2017

SUPPLEMENTARY RESEARCH REPORT ON THE JUDICIAL RECORDS OF ADDITIONAL NOMINEES FOR APPOINTMENT TO THE WESTERN CAPE HIGH COURT

OCTOBER 2017

1. This supplementary research report covers the five candidates added to the shortlist of candidates for the Western Cape High Court. As we only became aware of these additional candidates after the completion of our main research report into the other candidates, we have prepared this separate supplementary report.

2. This report should therefore be read together with the explanation of methodology and submissions in our main report of 8 September 2017.

3. We again acknowledge the support of the Open Society Foundation and the Raith Foundation, for making this project possible.

DGRU

15 September 2017

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MR STEPHEN KOEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 18 May 1960

BA, UCT

LLB, UCT (1982)

CAREER PATH

Acting Judge, Western Cape High Court (2007, 2009 – 2013, 2015 – 2016)

Partner, Bisset Boehmke & McBlain (1990 -)

Professional Assistant, Bisset Boehmke & McBlain (1987 – 1990)

Professional Assistant, Francis Thompson & Aspden (1987)

Commissioner, Small Claims Court.

SELECTED JUDGMENTS

PRIVATE LAW

TRANSNET LTD V ERF 154927 CAPE TOWN (PTY) LTD AND OTHERS (2367/2007) [2010] ZAWCHC 401 (17 MAY 2010)

Applicant sought an order evicting certain of the respondents from immovable property owned by it. The eleventh respondent asserted that it was entitled to occupying the property in terms of an oral lease agreement.

Koen AJ held:

"Notwithstanding that it can adduce no admissible evidence to controvert Lombard's [a director of the eleventh respondent] account of the conclusion of an oral lease agreement Transnet contends that the facts put up in support of the alleged lease ... are insufficient ..." [Paragraph 6]

"Transnet's ownership of the immovable property in question is not disputed. What is in issue is Lorcom's right to occupy the immovable property in terms of the alleged oral lease. In this regard, a dispute of fact exists. ..." [Paragraph 7]

"What makes matters difficult for Transnet is that what Lombard says is not controverted, and the truthfulness of his evidence can be measured only against inherent contradictions therein and against the established facts. The scope for an analysis of probabilities in motion proceedings, if it exists at all, is extremely limited. Motion proceedings are not intended to enable a Court to weigh probabilities to determine where the balance lies in order to decide who is probably telling the truth." [Paragraph 27]

"Discredited as it undoubtedly now is, it is a principle of our law that a term of an agreement of lease leaving the power to determine the rental entirely to the discretion of one of the parties renders the agreement invalid ... it is evident from a reading of *Benlou* that the principle was reluctantly accepted in that case because the Court considered itself to be bound by it notwithstanding that it is illogical, and that it does not accord with the position in other legal systems. I respectfully agree with the criticism of the principle, which seems to me to be illogical and contrary to common sense." [Paragraph 32]

"Notwithstanding the reluctance with which the principle confirmed in Benlou appears to have been accepted, and the criticism which has been directed at it, it is our law as expressed by the Supreme Court of Appeal and I am bound by it. ..." [Paragraph 34]

Koen AJ found that the oral agreement was nonetheless valid, and dismissed the application.

COMMERCIAL LAW

KULENKAMPFF AND ASSOCIATES V VOSLOO AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 18194/08 (18 FEBRUARY 2010)

This was an application for the provisional sequestration of the first respondent.

Koen AJ held:

"It is well established that applications for the provisional sequestration orders should not be used in order to recover debts which are bona fide disputed on reasonable grounds. This is so because the procedure for a provisional sequestration is not designed for the resolution of disputes as to the existence or otherwise of a debt... There is no logical reason why the rule, which is designed to deter creditors from collecting debts which are bona fide disputed ... by way of liquidation proceedings, should not apply equally in sequestration proceedings. Insolvency proceedings are plainly not appropriate where the existence of a debt, and thus the legal standing of the creditor, is the subject matter of a genuine dispute." [Paragraph 17]

"Where legal standing as a creditor is placed in dispute by the respondent opposing the grant of a provisional sequestration order the respondent attracts an onus to establish that the existence of the debt is bona fide disputed by him on reasonable grounds. If he discharges this onus then a provisional order will be made..." [Paragraph 18]

"In the result I find that Mrs Vosloo has established standing as a creditor in regard only to the four loan debts evidenced by cheque stubs ... and that it would be to the advantage of creditors if Mr Vosloo's estate were to be sequestrated. ..."[Paragraph 31]

"What remains for consideration is whether, notwithstanding that the requirements of section 10 have been proved, this Court should exercise the discretion vested in it to grant a provisional order of sequestration. It will be noted that I have observed that that the debts in respect of which Mrs Vosloo has obtained standing as a creditor ... have probably prescribed." [Paragraph 32]

"...It seems to me to be undesirable to grant an order for the provisional sequestration of a debtor at the instance of a creditor who will, on the probabilities, be disqualified in participating in any *concursus creditorum*." [Paragraph 35]

The application was dismissed.

