SUBMISSION AND RESEARCH REPORT ON THE JUDICIAL RECORDS OF NOMINEES FOR APPOINTMENT TO THE SUPREME COURT OF APPEAL, COMPETITION APPEAL COURT, HIGH COURT AND ELECTORAL COURT

APRIL 2018

INTRODUCTION

1. The Democratic Governance and Rights Unit (DGRU) is an applied research unit based in the Department of Public Law at the University of Cape Town. DGRU's vision is of a socially just Africa, where equality and constitutional democracy are upheld by progressive and accountable legal systems, enforced by independent and transformative judiciaries, anchored by a strong rule of law. The mission of the DGRU is to advance social justice and constitutional democracy in Africa by conducting applied and comparative research; supporting the development of an independent, accountable and progressive judiciary; promoting gender equality and diversity in the judiciary and in the legal profession; providing free access to law; and enabling scholarship, advocacy and online access to legal information. The DGRU has established itself as one of South Africa's leading research centres in the area of judicial governance.

2. The DGRU recognises judicial governance as a special focus because of its central role in adjudicating and mediating uncertainties in constitutional governance. The DGRU has an interest in ensuring that the judicial branch of government is strengthened, is independent, and has integrity. The DGRU's focus on judicial governance has led to it making available to the Judicial Service Commission (JSC) research reports on candidates for judicial appointment, and to DGRU researchers attending, observing and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for the JSC interviews in September 2009, and for all further JSC interviews from October 2010 onwards.

3. The intention of these reports is to assist the JSC by providing an impartial insight into the judicial records of the short-listed candidates. The reports are also intended to provide civil society and other interested stakeholders with an objective basis on which to assess candidates' suitability for appointment to the bench.

METHODOLOGY OF THIS REPORT

4. In our April 2017 report, we recounted how we had attempted to implement a new style of report for the October 2016 sitting of the JSC. This was intended to present a more comprehensive overview of a candidate's track record than presenting simple summaries of judgments and academic articles candidates have written. We attempted to present a comprehensive overview of all a candidate's judgments, including a table of the total number of cases heard and judgments written. We noted that this had presented several challenges, leading to the October 2016 report focusing only on candidates for the Constitutional Court.

5. We noted how, based on this experience and on feedback from members of the JSC on the usefulness of our reports, the April 2017 report adopted a "hybrid" approach between the original structure of our reports, and the changes we had attempted to make in the October 2016 report. We continue to follow this "hybrid" approach in the current report.

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

6. To that end, we have not attempted to set out all of candidate's judgments, and continue to group the summaries of judgments and thematic headings. These thematic headings are the following:
   6.1. Private Law;
   6.2. Commercial Law;
   6.3. Civil and Political Rights;
   6.4. Socio-Economic Rights;
   6.5. Administrative Justice;
   6.6. Constitutional and Statutory interpretation;
   6.7. Environmental Law;
   6.8. Labour Law;
   6.9. Civil Procedure;
   6.10. Criminal Justice;
   6.11. Children's' Rights
   6.12. Customary Law; and
   6.13. Administration of Justice.

7. This is the full list we utilise, and it is possible that some categories will not have any cases included in any particular report.

8. We have always emphasised that the purpose of these reports is not to advocate for or against the appointment of any particular candidate. It is worth emphasising this in light of the inclusion of sections on media coverage of candidates, and of the inclusion of academic commentary on judgments, in the report.

9. In the course of watching JSC interviews over the years, it has become clear to us that traversing candidates' written judgments alone does not necessarily capture the full range of issues that may be canvassed with them during an interview. In order to try to give a more holistic picture of a candidate, we have begun to include media coverage of candidates, based on simple desktop research.

10. We generally do not include media reports of judgments, since these will be covered by our selection and summaries of judgments. The intention is to capture material such as speeches or interviews which may give additional insight into issues such as a candidate's personal background or mindset, which may be relevant to their suitability for judicial appointment.

11. We obviously are not able to confirm the veracity or otherwise of media reports, and as with judgments, we aim simply to present the results of the research we undertake.

12. As we have previously noted, we do not provide our own analysis or criticism of the judgments summarised. Several users of our report have indicated that such an approach would be helpful, and so we have tried to integrate academic comment on judgments into the report. Again, we present the results of what we have found in the course of our research. A strong academic critique of a particular judgment provides an opportunity to engage on matters such as a

candidate's judicial philosophy and approach to legal reasoning, but does not necessarily render a candidate unsuitable for appointment.

13. We continue to welcome any feedback or suggestions on how the structure of the report may be further improved.

SUBMISSIONS REGARDING THE INTERVIEWS

14. In our previous reports we have regularly made suggestions about how aspects of the JSC's process, in particular relating to the public interviews, might be improved. This has been in the spirit of constructive engagement based on our observations of the work of the commission over a long period of time.

15. In the submission to our October 2017 report, we suggested that the JSC would benefit from articulating, as a matter of course, some brief reasons for the appointment or non-appointment of candidates. This, we suggest, would greatly benefit the transparency of the judicial appointments process, and may well be beneficial to the JSC's own decision making process.

16. There is a corollary to this. It is difficult to give a reason for a decision without having criteria in terms of which the decision is being made. The question of the criteria used by the JSC is one that we have made repeatedly over the years we have observed the work of the commission.

17. We wish to touch briefly on why we think the issue remains an important one that is worthy of the JSC's attention. Whilst the Constitution, in section 174 (1) and (2), provides broad guidance as to the qualities a judge should possess, we would argue that there is a great deal more detail that needs to go into the identification of whether a candidate has the qualities for judicial appointment.

18. The JSC has in the past recognised this. Supplementary criteria for judicial appointment were developed both under Chief Justice Mahomed in the late 1990's, and under Chief Justice Ngcobo. But it is no slight to the current commission to suggest that it would be beneficial for this JSC to go through a similar process itself. Circumstances and context changes, and factors that may have been central in commissioner's thinking ten years ago may no longer be relevant, whilst criteria that may not have been considered in the past may have become central to many commissioners' understanding of the qualities of an ideal South African judge.

19. We suggest that it would be a beneficial exercise for the JSC to again articulate fuller and more detailed criteria that are applied in selecting judges. This would bolster the transparency of the process, and be fair to candidates to assess their own chances of appointment.

20. Finally, we wish to acknowledge a change around another of our previous repeat submissions, about the time needed to make submissions to the JSC. We have the sense that more time is now available to make submissions, and we acknowledge this gratefully. We hope this report will be of use to all interested stakeholders.

ACKNOWLEDGEMENTS

21. This research was conducted by Chris Oxtoby, DGRU senior researcher, and Anisa Mahmoudi, Liat Davis, Zia Haffejee and Prince Mathibela, DGRU research assistants.

22. We are grateful for the financial support of the Open Society Foundation and the Raith Foundation for making this project possible.

DGRU

9 March 2018

JUDGE ELIZABETH BAARTMAN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 3 December 1960

B.Iuris, University of the Western Cape (1986)

LLB, University of the Western Cape (1994)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (June 2015 – May 2016)

Judge, Western Cape High Court (August 2009 -)

Acting Judge, Western Cape High Court (October 2008 – August 2009)

Senior State Advocate, Deputy Director, National Prosecuting Authority (2003 – September 2008)

Director, The People's Family Law Centre (2001 – 2003)

Presiding Officer, Cape Town Divorce Court (1998 – 2001)

District Court magistrate (1991 – 1998)

Prsecutor, Department of Justice (1986 – 1991)

Board member, Law Race and Gender Unit (2004 – 2009)

Member, Magistrates' Association of South Africa / JOASA (1991 – 2001)

SELECTED JUDGMENTS

PRIVATE LAW

CITY OF TSHWANE METROPOLITAN MUNICIPALITY V PJ MITCHELL (38/2015) [2016] ZASCA 1 (29 JANUARY 2016)

Case heard 4 November 2015, Judgment delivered 29 January 2016

This appeal concerned the interpretation of section 118 (3) of the Municipal Systems Act. The issue was whether security provided in favour of the municipality for monies owed for services delivered in respect of fixed property, was extinguished when the property was sold at a sale in execution and subsequently transferred to the purchaser.

