in court. The accused paid the fine and was released. In the present proceedings, the accused applied for the deemed conviction and sentence to be set aside.

Thulare AJ (Dolamo J concurring) considered the meaning of section 57(6) and (7) of the Criminal Procedure Act, which regulate the payment of an admission of guilt fine at a police station or local authority, and the process thereafter:

"The conviction and sentence of an accused in terms of s 57(6) is sui generis. It is not a verdict. It is not even a pronouncement by the clerk of the court. It is an automatic consequence of an administrative act performed by a member of the court's support services. It automatically follows on the clerk of the court performing his or her clerical duties. …" [Paragraph 15]

Thulare AJ noted that the administrative duties performed by the clerk of the criminal court pursuant to section 57(6) of the Criminal Procedure Act were set out in codified instructions complied by the Department of Justice. Performance of those duties resulted in an automatic conviction and sentence in accordance with section 57(6), and took the view that "the clerk … simply enters on court records what is essentially an agreement between the state and the accused." [Paragraph 16] Thulare AJ held further that section 57 provided a mechanism "to provide for settlement of trivial disputes between the state and an accused person where neither party wishes to go through a long trial procedure and both are willing to bring their dispute to a quick end" [Paragraph 17], and that an admission of guilt under s 57 was distinguishable from an unequivocal admission of guilt under s 217 of the Act [Paragraphs 18 – 19].

Thulare AJ held further that:

"The previous convictions envisaged in s 271 of the Act have serious consequences for an accused ... In my view this cannot be prior conduct and the manner in which an accused thought he or she behaved towards others, seen against his or her own view of the accepted norms of society, generally without having obtained legal advice. A finding on such past conduct and the pronouncement of the conviction, because of its serious implications, in my view, should only follow where the evidence has established the guilt of the accused beyond reasonable doubt. In a criminal matter, in my view, the only competent authority to

make a pronouncement with such dire consequences should be a judicial authority, which is vested in the courts ... A conviction referred to in s 57(6) of the Act is not such a conviction." [Paragraph 30]

"A conviction and sentence following an entry into the admission-of-guilt record book by the clerk of the criminal court in the magistrates' court is not a conviction whose record is permanent. It was not a conviction and sentence to be entered in the criminal record system by the South African Police Service. …" [Paragraph 44]

The conviction and sentence were thus set aside, with a copy of the order to be served on the Minister of Police.

In **Mong v Director of Public Prosecutions and Another (17593/2018) [2019] ZAWCHC 106 (23 August 2019)**, a different composed bench of the Western Cape High Court declined to follow the **Madhinha** decision [see paragraphs 62 – 82]. The court (per Henney J, Samela J concurring) held that:

> "It is clear that the decision of this court in the case of *Madhinha*, besides the fact that it is clearly wrong, will have, as a consequence, a disastrous effect on our criminal justice system, especially when it relates to the payment and the legal effect of an AOG [admission of guilt] fine for certain offences. … The court in that case, with the greatest respect, clearly and demonstrably misinterpreted the law regarding this aspect. …" [Paragraphs 62 – 63]

The court further held that the **Madhinha** decision was at odds with existing Appellate Division authority [paragraph 65], had "simply failed to examine the aim and purpose of the proviso in subsection (7) of section 57" [paragraph 66], and that it potentially led to unequal treatment of those who chose to pay and admission of guilt fine compared to those who did not [Paragraph 68]. The court held that the decision "would also have deleterious and far reaching consequences for society where, for example, an abusive partner would regularly commit a relatively serious violent offence, like common assault, on his or her partner, would choose to pay an AOG fine and would then not attract a previous conviction." [Paragraph 69].