ADMINISTRATIVE JUSTICE

CLUB MYKONOS LANGEBAAN LTD V LANGEBAAN COUNTRY ESTATE JOINT VENTURE AND OTHERS 2009 (3) SA 546 (C)

Case heard 17, 18 and 19 June 2008, Judgment delivered 24 July 2008

The applicant [CML] and first respondent [the developer] owned adjacent land. The respondent applied for its property to be rezoned and subdivided, which was granted upon certain conditions, including the provision of a link road that would traverse the respondent's property and allow for access to the applicant's property. The parties differed as to the interpretation of these conditions, and specifically as to who held responsibilities regarding the road.

Koen AJ held:

"I have some doubt whether a vesting of 'public streets and public places', which is the automatic legal consequence of the confirmation of a subdivision, can be equated to a condition requiring a 'cession of land' imposed under s 42(2) of the Land Use Planning Ordinance ... (Western Cape) (LUPO).... Sections 28

and 42(2) of LUPO are different in language and unrelated in purpose … Section 28 envisages a situation, as I understand it, where the owner of the parent erf applying for subdivision (that is, before the application is considered by the council) contemplates that it will be necessary that part of the parent erf be used as public streets and public places and thus submits to the automatic legal consequence of vesting upon the confirmation of the subdivision. This is not the same, as I see it, as a condition imposed after the application has been considered by the council, which requires a cession of land to the municipality where all the different factors referred to in s 42(2) of LUPO, such as the needs of the community, public expenditure, the rates and levies paid in the past, or to be paid in the future, have been considered." [Paragraph 37]

"Furthermore, the form in which this matter was brought does not facilitate a challenge to the validity of the conditions. In these proceedings there was no *lis* between the developer and the municipality. They are both respondents. Issues which may be relevant to the validity of the conditions have thus not been properly addressed in the evidence and, as I have already intimated, to make findings about the validity of the conditions, an exercise which involves examining whether the different requirements of s 28 and/or s 42(2) of LUPO have been complied with, will involve too large a degree of speculation for such findings to be reliable. It is plainly unwise to fish in a sea of evidence put before a court by the parties for the purpose of resolving one issue, in the hope of finding evidential material which answers another issue." [Paragraph 40]

"… What is clear is that the conditions, construed in this manner, have not been complied with." [Paragraph 46]

"… That the legislature intended that compliance with conditions imposed by a council when approving a rezoning or subdivision application is essential and imperative is underscored by the fact that a failure so to comply is a criminal offence in terms of s 41 of LUPO." [Paragraph 47]

"The real issue … is what the conditions mean and it is to take too narrow a view of the court's function and powers in regard to the resolution of disputes, particularly where the exercise of public-law rights and the performance of public-law duties are in issue, to avoid that issue because the declaratory relief initially sought had been unwisely formulated. … It is therefore appropriate, in my view, that a declaratory order, coupled with an enforcement order, be made." [Paragraph 50]

"The decision of the municipality to initiate the process to have the road (possibly) constructed did not flow from its approval of the developer's rezoning and subdivision application. It was a decision independently taken and is unrelated to the conditions it imposed upon the developer. Whether or not the road is necessary, and in the interests of the community, is not a matter upon which a court can pronounce, and I am satisfied that it would not be correct for me to order compliance with these conditions, with a view, at least, that such compliance might eventuate in the link road being built. This should not be understood to mean that these conditions need not be complied with. It means simply that they are not sufficiently connected to the primary declaratory relief sought, for it to be necessary or desirable to order compliance with them in this application." [Paragraph 52]

The court found that conditions required the whole of the road to be reflected on the plans.

CIVIL PROCEDURE

POTTERS MILL INVESTMENTS 14 (PTY) LTD V ABE SWERSKY & ASSOCIATES AND OTHERS (7218/2006) [2016] ZAWCHC 5; 2016 (5) SA 202 (WCC) (1 FEBRUARY 2016)

Case heard 25 January 2016, Judgment delivered 1 February 2016

Plaintiff sued a firm of attorneys and a partner of the firm for damages, alleging the breach of a duty of care owed to it in relation to its purchase of a portion of un-subdivided agricultural land from one of the partner's clients. Plaintiff alleged that the sale agreement was void for non-compliance with the provisions of the Subdivision of Agricultural Land Act. This judgment dealt with an application to amend the defendant's plea, which was opposed by the plaintiff.