Baartman JA (Mpati P, Bosielo and Saldulker JJA concurring) dealt with whether the exception to the common law invoked by the court a quo applied to the statutory hypothec created by s 118(3) of the Act:

"…In my view, the exception in Voet 20.1.13, on which the court a quo relied, does not apply to a hypothec created by a statute that places no limit to its duration. There is nothing in the Act that indicates that any exception to the application of the provisions of s 118(3) was contemplated where property is purchased at a sale in execution. On the contrary, there are indications that the exception to the common law invoked by the court a quo does not apply to the statutory hypothec created by s 118(3) of the Act." [Paragraph 15]

"No distinction can therefore be drawn between property sold either at a sale in execution or in a private sale when considering the question whether the hypothec created by s 118(3) survives transfer. It follows that the court below erred in concluding that the appellant's statutory hypothec had been extinguished by the sale in execution and subsequent transfer of the property into the name of the respondent." [Paragraph 16]

The appeal was upheld. Zondi JA dissented, holding that under common law, a "burden on a property does not survive the transfer of the property from one person to another where such transfer takes place pursuant to a sale in execution and the creditors holding a hypothec 'have kept silent'." Zondi JA held that s 118(3) could and should be interpreted consistently with this common law position.

COMMERCIAL LAW

CHEVRON SA (PTY) LTD V DENNIS EDWIN WILSON T/A WILSONS AND OTHERS (5244/2013) [2014] ZAWCHC 121 (5 JUNE 2014)

Judgment delivered 5 June 2014

This case involved a challenge to the constitutionality of section 89(5)(b) of the National Credit Act. Applicant had extended credit to the first respondent since 1997. Applicant instituted proceedings in the Magistrates' Court claiming amounts owed for the supply of petroleum products. During the proceedings, it emerged that, though the applicant was required to be registered as a credit provider, it had failed to do so. As a result, in terms of s 89(5)(a), the agreement in terms of which the applicant claimed against the first respondent was void, and s 89(5)(b) required that the court order a refund of all monies paid by first respondent to the applicant under the agreement.

Baartman J held:

"Section 89(5)(b) makes provision for the obligatory refund of any money with interest that the consumer has paid the credit provider under the agreement irrespective of circumstances of the matter. … I am persuaded that the obligatory nature of the refund constitutes an infringement of section 25(1) of the Constitution …" [Paragraphs 6 - 7]

"… [C]ounsel for the third respondent [the Minister of Trade and Industry], submitted that the deprivation is arbitrary both on a substantive and procedural level. I agree. The court is denied any discretion to decide on a just and equitable order. This is problematic and leads to procedural unfairness. Similarly, on a substantive level the obligatory nature compels a court to order the refund whether or not there is sufficient reason for a deprivation." [Paragraph 8]

"The third respondent has not advanced any basis for a limitation of rights in terms of section 36 of the Constitution. … [T]he factors that indicate that the deprivation is arbitrary also indicate that the deprivation cannot be reasonably justified in terms of section 36 of the Constitution. There are less restrictive means that can be employed to achieve the object - registration of credit providers that fall within the ambit of the Act. …" [Paragraph 9]

"It was in issue whether the proposed order would amount to a reading-in or a reading-down of the provisions of section 89(5)(b). Regrettably, the issue received too much attention and contributed to the clouding of issues … [T]he order sought does not amount to an "intrusion into the domain of the legislature" because the Amendment Bill will soon be signed and the order sought is identical to its wording." [Paragraphs 12 - 13]

The section was found to be inconsistent with the Constitution and invalid. The Constitutional Court confirmed the finding of invalidity in Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others (CCT 88/14) [2015] ZACC 15; 2015 (10) BCLR 1158 (CC) (5 June 2015).

ADMINISTRATIVE JUSTICE

TSHABALALA V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS (18871/2014) [2014] ZAWCHC 169 (12 NOVEMBER 2014)

Judgment delivered 12 November 2014

Applicant, the then chairperson of the SABC, was the subject of an inquiry by a Parliamentary Portfolio Committee, after a newspaper article alleged that she was not qualified for the position. Applicant sought a declaratory order to the effect that the inquiry was a disciplinary inquiry to which the principles of natural justice applied.

Baartman J held:

"The parties agreed, correctly in my view, that the inquiry constituted administrative action as defined in section 1 of the Promotion of Administrative Justice Act … therefore, the rules of natural justice (procedural fairness) were applicable to the inquiry." [Paragraph 10]

"Apart from the reference to legal representation … the notice [of hearing] complies with the rules of natural justice. Fortunately, the issue of legal representation has been dealt with appropriately and the applicant will, as she is entitled, be represented by a legal team of her choice and at her own cost. The applicant has further received, although some only shortly before the hearing of this application, all the particulars that she requested. She is not, however, in possession of the correspondence in which Unisa allegedly indicated that it had not awarded any academic qualifications to her. Evidently, this is a gross oversight as the respondents have not given any reason to refuse her a copy of the letter… [T]he issue … should be dealt in accordance with the principles of natural justice which would in the absence of good cause dictate that the applicant be given a copy of the letter. If this is so … the applicant's rights will not be compromised in the pending hearing." [Paragraph 17]

"… [T]here is merit in the submission that she will be prejudiced by virtue of her exclusion from the process in the National Assembly. … [T]he applicant should have an opportunity to respond to the report prior to the proceedings in the National Assembly. In the circumstances … the rules of natural justice would demand that the applicant be given a copy of the committee's finding and a reasonable opportunity to respond thereto in writing which response should accompany the committee's report to the National Assembly and should be taken into consideration in the process leading to the adoption of any resolution." [Paragraph 18]

The application was dismissed, with no order as to costs.

BUTHELEZI AND ANOTHER V MINISTER OF HOME AFFAIRS AND OTHERS (22071/2011) [2012] ZAWCHC 3 (3 FEBRUARY 2012)

This was an application by two opposition party members of parliament to have the conduct of the respondents reviewed for their delay or refusal to issue the Dalai Lama with a visa to enable him to travel to South Africa. They sought to review the refusal decision or the delay in terms of PAJA, and alleged that there was a constructive refusal to grant the visa.

Baartman J held:

"The granting or refusal of an application for a temporary visa constitutes administrative action. Thus, this court may review and set aside such action and grant an order that is just and equitable and may, in exceptional circumstances substitute, vary or correct a defect resulting from administrative action or direct the administrator to perform in terms of section 8(2) of PAJA." [Paragraph 16]

"... [I]t is apparent that the withdrawal of the visa application, the absence of the Dalai Lama as an applicant in this matter, the fact that the events he intended to attend have taken place and the absence of his response to the new invitation are material factors that must influence the decision whether to consider the application, despite the matter being moot." [Paragraph 25]

"... [I]t is arguable that the profile of the Dalai Lama makes it unlikely that similar controversy will arise in other visa applications. In any event, every visa application, including any future visa application by the Dalai Lama, must be considered in accordance with the law; hence the importance of a decision that is no longer live cannot, without more, be converted into one that necessitates court intervention." [Paragraph 30]

"Allegations of disregard for human dignity and the rights entrenched in the Constitution have been levelled against the respondents in various matters before the courts. However, the courts have been unanimous in condemning such behaviour where the circumstances have justified it. But this case turns on its own peculiar facts. Furthermore, there is therefore no reason to fear that our courts would not in future, in appropriate circumstances, come to the Dalai Lama's or any other aggrieved visa applicant's aid, should he or she approach the court. However, given the nature of this case, the relief sought would have no practical effect." [Paragraph 34]

"It follows that the interests of justice do not permit the exercise of this court's discretion in favour of the applicants to consider the matter despite its mootness... The importance of the issue is affected by the withdrawal of the application and the passage of time; the events the Dalai Lama intended to attend took place a long while ago. The criteria for granting visa applications are well-known and do not involve any complex legal issues. Although the parties have addressed this court fully on mootness and the merits, it does not justify this court giving advisory opinions on abstract propositions of law." [Paragraph 35]

The application was dismissed with costs.