S V DYONASE (CC47/2018) [2020] ZAWCHC 137 (1 SEPTEMBER 2020)

This was a judgment on sentence, the accused (who was employed as a taxi driver) having been convicted on eight counts of kidnapping, eight counts of robbery with aggravating circumstances, one count of sexual assault and six counts of rape. [Paragraph 1]

Thulare AJ noted that there were "strong feelings of annoyance, displeasure and opposition to gender-based violence", and that "[m]ore than just repetition of old slogans is necessary to push back the frontiers of patriarchy." [Paragraph 16] Thulare AJ remarked further that:

> "There are serious problems with the mind and its functions, of men like the accused, which affected their behavior. His mental characteristics and his attitude towards women led to abnormal, disorderly and violent behavior. The decision to wake up in the morning, drive out of your ordinary route with the sole purpose of kidnapping, robbing and raping or sexually assaulting women arise in the mind and is related to the mental and emotional state of a person …" [Paragraph 17]

Thulare AJ further remarked that the taxi industry "cannot afford to be the hide-out for those who abuse women" [paragraph 19], and then considered the approach to sentencing in *S v Zinn*:

> "The rule in *Zinn, supra*, include the perpetrator, generally men, and exclude victims, generally women, in gender-based violence, as a self-standing constituent factor to be considered for purposes of sentencing. I am unable to find a cogent reason why a Judge- made law, pronounced by an impartial judicial officer free from the chains of patriarchy which is notorious for its different standards for women, would seek to exclude women's voices as a factor in a sentence individualized and specifically tailored to pronounce justice for them. In my view, the time has arrived for the triad to mature to the quadrant in respect of gender-based violence." [Paragraph 20]

Thulare AJ described the experiences of the victims as set out in the probation officer's report and the victim impact statements. [Paragraphs 25 – 28] Regarding the accused, Thulare AJ found:

> "To achieve a sense of distorted importance and control, in order to feel gratified, the accused asserted sexual dominance and power over vulnerable women. His use of sexual relations to satisfy emotional needs is what his eldest brother observed and termed "a womanizer". It is a mind-set with toxic implications for the distribution and exercise of masculine power. It manifested an unusual need for power and dominance. Women, in his world, were objects, and that explained why in my view, he saw nothing wrong with his gender-based violence perpetrated against them." [Paragraph 30]

Thulare AJ commented further on the seriousness and prevalence of gender-based violence, on the "deleterious effect" of rape on victims and their families. Thulare AJ held that the court had an obligation "to reflect the society's legitimate outrage", and that the sentence "had to reflect cognizance of the pain, heartbreak and destruction of the lives of the victims."

> "The personal circumstances of the accused, seen against the background of the crime, the interests of the community and the impact on the victims, do not satisfy me to be substantial and compelling to justify a departure from the discretionary minimum sentences." [Paragraph 32]

The accused was sentenced to an effective term of life imprisonment.

SELECTED ARTICLES

'Y 2 4 JESUS: ZION, WHERE INDIGENOUS KNOWLEDGE MEETS CHRISTIANITY', Author House, 2010.

The synopsis of the book on the Amazon.com website states that:

"The book seeks to explain the knowledge systems of the Indigenous people and seeks to demonstrate that the thinking, in general, that Indigenous knowledge is inferior, 424nbiblical or UnChristain can no longer be sustained. This is done through scriptural references. An explanation is also given of some practices, traditions and the hierarchical organogram of Indigenous Churches in South Africa through scriptures" (https://www.amazon.com/Jesus-Where-Indigenous-Knowledge-Christianity/dp/1449076009).

'MAGISTRATES AS PRIMARY DRIVERS AND PLAYERS IN THE CHANGE PROCESSES IN CHILD JUSTICE AND THE PLIGHT OF AN UNACCOMPANIED FOREIGN CHILD', Paper presented at a Child Justice Seminar, Polokwane, 2009. (Available at http://www.ipt.co.za/pdf/Child_Justice_and_the_plight_of_unaccompanied_foreign_children.pdf).