Koen AJ held:

"… [I]t is necessary to make some observations about the nature and scope of the admission in issue. The admission … to the effect that non-compliance with the Subdivision Act rendered the agreement void is an admission of nothing more than a legal conclusion which had been postulated by the plaintiff in its particulars of claim. It related to no facts which had been pleaded by the plaintiff. In essence, the admission is nothing more than an admission that the validity of the agreement should be determined with reference to the Subdivision Act, and that in terms of that Act the agreement would be void. That is, of course, quite correct." [Paragraph 10]

"Where a plaintiff alleges in a pleading that a particular law governs the case, whereas that law may not, an admission by a defendant that the law referred to governs the case does not make it so. What the law is has always been a matter for the Court to determine, and it is well established that mistakes about the law which the parties make are not binding on a Court. …" [Paragraph 11]

"It is evident, in my view, that an admission by a defendant that the applicable law is what the plaintiff alleges it to be falls to be treated somewhat differently to the admission of a fact which is necessary for a plaintiff to prove. If a fact is admitted by the defendant the plaintiff need not prove it. Questions of proof do not arise when it comes to the law. …" [Paragraph 13]

"… [W]hat really happened in Amod is that the law which applied when the plea was drafted changed, and the Court not only permitted the plea to be amended after the law had been changed to take account of this, but it also permitted the defendant to deny a number of facts which the defendant had previously admitted. In Amod the Court had assumed, and did not hold, that what was in issue was a pure question of law." [Paragraph 23]

"I conclude … that the facts in Amod are quite different from those in this case. Amod is not of direct application to cases where the withdrawal of an admission about the law only is sought. In my opinion, because of the different factual context, the statement in Amod to the effect "that, even in the case of the withdrawal of an admission of law, the court is not relieved of its obligation to consider whether the granting of the application will unfairly prejudice the other side" … should not be understood to mean that prejudice is a consideration where an amendment is sought only so as to place the issues before the Court in the correct legal context." [Paragraph 24]

"… It is true that amendments involving the withdrawal of admissions of fact have the potential to cause prejudice to the other party. However … amendments involving the withdrawal of an incorrectly

admitted legal consequence are of a different nature. In any event, in this case I do not think that any prejudice of the kind which might militate against the proposed amendment exists. Only the law is prejudiced if cases must be decided on the basis of what the parties might have in ignorance agreed the law to be." [Paragraph 33]

The amendment was allowed, with costs of the application to stand over for determination at the trial.

PROFESSOR SUNETTE LÖTTER

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 24 March 1959.

BA (Law), Rand Afrikaans University (1980)

LLB, Rand Afrikaans University (1983)

LLM, University of Pretoria (1986)

LLD, University of Pretoria (1991)

CAREER PATH

Broadcasting Complaints Commission of South Africa

Deputy Chairperson (2008 – 2010, 2017 -)

Commissioner (2000 – 2008)

Professor of Criminal Law, UNISA (1997 -)

Associate Professor, UNISA (1995 – 1996)

Senior Lecturer, UNISA (1992 – 1994)

Legal Advisor, South African Police (1987 – 1991)

Legal Advisor, South African Railway Police (1986 – 1987)

Public Prosecutor, Department of Justice (1983 – 1986)

SELECTED ARTICLES

'CRIMINAL LAW, FEMINISM AND PORNOGRAPHY', SA PUBLIC LAW Vol 12 Issue 2 (1997), 423.

This article examined the impact of the newly promulgated Bill of Rights on the regulation of pornography, and analysed theoretical approaches to pornography as well as provisions of the Film and Publications Act of 1996.

"The clause on explicit sexual violence and the degradation clause coupled with a criminal sanction upon transgression, raise the question of the desirability of governmental protection of women by prohibiting explicitly violent or degrading sexual conduct."

"The fact that a criminal sanction is coupled to the transgression of the prohibitions with regard to these clauses may create the impression that the equality of women is regarded as a serious issue. The reverse is unfortunately also true. Groups in need of governmental protection are usually disempowered and decidedly unequal."

"The inclusion of the clause on explicit violent sexual conduct is justified with reference to the risk of harm. … [T]he evidence supporting this claim is suspect. Furthermore, if the risk of harm were the real motivation for the insertion of the clause, a more consistent approach in respect of the written word would have been expected. If this clause can only be justified on moral grounds, it should not be underpinned by a criminal sanction. … If the government is not able to protect women against rape and other violent crime, how is it going to protect women against an offence as vague as degradation?" (Page 435)

"In order for a person to be convicted of a crime, the crime must have been clearly defined at the time of its commission. To attach a criminal sanction to the degradation clause implies that no uncertainty exists with regard to which depictions of sexual conduct would be degrading. …" (Page 435 - 436)

"The degradation clause offers no justification for restricting the freedom of speech nor for the intervention of criminal law. However, it does provide government with the opportunity to decide on behalf of women when and which depictions of sexual conduct would be degrading – a result which is, in itself, degrading." (Page 436)

"THE ETERNAL QUEST FOR AN INDEPENDENT PUBLIC BROADCASTER: WHAT'S NEWS", JOURNAL FOR JURIDICAL SCIENCE (2016) VOLUME 42 ISSUE 2, 14.