CRIMINAL JUSTICE

S V MSIZI (A345/2011) [2011] ZAWCHC 441

Judgment delivered 25 November 2011

This was an appeal against sentence, the appellant having been sentenced to 5 years imprisonment for assault with intent to do grievous bodily harm in the Regional Court.

Baartman J (Van Staden AJ concurring) held:

"By providing for correctional supervision as a sentence option, the legislature distinguished between those offenders who ought to be removed from society by means of imprisonment and those who, although deserving punishment, should not be removed from society. The Appellant clearly falls into the second category." [Paragraph 8]

Baartman J considered the best interests of minors who depended on the accused for support:

"Section 29(2) of the Constitution requires that a child's best interest has paramount importance and any matter concerning children must obviously be considered6. The fact that the Appellant was paying maintenance for his dependant child and also contributing to the household where a further minor child was living, should have persuaded the Magistrate to at least consider correctional supervision and to call for a report." [Paragraph 9]

"... I conclude that the Magistrate erred by deciding that correctional supervision was not an appropriate sentence. Subject to the input of a probation officer or a correctional officer, rehabilitation in the form of a course in anger management might have been appropriate in this case. However, since the imposition of sentence on 10 March 2011 the Appellant has been in custody for a further period of more than eight months. In all the circumstances I believe that it will not be appropriate to impose a sentence of correctional supervision at this stage. The fact of the matter is that the Appellant has been in prison for more that [sic] a year." [Paragraph 10]

"I would therefore set aside the sentence imposed and substitute it with a sentence of 3 years imprisonment of which 2 years and 6 months is suspended for a period of 3 years on condition that the Appellant is not convicted of an offence of which an act of violence is an element and in respect of which the Appellant was sentenced to unsuspended imprisonment without the option of paying a fine. I would further order that this period of the effective 6 months imprisonment be antedated in terms of Section 282 of the Criminal Procedure Act to commence on the date of sentence ... If there is no other valid reason for the Appellant to be detained in prison he should be released immediately." [Paragraph 11]

CHILDRENS' RIGHTS

P P V C P (15992/2012) [2012] ZAWCHC 322

Judgment delivered 21 September 2012

This application concerned the best interests of a minor whose natural parents were going through a divorce. The applicant (the father) was seeking an order to have the minor returned to Cape Town from the Free State.

Baartman J held:

"Despite the respondent's allegations to the contrary, I am of the view that the minor was not prepared for the move when it happened. The respondent alleged that she had fled the common home because she was the victim of domestic violence. I accept that the applicant assaulted the respondent during the course of the marriage. Unfortunately, the respondent did not seek the protection available to her through the appropriate legislative means; instead, she fled. In so doing she has pre-empted a court decision in respect of the minor's primary residence. It remains this court's duty to enquire into the best interest of the minor." [Paragraph 10]

"It is common cause that the applicant has never displayed any violent behaviour towards the minor, in her consultation with Smit she expressed her affection for both her parents." [Paragraph 11]

"It follows that the respondent foresees no harm to the minor in the company of the applicant. The applicant holds a different view in respect of the minor's safety in her present abode. He indicated that the respondent had been sexually molested and raped by her brother who currently resides in Paarl. ... In her opposing papers, the respondent denied the allegations, however, in her consultation with Smit she admitted that she had been molested, by her brother. This is not the brother with whom she currently resides. Despite the geographical distance between the respondent and her brother, the applicant remains concerned for the minor's safety. ..." [Paragraph 12]

"The minor has indicated ... that she would prefer to stay with the respondent. In giving effect to the minor's expressed preference, it is important to assess her emotional maturity. She is 11 years old and it is apparent from the papers that both parties have tried to influence her. I am not persuaded that the minor is currently able to express a genuine preference." [Paragraph 14]

"...That submission [regarding the busy work schedule of the grandmother] loses sight of the fact that the minor would be at school during the day. She would be in no different a position than many children her age whose: parents work. In addition, the respondent has been a house wife until now but since she is about to be divorced, she will also have to find employment." [Paragraph 15]

"In my view, the available evidence suggests that it would be in the minor's best interest to return to Cape Town pending a final decision in this matter. I intend to order that the applicant vacate the common home in the event that the respondent should elect to return with the minor. In that eventuality, the applicant should also refrain from visiting the common home pending finalisation of this

matter. Should the respondent elect not to return, I P, the paternal grandmother, will stay in the common home with the applicant and the minor child." [Paragraph 16]

The respondent was ordered to return the minor to Cape Town pending finalization of the matter.

MEDIA COVERAGE

Marilena Ioannou, "Bar News, Cape, New Judges", *Advocate* Vol 22 No. 3, December 2009
(http://www.sabar.co.za/law-journals/2009/december/2009-december-vol022-no3-pp08-and-10.pdf)

> "She feels 'humbled' by her appointment and 'honoured by the trust that has been placed in her.' Whilst initially feeling somewhat overwhelmed, she emphasises her excitement at what lies ahead, and is resolute that whatever challenges she may face on the Bench, she is committed to doing 'whatever it takes.' On effective advocacy, Baartman J says that she is most persuaded by counsel who maintain their composure, remain professional and do not become flustered; their measured and composed delivery best ensures that the crux of their argument is not lost." [Page 8]

Emsie Ferreira, "Aspirant Judge wins battle with NPA", *Mail & Guardian* 21 July 2009
(https://mg.co.za/article/2009-07-21-aspirant-judge-wins-battle-with-npa)

> "A former employee of the National Prosecuting Authority (NPA) nominated for the Western Cape bench told the Judicial Services Commission on Tuesday that the prosecuting body had demanded she pay back her salary for the time she served as an acting judge.
>
> Elizabeth Baartman said after a "lengthy campaign", which included many letters to Chief Justice Pius Langa, her dispute with the NPA ended last week with a phone call from its acting head, Mokotedi Mpshe. He said they would withdraw the claim.
>
> "Advocate Mpshe called me last Friday to say they won't pursue the payment issue," the former prosecutor at the NPA's Asset Forfeiture Unit (AFU) told the JSC."

JUDGE TREVOR GORVEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 21 April 1954

BA, University of KwaZulu Natal, Durban (1976)

LLB, University of KwaZulu Natal, Pietermaritzburg (1978)

Bachelor of Theology, University of South Africa (1986)

CAREER PATH

Judge, KwaZulu Natal High Court (November 2008 -)

Advocate (1988 – 2008)

General Secretary, Student YMCA, UKZN, Pietermaritzburg (1985 – 1988)

General Secretary, Student YMCA, UKZN Durban (1982 – 1985)

Assistant Secretary, Student YMCA, UKZN, Durban (1982 – 1985)

Prosecutor, Department of Justice (1978 – 1980)

Society of Advocates, KwaZulu Natal

Chair, Pietermaritzburg Branch (2006 – 2008)

Advocacy Trainer (2005 – 2008)

Pupilage Co-ordinator, Pietmaritzburg branch (2002 – 2008)

Bar council member and committee member, Pietermaritzburg bar (2002 – 2004)

Member (1988 – 2008)

NADEL

Member (1988 – 2008)

Executive member, Pietermaritzburg (1989 – 1990)

Member, lay preacher and lay minister, St Matthews anglican church (1985 -)

Board member, St Nicholas Diocesan School (1999 – 2016)

Board member, Epworth school (2005 – 2011)

Director, Dusi UMngeni Conservation Trust (2006 -)

Director, Journal of Theology for Southern Africa (2006 -)

SELECTED JUDGMENTS

COMMERCIAL LAW

PREMIER FOODS (PTY) LTD V MANOIM NO AND OTHERS 2016 (1) SA 445 (SCA)

Case heard 29 September 2015, Judgment delivered 4 November 2015.

Appellant had been granted immunity in terms of the Competition Commission's corporate leniency policy (CLP). It duly gave evidence on cartel activities (relating to an alleged bread cartel in the Western Cape) to the Competition Tribunal. The Tribunal made an order declaring the conduct of the appellant to be a prohibited practice in respect of its involvement in cartel activity (the declaration). Appellant argued that the Tribunal was not empowered to make the declaration, as the conduct in question was not included in the complaints referred to the Tribunal. Claimants wished to sue the cartel members for damages. To do so, they required a notice certifying that the conduct forming the basis of the claim had been found to be a prohibited practice under the Competition Act. Appellant sought an order declaring that such a notice could not be issued in respect of the appellant.