"Mothering, in Africa, has got nothing to do with conception, gestation period, labour pains, giving birth, sex or gender. Just to illustrate the point, there were no prisons in South Africa before the arrival of Jan van Riebeeck. Today, a prison visit by a Magistrate and a discussion with prisoners reveals that the absence of mothering is almost the sole cause of prison overcrowding." [Page 1]

"It is because of the apologetic view towards children that we refuse to acknowledge that in the foundation phase, which is between the ages of six and ten, punishment of the child is a necessary evil to help correct behaviour. Apologists have succeeded in elevating a tool of discipline, whatever the circumstances, to abuse - so much so that parents, including Magistrates and Judges, do not know whether physical correction of a child's behaviour by a parent is acceptable or not, and if it is, where the line is between discipline and violence or abuse. Apologists have blurred, if not removed, the line." [Page 3].

"My sense of justice finds the provisions of section 47 (2) (b) (i) of the Child Justice Act … objectionable. To have diversion founded by acknowledgement of responsibility by the child is simply too close to injustice for my comfort. In my view, we appear to be happy to bury justice in the cemetery of statistics for the National Prosecuting Authority. If it is in the best interests of the child to divert, we should divert. We should not only divert when the response of the child places a smile on the face of the prosecutor." [Page 10].

MEDIA AND OTHER COVERAGE

Remarks quoted at the 2019 JOASA annual general meeting:

"Outgoing president of the Judicial Officers Assocation of South Africa, Daniel Thulare, gave his presidential address at the association's AGM in Johannesburg this weekend, urging the Minister of Justice and Correctional Services to back calls for a symposium that would include 'judicial officers of all ranks'. The proposed symposium, given strong support by Joasa's members during the AGM's business meeting, would allow all the country's judicial officers to define what was meant by a 'single judiciary' and to identify the consequences that would follow from that definition.

The 'heads of courts' … met 'at the pleasure and invitation' of the Chief Justice, Thulare said. Conspicuously absent from those meetings were the chief magistrates and regional court presidents who were also heads of magistrates court at district and regional level. 'There are no reasons advanced as to why the current decision-making governance structure of the judiciary excludes the magistracy.' …

For magistrates to be represented by a judge president at the heads of court meeting of the judiciary, was like the days of 'marital power', Thulare said. ... It was a 'paternalistic idea' that had been discarded in the new democratic, constitutional South Africa, and to treat magistrates in this way was 'problematic'. …

The office of the Chief Justice was not a 'judicial kingdom', he said. A new document from that office had been sent to the Minister of Justice and Correctional Services, Ronald Lamola. It outlined an institutional model for the judiciary and proposed a new judicial council. Addressing the Minister, who attended the meeting, Thulare said, 'I have to tell you that we in Joasa do not support it.' The proposed model excluded SA's 2000 magistrates. 'They are not represented in this plan. You should send it back for that reason alone.' He urged the Minister, 'Whenever you engage with the judiciary, please ask – where are the magistrates?':

- **Carmel Rickard, *'Over-concentration of power in hands of Chief Justice' – Joasa president* (28 July 2019), available at http://carmelrickard.co.za/over-concentration-of-power-in-hands-of-chief-justice-joasa-president/**

"The South African Insurance Association (SAIA) has noted comments by Magistrate Daniel Thulare that were published in the Sowetan on Monday, 8 February 2010 which included that "any conviction for a citizen driving without a licence will be unlawful if the state has failed to test that person".

"Whilst it is acknowledged that there are challenges in the driver's licence booking system, the SAIA cannot support the statement made by Judge Thulare. It is against the law to drive without a valid driver's license. Insurance policy terms and conditions support the law of the country, and require that a driver authorised to drive an insured vehicle should hold a valid driver's licence. The insurance industry will not honour any claims where individuals driving a vehicle are not in possession of the relevant valid driver's license, as required by the terms and conditions of the policy," …

- **South African Insurance Association, *Insurance Industry Warns Against Driving Without a Valid Driver's License*, available at https://saia.co.za/newSite/index.php?id=344**