The article discusses how the legislature has discharged the constitutional obligation to establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representative of South African society.

"The biggest challenge in public broadcasting is to find and enforce a balance between editorial independence and public accountability …" (Page 14)

"A perusal of the resolutions, guidelines and objectives expressed in the Preamble to the Broadcasting Act and subsequent sections, leads one to infer that the Legislature set out to create the perfect public broadcasting model. The ideal public broadcaster is, therefore, owned by all citizens and tasked with a social obligation to correct past broadcasting injustices by aligning public broadcasting principles with

constitutional values, while simultaneously providing broadcasting services in the public interest in an independent, unbiased and balanced manner. The Legislature balanced out these obligations by acknowledging the public broadcaster's right to freedom of expression, journalistic, creative and programming independence and thus ticked all the boxes for an independent public broadcaster. …" (Page 17)

"While legislation, policies and Codes of Practice provide the structure for an independent public broadcaster, the attainment of the goal is, ultimately, contingent upon the individuals who have to implement the rules and regulations. …" (Page 20)

"… [I]t is submitted that the true value of editorial independence lies in the values it represents – freedom of speech and freedom to receive information. Editorial independence is a prerequisite for independent public broadcasting, but it does not trump public accountability. The condition, upon which the public broadcaster is granted editorial independence, is that of impartial, unbiased and balanced reporting, which condition, if it breaks the loss of editorial independence, will be the consequence of its crime and the punishment of its guilt." (Page 25)

DOCTOR LEAVIT MKANSI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 10 March 1970

BProc, University of the North (1992)

LLM, Human Rights and Constitutional Practice, University of Pretoria (1999)

LLM, International Business Law, University of Hull (United Kingdom) (2004)

Doctor of Laws, UNISA (2007 -)

Certificate in European Union Institution and Law, University of Brussels (date not given)

CAREER PATH

Regional magistrate, Bloemfontein (2002 -)

Part-time lecturer, UNISA (2010 – 2013)

Senior state advocate, Directorate of Special Operations (Scorpions) (2001 – 2002)

Prosecutor, Pretoria Magistrates' Court (1997 – 2001)

Candidate Attorney and attorney, Maartens, Huysamen & Partners (1993 – 1997)

Member, Ndzalo Trust

SELECTED JUDGMENTS

M v M (A216/2014) [2015] ZAFSHC 36 (5 MARCH 2015)

Case heard 9 February 2015, Judgment delivered 5 March 2015

Appellant and respondent had been married in Lesotho. Unopposed divorce proceedings were subsequently brought in the Bloemfontein Regional Court. On appeal to the High Court, Mocumie J (Lekale J concurring) held :

'On the verge of the plaintiff being sworn in to give evidence under oath, the regional magistrate (Mr Mkansi), *mero motu*, raised a point *in limine* regarding the jurisdiction of the regional court to dissolve a marriage entered into in a foreign jurisdiction. The basis of raising such point *in limine,* as he put it, was because the plaintiff and the defendant were different from parties who are married in the Republic of South Africa. He posed the contentious question '…is there a specific reason why the parties would not go and finalise their divorce in Maseru, Lesotho, which is not far from Bloemfontein?'" [Paragraph 4]

"… [T]he regional magistrate concluded that: 'I am not convinced that I have jurisdiction over the citizens who were married out of the borders of the Republic of South Africa. The second reason, the question of practicality why the plaintiff cannot pursue or proceed with this action in Maseru, Lesotho which is about 155 less than 160 km from Bloemfontein, I do not believe the question of practicality has merits. The plaintiff can institute divorce proceedings in Maseru, Lesotho, which is not far from the province of the Free State…'" [Paragraph 6]

"We gather from this ruling, in the absence of any order and reasons by the regional magistrate that he dismissed the action for divorce. …" [Paragraph 7]

"… [I]t is still not clear why the regional magistrate was of the view that he did not have jurisdiction. There is no indication that there are conflicting decisions on this issue in the regional courts across the country and more specifically in the Free State. Neither does the regional magistrate say so expressly. Nor does he say that the relevant sections of the Act as amended and the Divorce Act are unclear." [Paragraph 16]

"… [T]he regional magistrate did not give reasons for his decision. He did not even expressly state that he was dismissing the action for divorce or staying the proceedings pending a decision by this court on the issue of jurisdiction that he had raised *mero motu*. Even when he was given the proverbial 'second bite at the cherry', to provide reasons for his decision when the plaintiff lodged leave to appeal, he again chose not to give reasons." [Paragraph 17]

"… The Regional Court President must consider this case as one pointing to lack of training or inadequate training on divorce matters and take steps to remedy this, so that it should not be repeated."