Gorven AJA (Maya ADP, Shongwe and Petse JJA and Baartman AJA concurring) held:

" … [A]ll that is offered to a leniency applicant is immunity from the application of the provisions of s 59. The CLP expressly provides that leniency applicants do not enjoy immunity in civil actions. No immunity is therefore offered from a declaration because this is what gives rise to the right to claim damages. …" [Paragraph 16]

Gorven AJA considered whether the Tribunal had the power to grant the order:

“The Tribunal is a creature of statute. It has only those powers given to it by the Act and must exercise its functions in accordance with the Act. The Commission investigates, refers and prosecutes complaints. The Tribunal determines those complaints which have been referred to it. Its power to determine a complaint only arises on referral in terms of the Act, generally by the Commission. Put another way, the referral by the Commission is 'a jurisdictional fact for the exercise of the Tribunal's powers in respect of prohibited practices'. … The Tribunal is only empowered to make a declaration on matters falling within terms of a referral. The Commission submits that the question 'is whether a complaint against a particular party is properly referred to and before the Tribunal when that party is not formally cited as a respondent'. … My view is that the question goes beyond the issue of citation.” [Paragraph 18]

“When the Commission refers a complaint to the Tribunal … it is entitled to refer only some of the particulars of a complaint. ... If this is done, the Tribunal's power is limited to those particulars referred to it by the Commission. … In the present matter … the issue is whether the particulars of the complaint relating to Premier's conduct fell within the ambit of the referrals. The Commission and the claimants accept that Premier was not cited as a respondent in the complaint referrals. They further accept that no relief was sought against Premier in the referrals. They say, however, that the particulars of the complaint relating to Premier nevertheless fell within the ambit of the referrals.” [Paragraphs 19; 22]

“… [T]he Commission neither cited Premier as a respondent nor did it seek any relief, including a declaration, against it. ... [T]he Commission itself said that it had deliberately not cited Premier as a respondent. ...” [Paragraph 26]

“The Commission … submits that the firm against whom such an order is made need not be a party. Because Premier participated in the proceedings on the basis of its admitted involvement in the cartel activity, an order could be made against it. It says that no prejudice to Premier ensued. But this ignores the approach in Agri Wire and Senwes, both of which require the subject-matter of the order to fall within the ambit of the complaint referral, failing which the Tribunal has no power to make a declaration. As I have indicated, my view is that Premier's conduct is not covered by the referrals. The Tribunal thus had no power to make the declaration. ...” [Paragraph 27]

“Premier knew that the other members of the cartel had been cited as respondents and that relief was sought against them. This does not mean that it should have anticipated that relief would be sought against it, since the referral told it the opposite. ... The submission that, because Premier was involved as a leniency applicant in which it clearly admitted its culpability, a finding could be made against it, attempts to invoke precisely that 'liability to legal process through oblique or informal acquaintance', which was rejected by the Constitutional Court. Citation as a party is necessary so that that person can invoke all the rights of a party against whom relief is sought. ” [Paragraph 30]

“Based on the fact that the conduct of Premier was not part of the referral to the Tribunal, the Tribunal had no power to grant any order against it. In addition Premier was not cited as a respondent. The declaration is accordingly a nullity. Premier was not obliged to have the order containing the declaration set aside. Being a nullity, it is competent for a court to find that there is simply no declaration to certify. This in turn means that, in this matter, no notice in terms of s 65(6)*(b)* should be issued. As is clear from what I have said above, however, it was necessary for Premier to approach a court. Premier, the Commission, the Tribunal and the Chairperson were not entitled to simply ignore the declaration.” [Paragraph 47]

The appeal was upheld with costs, and an order issued declaring that neither first or second respondent could issue a notice certifying that appellant's conduct constituted a prohibited practice.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

MINISTER OF HOME AFFAIRS AND OTHERS v SAIDI AND OTHERS 2017 (4) SA 435 (SCA)

Case heard 30 March 2017, Judgment delivered 30 March 2017.

The issue in this case was whether section 22(3) of the Refugees Act empowered a Refugee Reception Officer (RRO) to extend permits (which allowed potential refugees to remain in the country while their applications for refugee status were determined) once internal remedies have been exhausted by an asylum seeker. A cross-appeal concerned whether, if this was the case, the High Court should have directed the RRO to extend permits if an application for judicial review of the refusal of asylum was pending. It had previously been a practice for permits to be extended if judicial review proceedings had been instituted, but this was changed so that permits were no longer extended once internal remedies had been exhausted.

Gorven AJA (Maya AP, Swain and Majiedt JJA and Mbatha AJA concurring) held:

"There is nothing in the language of s 22(3) itself which limits the power to extend permits to the period prior to the exhaustion of the internal remedies. No period for the exercise of the power is specified. The RRO is simply given the power 'from time to time to extend the period for which a permit has been issued . . .'." [Paragraph 12]

"... The words relied on in s 22(1) — 'pending the outcome of an application' — are used in relation to the issuing of a permit. They do not find echo in s 22(3) dealing with the extension of permits. In any event, they cannot mean that the permit is issued in order to lapse once the internal remedies have been exhausted. ..." [Paragraph 14]

"The purpose of the Act and the background to its promulgation clearly seek to apply the values espoused in the Constitution, including human dignity, the advancement of human rights and freedoms, and the supremacy of the Constitution and the rule of law. It also seeks to give effect to a commitment to the comity of nations and a desire to bring our legislation concerning refugees into line with the human rights and other instruments mentioned in the Act and the standards and principles of international law. ..." [Paragraph 22]

"Section 39(2) of the Constitution is a bedrock principle of interpretation requiring courts to interpret statutes so as to 'promote the spirit, purport and objects of the Bill of Rights'. This has been expanded on in various ways: 'The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values'; a court must 'prefer a generous construction over a merely textual or legalistic one in order to afford to claimants the fullest possible protection of the constitutional guarantees'; and, again in *Bato Star*, 'first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation'." [Paragraph 27]

"I have concluded that s 22(3) is at least capable of the interpretation that the RRO is empowered to extend permits after the internal remedies have been exhausted. The rights to bodily integrity, just administrative action and access to courts are immediately identifiable values which would be advanced by this interpretation. These would be placed at risk if the asylum seekers are returned for no other reason than that the internal remedies have been exhausted in circumstances where judicial review proceedings have been launched." [Paragraph 28]

The appeal and cross-appeal were both dismissed with costs.

CIVIL PROCEDURE

WISHART AND OTHERS V BLIEDEN NO AND OTHERS 2013 (6) SA 59 (KZP)

Case heard September 28, 2012, Judgment delivered November 15, 2012

The three applicants sought to interdict the second and third respondents, who were advocates, and the fourth respondent, who was an attorney, from examining the applicants at an enquiry in terms of section 417 of the Companies Act. The basis was that the applicants were former clients of the respondents, and that the respondents were subject to conflict of interests and were privy to confidential information. In effect, however, the clients had been the companies which the applicants represented, not the applicants in their personal capacities.

Gorven J held:

"It is accepted that no attorney-client contract was concluded between any of the applicants and any of the respondents. The contracts were with the companies. The contracts also related to disputes in which the companies, not the applicants personally, were involved. All communications by Loader and the first applicant were made to the respondents on behalf of the companies. There was no communication between the second and third applicants and any of the respondents at any time. The attorney-client contracts in question are no longer in existence. The companies are not asserting any right to confidentiality" [Paragraph 43]

"The first aspect to the issue as to standing is whether the applicants have the right to protect information confidential to the companies. The short answer is that the applicants do not seek any such relief. They seek to protect themselves. It is true to say that the applicants seem to confuse their own interests and rights with those of the companies. The application is largely concerned with confidential information of the companies or privileged communication supposedly made by the officers of the companies on their behalf. Very little is said of information personal to the applicants. The applicants are clearly not entitled to rely on the protection of information confidential to the companies in question, or privilege which vests in the companies. ... Privileged communication is mentioned often but nowhere particularised." [Paragraph 44]

The first applicant then sought to be considered as an "informal client":

"…[H]e claims that his interests are co-extensive with those of the various companies in question but does not say what he means by this. He says that nothing was discussed which was personal or confidential to him… In my view this comes nowhere near to the situation where the first applicant can be described as having been an 'informal client' or 'as good as' a client as was the case in that matter." [Paragraph 48]

Gorven J found that no case had been made out on the papers that any confidential information personal to the applicants was disclosed to the respondents.