The appeal was upheld and the case was remitted to be continued in the Regional Court.

MEDIA COVERAGE

Quoted criticising the State's conduct of a case against a couple "alleged to have forced their daughter into sex":

> "Magistrate Leavit Mkansi said the State was violating the rights of the two accused by remanding the case further.
>
> "The court believes you have a right to a trial and nothing has been done to advance your rights. The court finds that the defence has made a valid case of refusing a further remand. You are free to go," said Mkansi."

- Jeanette Chabalala, "Case withdrawn against couple accused of forcing daughter, 11, into sex", *News24* 19 February 2016 (available athttp://www.news24.com/SouthAfrica/News/case-withdrawn-against-couple-accused-of-forcing-daughter-11-into-sex-20160219)

MS SHARON MARKS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 18 September 1959

BA, University of KwaZulu-Natal (1979)

LLB, University of KwaZulu-Natal (1982)

Diploma, Advanced International Program on Human Rights, University of Pretoria and Lund University (Sweden) (1995)

CAREER PATH

Acting Judge, KwaZulu-Natal High Court (2012, 2014 – 2017)

Regional Court President (2011, 2012, 2013, 2016 – 2017)

Acting Regional Court President (2007)

Assessor, High Court (2005 – 2006)

Regional Magistrate (1992 -)

Magistrate (1986 – 1992)

Prosecutor (1983 – 1986)

Member, JOASA (1983 – 1986)

ARMSA

Member (1986 -)

National Treasurer (2004 – 2006)

Chairperson, KwaZulu-Natal (2002 – 2005)

Salaries and services committee (2002 – 2005)

SA – IAWJ

Member (2004 -)

Programmes Committee (2004 – 2006)

School governing body, Northlands Girls High School (2009 – 2013)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

PA PEARSON (PTY) LTD v ETHEKWINI MUNICIPALITY AND OTHERS 2016 (4) SA 218 (KZD)

Case heard 5 November 2015, Judgment delivered 2 December 2015

This case related to a dispute over whether the Local Government: Municipal systems Act allowed the municipality to reallocate payments from one account to another of the same account holder.

Marks AJ held:

"In respect of the interpretation of s 102(1)*(b)*, the section ought to be interpreted so as to have regard to the language of the provision itself, read in its context and having regard to the purpose of the provisions and J the background to the legislation. Furthermore, all legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights. …" [Paragraph 9]

"[S] 102 read together with the other provisions of ch 9 of the Act undoubtedly gives powers to municipalities to enable them to collect all moneys that are due and payable to them in the most cost-effective manner. There is a clear legislative need for the Municipality to efficiently collect moneys due to it by means of the powers afforded to it. This point has been repeated in numerous judgments." [Paragraph 14]

"The Municipality is entitled to credit payments made to *any* account held by a customer to *another* account of the customer. It is common cause that that is what occurred … when the Municipality took funds paid in respect of one account and credited those funds to another account. On a plain reading of s 102(1)*(b)* the Municipality is entitled to credit payments in the manner in which it has in this matter." [Paragraph 16]

"The argument that this could never have been the intention of the legislature, especially if one has regard to s 118(3) of the Systems Act, cannot be sustained. The purpose of the provisions of s 118(3) of the Systems Act was highlighted in the Constitutional Court judgment of *Mkontwana*, which determined that landowners were liable for the amounts due by tenants for services rendered to the owner's land, and that such an imposition of liability did not amount to an arbitrary deprivation of property, given the closeness of the relationship of the debt and reason for deprivation. The judgment did not deal with the provisions of s 102 and how that would affect the liability of the owner of the property. …" [Paragraph 17]

The application was dismissed.

CIVIL PROCEDURE

NATIONAL MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND ANOTHER V ETHEKWINI MUNICIPALITY; IN RE: INDEPENDENT SCHOOLS ASSOCIATION OF SOUTHERN AFRICA V ETHEKWINI MUNICIPALITY AND OTHERS (6957/2010) [2014] ZAKZDHC 42 (6 OCTOBER 2014)

Case heard 4 August 2014, Judgment delivered 6 October 2014

The applicant Ministers sought to exclude various documents from those required, by a previous court order, to be dispatched to the registrar of the court. The respondent opposed the application and instituted a counter-application to strike out the applicant's opposition to its review application, and to declare the Ministers in contempt of court.

Marks AJ held:

"The contention by the Ministers that Rule 28 of the Uniform Rules is applicable to amendment of pleadings only is misplaced. … Rule 28 … governs amendments to pleadings and documents and sets out succinctly the procedure to be followed. The Rule is not confined to pleadings only, it includes all documents and even includes affidavits. The language of the Rule is clear and unambiguous. … At the date of the hearing the Ministers had not given notice of its intention to amend their notice of motion … In fact, the amended notice was not properly filed in the papers before court either. Neither did the Ministers made a substantive application to amend the notice of motion in court. The application to amend the notice of motion was found in the supplementary affidavit that was filed in the papers. This supplementary affidavit was also filed without any substantive application being made … It is clear that there is merit in the argument that an irregular step has been taken … and Ethekwini is fully justified in noting an objection … " [Paragraph 11.1 – 11.4]

"Both parties argued the matter, and both parties were invited to file supplementary heads of argument which they did. Furthermore, the original heads of argument filed on behalf of the ministers clearly deals with the declaratory order sought in the amended notice of motion. No issue was raised in objection to the relief that was argued in the heads of argument. Ethekwini knew what case to meet in court …" [Paragraph 11.10]

"… [T]he argument … that it could never have been the Court's intention is based on his mistaken submission that in ALL cases the right of professional privilege is an absolute limitation of a party's

constitutional right of access to information. … Moreover, the office of the Ministers is a constitutional body with a public interest duty. It must operate with transparency and accountability. The Ministers have a duty to explain to the public how they arrived at the decision that Ethekwini now seeks to review. The documents sought by Ethekwini will assist in the enquiry into the rationality of the decisions taken by the Ministers. It cannot simply be stated now that these documents are covered by privilege or confidentiality. … " [Paragraphs 14.3 – 14.5]

"… [N]otwithstanding that the documents to be dispatched by the Ministers were not listed the interpretation of the order is that ALL of the documents, including those which the Ministers now seek to claim as confidential, irrelevant and privileged were included in the order to be dispatched. In other words, the Court's intention was not that a "reduced record" be dispatched by the Ministers to Ethekwini." [Paragraphs 15.2 – 15.4]

"The extrinsic facts reveal that these particular documents were the subject matter of the court order that was granted when the application to compel was brought … To my mind, if it was the Court's intention to exclude these documents then the order would have stated such. Moreover, on the date that the order was granted there was no opposing affidavits filed on behalf of the Ministers that the documents sought were irrelevant, confidential or privileged." [Paragraph 15.6]

The Ministers' declaratory order was dismissed. Marks AJ then considered the contempt application:

"… The Ministers appeared to be under the belief (albeit mistakenly) that they were entitled to withhold certain documents … To my mind eThekwini has failed to discharge the onus upon it. Therefore the application for contempt of a court order became premature and cannot be granted. To my mind it should be adjourned *sine die*." [Paragraphs 17.2 – 17.3]

The application to strike out the defence was similarly dismissed.

CRIMINAL JUSTICE

BRIAN ALI AND ANOTHER V THE STATE, UNREPORTED JUDGEMENT, CASE NO: AR354/12 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Appellants had been convicted on one count of robbery with aggravating circumstances, and two counts of murder, by the High Court, and sentenced to 15 years imprisonment in respect of the robbery, and life imprisonment in respect of both counts of murder. The appeal was against sentence only.

Marks AJ (Bezuidenhout AJ and Balton J concurring) held:

"… [C]ounsel for the appellant conceded that the murders were committed in an aggravating and serious manner. He nevertheless argued that the appellant should receive lengthy sentences short of life imprisonment. He based his assertions primarily on the fact that they were first offenders, that they were 'relatively young', that they had confessed, co-operated with police and had pleaded guilty and not wasted the court's time." [Page 3]

"The issue is … whether or not there was either a material misdirection by the trial court in determining an appropriate sentence or whether such sentence was so shockingly inappropriate that it can be inferred that the trial court's sentencing discretion was not properly exercised. …" [Pages 4 - 5]

"... While youthfulness is generally regarded as a mitigating factor, this is not by virtue of the offender's age per se, but rather because of the immaturity associated with being of a youthful age. ... The appellants were at the time they committed the offences aged 23 and 27 respectively, well beyond ther teenage years and therefore not considered to be prima facie immature. ... The manner in which the offences were committed does not suggest that they are individuals with a particularly low level of immaturity. There is thus nothing to suggest that their maturity levels are below that which can be expected of an adult, and it cannot therefore be said that their ages constitutes either wholly or in combination with other factors, a substantial and compelling circumstance." [Pages 6 - 7]