"This means that … the issue as to standing must be decided in favour of the respondents. Properly construed, it seems to me that the right asserted by the applicants in support of their claim to a final interdict is a right not to be examined by the respondents in the s 417 enquiry. Within the context of this application on the present state of our law, proof of that right would require proof that: (1) the applicants had a previous attorney-client contract with the respondents; (2) confidential information of the applicants was imparted or received in confidence as a result of that contract; (3) that information remains confidential; (4) that information is relevant to the matter at hand; and (5) the interests of the present client of the respondents are adverse to those of the former clients. None of the first four of these requirements is met. In the present case, therefore, no legal duty on the part of the respondents arose towards the applicants or is present now." [Paragraph 50]

The application was dismissed with costs. The decision was upheld on appeal in *Wishart and Others v Blieden N.O. and Others* (659/2013) [2014] ZASCA 120 (19 September 2014), with the SCA holding that the refusal to restrain a lawyer from acting against a litigant where there was no misuse of confidential information was correct.

CRIMINAL JUSTICE

BOOYSEN V ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2014 (2) SACR 556 (KZD)

Case heard 7 February 2014, Judgment delivered 26 February 2014

First respondent issued two written authorisations to charge the applicant under the Prevention of Organised Crime Act (POCA). Applicant sought to have the decision to issue the authorisations and the decision to prosecute him reviewed and set aside. The application was based directly on the Constitution and the principle of legality. Applicant also sought to interdict the first respondent from authorising his prosecution on any charge referred to in s 2(1) of POCA, without facts, under oath, being put before her implicating the applicant.

Gorven J held:

"The respondents submit that the trial court would be best suited to deal with the authorisations … However, this matter is clearly distinguishable … The issue raised … can and should be dealt with prior to the commencement of the trial since the question is whether Mr Booysen can be charged with the two POCA counts. For this to be competent, the validity of the issuing of the authorisations must be determined. If they are not valid, they may be reviewed and set aside … [B]ecause this application relates to only one of a number of accused persons, it can most conveniently be dealt with in a separate

application which does not affect the conduct of the trial. … [I]n this narrow instance this court is the appropriate forum and that the appropriate procedure has been adopted. …" [Paragraphs 8 - 9]

"… What is actually at issue is whether the second part of the twofold test, the rationality aspect, was satisfied. … [T]he question is whether the decision of the NDPP, viewed objectively, was rational. This decision is not a polycentric one or one involving the formulation or implementation of policy, so the rationality test is somewhat less variable. In the context of the first impugned decision, my view is that the information on which the NDPP relied to arrive at her decision must be rationally connected to the decision taken." [Paragraph 22]

"… [T]he NDPP says that she relied on 'information under oath and the evidence as contained in the dockets' and that the instances relied on by her are 'referred to in the above-mentioned statements, which were considered together with the other information in the docket (sic) before the impugned decisions were made'. Whilst she says that she will not detail all the information placed before her prior to her making the first impugned decision, she does not say that any of that undisclosed information was relied on by her. … [T]he respondents submitted that, because correspondence annexed to the founding affidavit refers to documents which contain prosecution strategy and information concerning informers or sources contained in correspondence between the DPP and NDPP, the inference should be drawn that those documents were also relied on by the NDPP. The insurmountable difficulty … is that the NDPP does not say that she had regard to any such information or documents at the time the impugned decisions were made. … Had she said that she had considered such documents, even if the precise contents were not disclosed, this might well have affected the outcome of this application. …" [Paragraph 27]

"As regards the contents of the dockets, the respondents conceded … that no statements contained in them implicate Mr Booysen in any of the offences with which he has been charged. The dockets could therefore not have provided a rational basis for arriving at the impugned decisions." [Paragraph 29]

"… [T]he NDPP is … an officer of the court. She must be taken to know how important it is to ensure that her affidavit is entirely accurate. If it is shown to be inaccurate and thus misleading to the court, she must also know that it is important to explain and, if appropriate, correct any inaccuracies. … In response to Mr Booysen's assertion of mendacity on her part, there is a deafening silence. In such circumstances the court is entitled to draw an inference adverse to the NDPP. The inference in this case need go no further than that, on her version, the NDPP did not have before her annexure NJ4 at the time. In addition it is clear that annexure NJ3 is not a sworn statement. Most significantly, the inference must be drawn that none of the information on which she says she relied linked Mr Booysen to the offences in question. This means that the documents on which she says she relied did not provide a rational basis for the decisions to issue the authorisations …" [Paragraph 34]

"… Even accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster. I can conceive of no test for rationality, however relaxed, which could be satisfied by her explanation. The impugned decisions were arbitrary, offend the principle of legality and, therefore, the rule of law, and were unconstitutional." [Paragraph 36]

"I hasten to emphasise that this outcome is based purely on the facts of the present case. It does not provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute … The level of disclosure of the NDPP for offences of this nature cannot be such as to prejudice the state in its conduct of a future trial. In my view it will therefore not require an exacting, still less an exhaustive, level of disclosure. …" [Paragraph 38]

"Prayer *(e)* … seeks to interdict the NDPP from issuing fresh authorisations in the absence of the NDPP having before her facts under oath implicating Mr Booysen. A final interdict is thus sought. … Mr Booysen … certainly has no right at all to such a decision being taken only if affidavits connecting him to offences are in the possession of the NDPP. I have mentioned above, for example, that hearsay and similar fact evidence is admissible under certain circumstances in respect of offences under s 2(1) of POCA. … [T]here is no basis for the interdict … either in the form sought or in any other form. … I am of the firm view that to do so in these circumstances would amount to an unjustified intrusion into executive territory and would offend the principle of the separation of powers. To make such an order would amount to fettering the discretion of the NDPP to make the decisions in question. This discretion has been given to the NDPP by the requisite legislation and there is no attack on the constitutionality of that legislative provision. …" [Paragraph 40]

S v MATHE 2014 (2) SACR 298 (KZD)

Case heard 14 – 16 August 2012; 23 April 2014, Judgment delivered 24 August 2012

The accused, a Correctional Services official, was convicted of shooting and murdering the deceased, with whom he had an intimate relationship and a child. The deceased had, shortly before the killing, terminated her relationship with the accused, and the accused was deeply upset and emotional about the deceased's alleged infidelity. On the day in question he shot the deceased, who was sitting at the back of a taxi, during an exchange of fire between him and his work colleagues. In the process he shot another passenger in the taxi. The accused was found guilty, on his written plea of guilty and statement, of attempting to murder a fellow employee and of murdering the deceased. The convictions carried minimum sentences of 5 and 15 years respectively. In mitigation, the accused claimed that he had emotionally disintegrated at the time of the shooting, and hence had diminished criminal responsibility.

In considering sentence, Gorven J held:

"It is clear that diminished criminal responsibility is 'not a defence but is relevant to sentence because it reduces culpability'. …. In each case the question is the extent, or degree, to which the particular circumstances reduced the powers of restraint and self-control of the accused. This means that the facts of each case must be considered on their own merits." [Paragraph 16]

"I was invited to accept that the ipse dixit of the accused was to the effect that his criminal responsibility was diminished. He does not, however, say so in terms. What he says is that he was 'severely emotionally overwrought' and was 'emotionally disintegrated' whatever these phrases may mean. He also significantly said: 'I was still able to differentiate or appreciate between right and wrong and I was able to act in accordance with such appreciation'. I therefore need to evaluate the facts of the case to see whether there was a reduction in the capacity of the accused to appreciate the wrongfulness of his actions and whether he acted in accordance with that appreciation." [Paragraph 17]

"… I find that, whilst the accused was clearly emotional about the infidelity of the deceased and clearly found repugnant the thought that the deceased and Mabuyakhulu might be free to pursue a love relationship, no diminished criminal responsibility has been established. … " [Paragraph 26]

"The fact that he pleaded guilty is of little moment in the circumstances. He was caught red-handed with a number of eyewitnesses present, although it counts for something that he did not unduly burden the state with the need to prove the charges. He did express remorse and attempted to make some recompense. To that must be added the significant character evidence emerging from the two reports and the personal circumstances ... He has clearly been a stable, productive member of the community and engaged in uplifting actions over a long period of time. He has supported family and community members and wishes to support his child from the deceased and to take an active role in her life. He is a first offender and does not seem to display a propensity to violence. It seems clear that the accused is a candidate for rehabilitation. Of course, the emotional struggle of dealing with the infidelity and lack of honesty of the deceased must also be taken into account." [Paragraph27]

"An aggravating factor, however, is that, whilst he was able to control his actions, the accused treated a defenceless woman as a chattel who existed purely for his benefit. He did not accord her the dignity of choice concerning her life." [Paragraph 28]

"A 2012 study by the Medical Research Council showed that, of every two women who are murdered, one is killed by her partner. This means that the proprietorial attitude of men towards women has reached extremely serious proportions in our society. This attitude makes a mockery of the right to life accorded by the Constitution ... If a person kills another, this is the ultimate negation of the right to life. This set of attitudes also fundamentally undermines, during life, many of the other rights of women, including the right to equality, the right to human dignity, the right to freedom and security of their person, the right not to be subjected to servitude, the right to privacy and the right to freedom of association contained in the Bill of Rights. This proprietorial attitude is inimical to a democratic society based on values of human dignity, equality and freedom. It is clear that, in addition to depriving the deceased of her right to life, the accused infringed at least some of these other rights afforded to the deceased by our Constitution. It is my view that the nature of the offence and the interests of society demand that the crimes committed by the accused be severely punished." [Paragraph29]

The accused was sentenced to 3 years imprisonment for the attempted murder count, and 10 years imprisonment for the murder count, the sentences to run concurrently.

JUDGE COLIN LAMONT

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 1 March 1951

BA, Wits University (1972)

LLB, Wits University (1974)

CAREER PATH

Judge, Gauteng High Court, Johannesburg (2007 -)

Judge, Electoral Court (2017 -)

Acting Justice of Appeal, Supreme Court of Appeal (June – November 2017)

Advocate

Senior Counsel (2003 – 2007)

Junior Counsel (1975 – 2003)

Member, Johannesburg Bar (1975 – 2007)

Member, bar council (dates not specified)

SELECTED JUDGMENTS

PRIVATE LAW

MALEMA V RAMPEDI AND OTHERS 2011 (5) SA 631 (GSJ)

Judgment delivered 23 July 2011

A newspaper posed a series of questions to the applicant for an upcoming article. The applicant sought an interdict preventing the publication of certain of the allegations raised.

Lamont J held:

"The first question which I must answer is whether or not the allegations of fact made by the respondent in the form of questions are supported by fact. That involves a consideration of both the source and the response of the applicant to the questions which were made. … [T]he applicant dealt very superficially with fairly detailed allegations which were made, allegations which he could understand, and with which, had he wished to deal in more detail he could have." [Page 10].

"The applicant has a right not to be defamed. I however must take into account also the right of the public to receive information. The applicant in the present matter is a high profile public figure. He has made controversial statements at times. At present there is a discussion in the press concerning whether or not his income justifies his expenses. The question of the income of the applicant is topical and is relevant to that issue." [Page 10 – 11].

"The public is entitled in general terms to have full disclosures concerning persons who stand in a public position and who are high profile personalities, who invite comment about themselves." [Page 11].

"… [I]t is apparent that the applicant is a public person, and that the intrusion into his private life would be warranted. The aspects of his private life under consideration are in the public interest, in that they are topical and concern attempts to cast light upon claimed inconsistency in the applicant's lifestyle." [Page 13].

"… [S]ufficient factors have been set out to establish that there is a reliable source who has disclosed information. … [T]here is no obligation on the applicant to have dealt with it otherwise than that he did, however, it leads to the inference being drawn that the enquiries which have been made by the respondents meet the test of reasonableness." [Page 13 – 14].

The application was dismissed.

COMMERCIAL LAW

BREDENKAMP AND OTHERS V STANDARD BANK OF SOUTH AFRICA LTD AND ANOTHER 2009 (6) SA 277 (GSJ)

Judgment delivered 8 June 2009.

The case related to the right of a bank to close a client's account. The applicants had sought an order preventing the Standard Bank from closing their accounts with the Bank. The issue to be decided was whether or not in the particular circumstances the manner in which the bank had implemented the clause entitling it to cancel the contract offended constitutional values.

Lamont J held:

"... [T]he applicant must be treated as if it was a person of equal bargaining capacity at the time the contract was concluded. The contract must accordingly be treated as if it was concluded by contracting equals each able to require terms each required to be inserted. Each party was free to negotiate and conclude the terms ultimately agreed. It follows then that the terms within the contract must be treated on the basis they were terms agreed to and intended to be agreed to by the contracting parties. ..." [Paragraph 27].

"The nature of the contract between the applicant and the bank is one in which contractual bonds of a personal nature are created. A bank relies on the integrity of its customer to conduct its activities in accordance with the parameters created by the contract and set by society, nationally and internationally. A bank is required to ensure that it so contracts as to meet the requirements set by the regulatory authorities of the state within which it operates. It must have regard to its international position as even if international principles are not incorporated into national law ... it deals with international entities and may face sanction in consequence of what is perceived to be misconduct. The sanction may be commercial (freezing assets, refusing to allow it to trade in a particular state) or social (labelling it as a person with which it is undesirable to deal, for example) The customer's morality and integrity are accordingly characteristics which impact on the customer/banker relationship." [Paragraph 32].

"... The inability to implement transactions to pay or receive monies in a bank account effectively excludes a person from participating in modern commercial activities. It is in my view in general an impairment of the dignity of a respectable proper member of society, a man of integrity, to be unable to obtain banking facilities." [Paragraph 33].

"I find ... that the unilateral termination of the facilities does not result in the applicant being "unbanked". It was accepted that if the applicant is not unbanked by the bank exercising its volition to cancel, then the Constitution does not in the present circumstances limit the bank's right to cancel the contract. This finding disposes of the matter. I will however deal with the other matters raised by the applicant." [Paragraph 46].

"Fairness judged from the bank's perspective dictates that proper weight be given to the right of a person to contract with, and remain in contract with persons of its choice. These are personal considerations of a contracting party. These personal considerations exist in a matrix of morality set by society in the form of its laws and the Constitution. ..." [Paragraph 48].

"The banker/customer relationship should not be seen in isolation in relation only its impact upon persons within the country in which the bank operates. This is particularly so when the customer is an international entity. The bank inevitably, if it deals with an international entity, will be dealing with other international entities at the request of the customer. The bank in its dealings in the international world on behalf of the customer becomes obliged to, in my view, have regard to the impact of its actions in the international world. The need for dishonest people to set up international structures, to make use of a

variety of banks internationally for the process of laundering monies and implementing fraudulent conduct are widely known. Steps are taken on an international basis to limit the activities of such persons. In my view, even if the foreign legislation does not have the effect of law nationally, to the extent that it has an impact on the relationship between the bank and external bodies, the bank is entitled to have regard thereto. …" [Paragraph 53].

"The motivation of the bank to terminate the contract was the OFAC listing and its discovery of the nature of the applicant's reputation. Subsequent to the cancellation notice, the EU listed the applicant. The applicant is taking steps to reverse the listings. The consequence of the listings remain even though these steps have been taken. The listings presently exist and are being enforced. The effect of the listings is so wide ranging that it includes an obligation on affected banks to not even deal with their own customers hence the reference to the frozen bank account. By reason of the international relationship and the existence of activities and accounts in affected jurisdictions the bank is at risk not only of direct sanctions and their consequences but of losing relationships it has. This can happen irrespective of the rights and wrongs of the listings and irrespective of the appeals made by the applicant." [Paragraph 55].