"Another ground which the appellants allege as a substantial and compelling circumstance, is the fact that they are remorseful. ... A guilty plea on its own is, however, not a suitable demonstration of remorse and the courts have warned against inferring genuine remorse simply because an appellant has pleaded guilty and co-operated with authorities. ... A court must look at the intensity, longevity and foundation of the appellant [sic] remorse to determine if it is sincere or whether it merely constitutes regret at getting caught." [Page 7]

"The argument for the appellants alleging remorse ... are largely based on their plea of guilty, their co-operation with police officials and taking the court into their confidence. ... [T]his is not enough and far more is required before genuine remorse will be inferred. Nothing further was pro-offered to substantiate the alleged remorse ... No apparent demonstration of genuine penitence on their part can be drawn from anything on record, nor is there any kind of attempt made at seeking amends or apology to the families of the deceased. There is therefore, nothing ... to conclude that the appellants' alleged remorse is such to constitute a substantial and compelling circumstances warranting a lesser sentence." [Page 9]

The appeal was dismissed.

MS LANI OPPERMAN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 28 April 1964

BIuris, University of the Free State (1990)

LLB, University of the Free State (1994)

LLM (*cum laude*), University of the Free State (2005)

LLM (*cum laude*), University of the Free State (2007)

CAREER PATH

District Court Magistrate (2017 -)

District Court Magistrate, Domestic Violence Court (2016 – 2017)

Acting Judge, Free State High Court (2015 – 2016)

Acting Regional Court Magistrate (2007 – 2008, 2012)

Part-time lecturer, University of the Free State (2010, 2012)

District Court Magistrate (2003 – 2007)

Senior State Advocate (2000 – 2003)

Junior State Advocate (1997 – 2000)

Regional Court Control Prosecutor (1996 – 1997)

Regional Court Prosecutor (1994 – 1996)

JOASA

Member (2003 -)

Provincial Executive Committee (2010 – 2017)

SAC – IAWJ

Member (2008 -)

Vice President, publications (2012 – 2014)

Provincial co-ordinator (2008 – 2009, 2011 – 2012, 2016 – 2017)

Child Welfare and childline, Free State

Chairperson (2016 -)

Executive board member (2013 -)

Founding member, steering committee : shelter for victims of domestic violence, Bloemfontein

SELECTED JUDGMENTS

CRIMINAL JUSTICE

S V KUYLER 2016 (2) SACR 563 (FB)

Case heard 25 April 2016, Judgment delivered 23 May 2016

This case concerned a question of discharge from prosecution in terms of section 204(2) of the Criminal Procedure Act. The s 204 witness had been charged with robbery with aggravating circumstances and murder, along with 4 other accused. At the trial charges against the witness were withdrawn, and he was called as a witness for the state to testify on matters that might incriminate him. In issue was the correlation between the main trial and the s 204 enquiry, and the process to be followed in the s 204 enquiry.

Opperman AJ held:

"Conflict of interest between the task of the prosecutor and the legal character of a 204-witness is real. In this case, for instance, the witness did indeed answer appropriately on some questions and did assist the state to prove the case against the other accused, to a certain extent. He, however, endangered the evidence with a refusal to answer some questions, with blatant lies to others and vagueness in yet others." [Paragraph 23]

"As result of this the prosecutor was conflicted. He realised that the witness did not comply with the 204-test for indemnity. On the other hand he laboured under the impression that he could not argue against indemnity being granted, because that would weaken his case against the accused. The prosecutor also had the 'promise' of indemnity to consider. ..." [Paragraph 24]

"The premise this judgment will progress from is that the witness has a right to be heard. It is indeed the constitutionally correct imperative. The nature and form of the enquiry must be ascertained." [Paragraph 31]

"The enquiry is, as a product of the above, to establish on a balance of probabilities whether the witness answered all questions frankly and honestly. ... This is not a proceeding instituted with a view to conviction and punishment. It is a procedure for a specifically proclaimed different purpose. The test and purpose for the evaluation of veracity of the witness, to be applied in the main trial, are not the same as in the indemnity enquiry. The legislator declared that explicitly with: 'all questions frankly and honestly'." [Paragraphs 40 - 41]

"The test for veracity of the evidence in the main trial against the accused is objective against all the evidence adduced. The test for indemnity is subjective; the witness must testify to the best of his ability in the circumstances that prevailed. Circumstances such as personal intellectual and emotional intelligence, fear, perceptions of intimidation, ignorance of the legal system and more may come into play when the indemnity enquiry is held." [Paragraph 46]

The witness was not discharged.

S V MOKHATI (158/2015) [2015] ZAFSHC 226 (18 NOVEMBER 2015)

This was a review of conviction and sentence for dealing in dagga.