"It is my view that the bank is entitled to take up what it believes to be a morally correct stance. Part of having the freedom to contract and maintain dignity, within the parameters avoiding discrimination is the right to choose customers based on a morality you choose to apply." [Paragraph 64].

"I must finally consider constitutional fairness by comparing the impact of the bank's conduct upon the applicant with the impact of the continued relationship on the bank if the bank is not entitled to cancel. If the bank is allowed to cancel then the applicant can seek banking facilities elsewhere. If the bank is not allowed to cancel the bank is compelled to continue a relationship with a person with whom it does not wish to remain in contact, which continued relationship places it at risk financially, locally and internationally. In my view this would be unfair to the bank. It would significantly invade its right of freedom to contract. It would cause it an indignity in that it would be forced to accept a position it finds repugnant." [Paragraph 67].

The application was dismissed. An appeal to the SCA was dismissed in **BREDENKAMP AND OTHERS v STANDARD BANK OF SOUTH AFRICA LTD 2010 (4) SA 468 (SCA)**. An application for leave to appeal to the Constitutional Court was unsuccessful.

CIVIL AND POLITICAL RIGHTS

AFRIFORUM AND ANOTHER V MALEMA AND ANOTHER 2011 (6) SA 240 (EQC)

Case heard 4 July 2011, Judgment delivered 9 December 2011.

The case concerned whether or not certain words in a struggle song constituted hate speech.

Lamont J held:

"Speech that is political and that takes place in public is intended, and must be considered, to be communicated to the public at large not merely to those who are present at the time. As citizens, target group members have both a right and a duty to attend the political speeches of others, while as the

targets of such speech; they have a compelling interest in doing so. Such persons, even if they do not attend the event in question, can hardly avoid the impact of the speech. Public speech involves a participation in political discourse with other citizens, in a manner that respects their own correlative rights. Hate speech has no respect for those rights. It lacks full value as political speech. Hate speech does not address the community in general but merely a portion of it; those who are the target group. Hate speech should not be protected merely because it contributes to the pursuit of the truth. If it denies recognition of the free and reasonable rights of others it makes no direct contribution to the process." [Paragraph 33].

"The test to be applied where majoritarian or minoritarian positions are involved must always be whether the measure under scrutiny promotes or retards the achievement of human dignity equality and freedom. … " [Paragraph 34].

"… [M]inority groups are particularly vulnerable. It is precisely the individuals who are members of such minorities who are vulnerable to discriminatory treatment and who in a very special sense must look to the Bill of Rights for protection. The Court has a clear duty to come to the assistance of such affected people." [Paragraph 35]

"The important point is that at a time prior to the singing of the song … there was a public uproar about Malema singing the song. The public had interpreted the words which he sang as being an attack upon a sector of the community namely the Boer/farmer who were loosely translated as being the Afrikaans-speaking sector of the community. That sector of the community was angered about the use of words which they saw as an incitement to people who heard the words to attack them. It is also apparent, and this is the evidence before me, that at that time farmers and white Afrikaans-speaking members of society who lived in isolated areas (on plots and farms) felt themselves at threat." [Paragraph 78].

"… [T]here is good authority that the public at large, even those who did not attend the rallies, must be treated as being the audience at political rallies. The target group of white Afrikaners must be treated as being the audience even although it was not physically present at the rallies. There was publication to that audience in this sense and in the actual sense of publication by the Press." [Paragraph 91].

"The submission is that the song was sung by soldiers to soldiers who knew the true meaning of the words and who were celebrating a particular event. Thus the singing was appropriate. The problem with this approach is that the audience is not limited to the actual attendees but includes the whole public. Accordingly, the appropriateness of the occasion when it concerns political rallies must be judged on that basis. … " [Paragraph 93].

"… All hate speech has an effect, not only upon the target group but also upon the group partaking in the utterance. That group and its members participate in a morally corrupt activity which detracts from their own dignity. It lowers them in the eyes of right minded balanced members of society who then perceive them to be social wrongdoers. In addition, to the extent the words are inflammatory; members of the group who hear them might become inflamed and act in accordance with that passion instilled in them by the words. If it is claimed that the conduct was acceptable at a point in time and that a vested right exists to persevere with it on the basis of a legitimate expectation the simple answer is that times have changed. Change or transformation is hurtful. That hurt encompasses the loss of the exercise of rights which constitute violations of the Equality Act. All conduct by more than one person has as its source the words of at least one person. It is the words of one person motivating others that leads to action by those persons. …." [Paragraph 94].

"I assume that portion of the audience included persons who did not understand the meaning until it was translated. None of these limitations on the audience capacity to decode the words makes any difference for the reasons set out earlier [in para 93]. The meaning of the words is what the reasonable man would ascribe it to be." [Paragraph 103].

"When the gestures made by Malema are added to the context then it is clear that the words concern the use of a weapon – a gun. Whether the verb alone means destroy or shoot makes no difference. The verb contains an exhortation to violence. The gesture imports the weapon. Hence the mechanism by which the exhortation is to be implemented is by the use of the weapon, a gun. In reaching this conclusion, I am conscious that there are many ways by which destruction can take place, shooting is but one of them. In the context of the song the gesture provided the limitation on the words. The person to be shot is the object of the verb namely the regime. The regime included the Boere or white Afrikaans speaking sector of society. This sector might also include farmers." [Paragraph 104].

"The message which the song conveys namely destroy the regime and *"shoot the Boer"* may have been acceptable while the enemy, the regime, remained the enemy of the singer. Pursuant to the agreements which established the modern, democratic South African nation and the laws which were promulgated pursuant to those agreements, the enemy has become the friend, the brother. Members of society are enjoined to embrace all citizens as their brothers. … It must never be forgotten that in the spirit of ubuntu this new approach to each other must be fostered. Hence the Equality Act allows no justification on the basis of fairness for historic practices which are hurtful to the target group but loved by the other group. Such practices may not continue to be practised when it comes to hate speech. I accordingly find that Malema published and communicated words which could reasonably be construed to demonstrate an intention to be hurtful to incite harm and promote hatred against the white Afrikaans speaking community including the farmers who belongs to that group. The words accordingly constitute hate speech." [Paragraph 108].

"The meaning of the words is such a gross infringement of the target group's rights that it cannot be that Malema did not know he was acting wrongfully towards them. His moral culpability when measured in this fashion warrants an appropriate costs order against him." [Paragraph 117].

There have been a number of academic articles written about the judgment which include, but are not limited to, the following: **N Buitendag & K van Marle, "Afriforum v Malema: The Limits of Law and Complexity" in *Potchefstroomse Elektroniese Regsblad* 2014 vol. 17 n.6; Joel Modiri, "Race, Realism and Critique: The Politics of Race and Afriforum v Malema in the (In)Equality Court" in *The South African Law Journal* (2013) 130; Karmini Pillay, "From 'Kill the Boer' to 'Kiss the Boer' – has the last song been sung? *Afri-Forum v Julius Malema* 2011 12 BCLR 1289 (EQC): case note" in *South African Public Law* 28 (2013); Julian Brown, "Judges' History: On the Use of History in the *Malema* Judgment" in *South African Journal on Human Rights* 28 (2012).**

Modiri argues that there is reluctance in the judgment to engage with the full implications of identity and the complex nature of the facts. Modiri argues that Lamont J "relied on a conservative and reactionary understanding of race and did not take into account the current dynamics of racial powers and socio-economic privilege held by whites. The judge's decision is a classic example of rendering a concrete black point of view and lived experience irrelevant in favour of an abstract and reified approach that uncritically accepts white social norms as the standard for rationality and reasonableness." Modiri

contends further that the judgment fails because of its "insensitivity to the true racial experience in South Africa and its failure to concede the inability of legal rules to be determinate, neutral and objective.".

Buitendag and Van Marle criticize Lamont J's judgment through an "autopoietic/self-referential" systems theory lens. They contend that the judgment illustrates how law necessarily excludes the factual complexity of a case. This is done by deciding which are the only facts legally relevant, and then by reducing their meaning to a simple judgment of legal or illegal. They contend that at the beginning of the case Lamont J directed the parties to "isolate before the court what the legal issues were, the evidentiary and factual matters regarding the issues, and the extent to which the parties differed with regard to them." This, they argued, reduced the complexity of the problem "to the fulfillment (or not) of a small set of norms, ignoring active engagement and dialogue. One result of this is the denial of the fully-fledged identity of the parties." They argue that in such a case, "the normative claims of both the individual identity as well as the political identities of Malema and the larger political entities need[ed] to be assessed." They content that rather than "absolute, binary judgments, a slower, reflective engagement that makes modest claims" should be advanced.