Opperman AJ (Jordaan J concurring) held:

"... [T]he definition of 'dealing' in terms of the *Drugs and Drug Trafficking Act* ... was not explained to the undefended accused. It cannot be presumed that an accused knows that to carry dagga from one location to another implies dealing in drugs in terms of the law. ...The questioning consisted of the following: "Do you also confirm that, do you know that dagga is an undesirable dependence producing substance?" The accused is an uneducated lady that does laundry for a living. It should never have been assumed that she knows the meaning of "an undesirable dependence producing substance." ... The court did not obtain good and sufficient information before sentence. The financial circumstances of the accused were not established. The accused did not pay the fine. The fine may not be just. ..." [Paragraph 6 c – e]

"In this matter there was a complete failure of justice *per se*. ... The Constitution demands that the accused be given a fair trial. This does not mean sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious stratagems; it simply requires that justice be done." [Paragraph 13]

The conviction and sentence were set aside.

CHILDRENS' RIGHTS

R V T (3619/2014) [2015] ZAFSHC 228 (29 OCTOBER 2015)

Case heard 8 October 2015, Judgment delivered 29 October 2015

This was an application to vary provisions of a divorce order relating to permanent residence.

Opperman AJ held:

"There is palpable animosity between the parents. The evidence of the parents will, due to their subjective and possible idiosyncratic perspective, be regarded with caution. The court will not falter to act to serve the best interest of the minor children even if this cuts across parental rights." [Paragraph 10]

"The concern of the social worker with the emotional state of the children is underscored and corroborated by the repeatedly stated discontent by the minors at being cared for by the respondent's husband and the maternal grandfather. A method of disciplining the boys; that was confirmed by the respondent, support the statements of the children of belittlement by the husband and an unwillingness of the respondent to intervene. The non-observance of the prerequisites in the definition of care, to guiding the behaviour of the children in a humane manner and maintaining a sound relationship with the children, in addition, concerns the court. The conduct of the respondent towards the children caused a level of detachment and emotional stress with the boys that eventuated in a recommendation of immediate psychological assistance and therapy by the social worker." [Paragraph 13]

The application succeeded, and the applicant was declared to be the primary provider of residence to the children.

ADMINISTRATION OF JUSTICE

DU PLESSIS V ERASMUS (A118/2015) [2016] ZAFSHC 57 (24 MARCH 2016)

Case heard 7 December 2015, Judgment delivered 24 March 2016

This was an appeal against the decision of a district court in an action for breach of contract. In issue was whether the merits and quantum of the claim had been properly separated, and therefore whether the finding of liability was appealable. A further issue was that a judgment had not been handed down by the district court.

Opperman AJ (Van Zyl J concurring) held:

"I apologise for the song and dance; the case demands it. Since the dawn of democracy in 1994 there has not been, is not at this time and will not be in future, a case in any court of this country that is not deserving of judgment that is founded on defensible reasons. The judicial authority … as represented by the courts will be grossly ineffective if shorn of decrees bereft of adequate reasons in sustenance thereof. The right to access to courts, the independence of the judiciary and accountability of the courts, will be illusory. Trials and hearings will be moot and futile. Democracy will fail." [Paragraph 21]

"The Constitution was defied in the District Court; a purpose of judgment in writing is to enable the parties to a dispute legal access to the court of appeal. The dispute to be taken on appeal was not defined. The so-called lines of battle were not drawn for purpose of appeal. The court was not responsive. The dispute in the court *a quo* was not addressed and resolved due to the erroneous order. There are costs implication for both parties and finalization in litigation cannot be achieved. It is a collapse of justice." [Paragraph 26]

The appeal was dismissed.

MEDIA COVERAGE

"HOLDING THE WEIGHT OF THE LAW IN HER HANDS", *JUDGES MATTER* (8 AUGUST 2016) (http://www.judgesmatter.co.za/opinions/holding-the-weight-of-the-law-in-her-hands/)

> "The above and many years of involvement in the justice system of South Africa convinces me that Justice has a feminine soul and she is a lady. This is the reason why women are important in the transformation of the judiciary and all law in South Africa. I have an appreciation of the reality that the world acknowledges the spirit of justice and does change but it remains the same. Weirdly enough, it is still an issue being a woman on the bench but not an issue to be a man on the bench. Judges have to do justice to the people; all people. It does not matter whether the judge is a man or a woman or the entity that is being adjudicated is a man or a woman."
>
> "Why do I have to, in 2016 and in a liberated country, answer the question what being a woman in the judiciary means and what the importance of woman in the judiciary is? It should be a given by now that justice means equality. May I suggest that you also ask what being a man in the judiciary in the post-constitutional era is? There should not be a difference."