Pillay argues that "the inherent flaws in the judgment ultimately obscured the sequence of reasoning in the judgment." She contends that "the general trend of the Court was to simply cite cases in volume with no discussion or applicability in the sections cited; which was particularly disconcerting in those segments that ought to have formed core parts of the Court's analysis. In other instances, the Court simply did not deal with relevant hate speech cases." Moreover, Pillay argues that the court failed to produce a comprehensive analysis of the relevant hate speech provisions. She argues that the court missed an opportunity to lend some certainty to the interpretation and application of PEPUDA.

Brown critiques the manner in which Lamont J dealt with the history of South Africa. He contends that "it is a neat and schematic history, told with a peculiar mix of assertion … and imprecision … . It is also an inescapably thin and caricatured version of South Africa's history." Brown argues that "it is impossible to escape the fact that this history is strikingly reductive, both in its approach to social and cultural histories and, also, in its approach to the political groups with which it attempts to engage." Moreover, the judgment "lacks any citations to other historical accounts. … This gives the impression that this is simply the judge's personal take on recent South African history, made without reference to other people's experiences." Brown concludes by stating that "the judge may be correct in ruling that this song can constitute hate speech; but the judgment he has produced to support this ruling is so riddled with historical inaccuracies, unexamined prejudices, and tendentious descriptions of contemporary society that it is difficult to take the remainder of his reasoning seriously. Regardless of the ultimate correctness or incorrectness of his legal reasoning, this matter – this song and this country's difficult history – deserves a more considered (and better reasoned) judgment than this one."

SOCIO – ECONOMIC RIGHTS

UYS N.O AND ANOTHER V MSIZA AND OTHERS (2017) ZASCA 130.

Case heard 1 September 2017, Judgment delivered 29 September 2017

This was an appeal from the Land Claims Court against the amount of compensation determined to be due to the owner of a portion of a property expropriated pursuant to successful claim by labour tenant

under s 23 (1) of Land Reform Act. The main issue related to the market value of the land, and whether it had residential development potential or whether it was agricultural land, as the respective valuations differed substantially in worth.

Lamont AJA (Navsa ADP, Cachalia and Seriti JJA and Tsoka AJA concurring) held:

"An owner's right to compensation for the loss of rights in land is dealt with in s23(1) of the Act in the following terms: 'the owner of affected land or any person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a rights in land.'" [Paragraph 7]

"…. Du Toit's case … sets out in relation to the Expropriation Act that: *'It is therefore now the Constitution, and not the Act, which provides the principles and values and sets the standards to be applied whenever property, which in turn is now also constitutionally protected, is expropriated. Every act of expropriation, including the compensation payable following expropriation, must comply with the Constitution, including its spirit, purport and objects generally and s 25 in particular.'*" [Paragraph 11]

"Section 25(3) sets out a number of factors to be considered. Because it is usually the one factor capable of objective determination, market value is the convenient starting point for the assessment of what constitutes just and equitable compensation in any case, and then the other factors are considered to arrive at a final determination. … ." [Paragraph 12]

"This approach, the court emphasised, must be applied with care to ensure that all the factors set out in s 25(3) are given equal weight. The factors set out in s 25(3) makes justice and equity paramount in the calculation of compensation; market value on its own is but a component of the set." [Paragraph 13]

"… [T]he Constitution and the Act set the legal and policy parameters for the restoration of land rights to labour tenants. … [T]he relevant steps sanctioned by the legislation to enforce Mr Msiza's rights were in place and known before the Trust purchased the land. In other words there was a known impediment to the property's development potential when the property was purchased which had a direct bearing on the price that a willing buyer in the Trust's position would have been prepared to pay for the property." [Paragraph 19]

"The application of the *Pointe Gourde* principle, where the purchaser of land has knowledge of the facts which constitute the impediment to development at the time of the purchase, was considered in *Port Edward v Kay.* In that matter, which dealt with an expropriation, the existence of an impediment to development of land was known. … *Kay* is accordingly authority that the *Pointe Gourde* principle does not apply where the owner, who bought knowing of the impediment, is subsequently expropriated." [Paragraph 20].

"The *Pointe Gourde* principle therefore does not apply to the present case as the Trust bought the land knowing of the Msiza claim and the presence of the Msiza family on the land. On this basis the market value of the land is therefore R1,8 million, and not R4,36 million, which would have been the market value of the land with its developmental potential." [Paragraph21].

"The LCC was hesitant to apply the two-stage approach but did so and accepted the market value of R1.8 million. It then proceeded to consider compensation which would be just and equitable. It determined that an amount of R300 000 should be deducted from the market value." [Paragraph 22].

"There were thus no facts justifying the deduction of the amount of R300 000. The LCC arbitrarily decided on this amount with no rational foundation. The computation was accordingly unfounded and cannot stand." [Paragraph 27].

The appeal was upheld.

CRIMINAL JUSTICE

S V NDEBELE AND ANOTHER 2012 (3) SA 226 (GSJ)

Judgment delivered 21 February 2011

This case raised the issue of whether the theft of electricity (an incorporeal) could occur.

Lamont J held:

"The underlying objection to holding that an incorporeal is capable of theft is the requirement that there shall be a contrectatio. Inasmuch as a taking is required, so the argument goes, there can only be the taking of a physical movable. This matter was dealt with directly in S v Harper and Another, 1981 (2) SA 638 at 664 and following which held an incorporeal capable of theft. ..." [Page 28].

"... In the modern day there are more complicated transactions than existed historically and hence than were considered historically. ..." [Page 28]

"Hence the *contrectatio* is constituted by an appropriation of funds, which already exist in his account but, to which the customer is not entitled. This is not a *contrectatio* constituted by a physical removal of something from the owner. It is a taking of an electronic credit given by mistake and not processed or owned which is used deliberately against the interest of the owner. The *contrectatio* is constituted by an appropriation of a characteristic which attaches to a thing and by depriving the owner of that characteristic." [Page 28].

"The energy does not exist as an abstract concept it exists in reality in the form of energizing electrons. The electrons which are driven, and which, while travelling we call electricity, are the free electrons moving through the circuit. They belong to, are processed and released by Eskom. ... The process by which the electricity is delivered is that as an electron travels into the customer's circuitry, one leaves the customer's circuitry returning to the grid. ... [O]nce the customer uses the circuit and allows electron into his circuitry, the electrons of Eskom remain within his circuit, in substitution for those electrons having departed. In this way, the electrons change position, having originally being possessed by Eskom and subsequently being possessed by the consumer. The characteristic which attaches to the electron is the energy by which it moves. That characteristic is consumed when the electricity passes through a load in the customer's residence on the customer's circuit. The energy is transferred into the load used by the consumer ... That characteristic and the extent to which it has been used or transformed by the use of the electrical appliance is measureable. That characteristic is the characteristic which Eskom chooses to produce and sell to its customers. Once that characteristic, energy, is used by the electrical appliance or the load, it is no more. This also is the solution to the question of whether or not there has been a permanent deprivation. Electrons are not lost and eventually return to the grid from the customer's circuitry. However the characteristic attached to the electron, namely the force and energy it has while it is being driven towards and through the customer's circuit is removed from it. ..." [Page 30 – 32].

"It appears to me that modern day society has already advanced and accepted that there can be theft of this nature." [Page 33].

"It has long been recognised that the abstract and incorporeal nature of a right, which has been taken in the context of notes and coins is a loss. … The same reasoning applies to the submissions made in relation to electricity credits." [Page 33].

S d'Oliveira in "Theft of Electricity: A Short Circuit? *S v Ndebele* 2012 1 SACR 245 (GSJ)" in *THRHR* 2012 (75) agreed with the finding of Lamont J.

MEDIA COVERAGE

"Radovan Krejcir's sentencing started with him promising he wasn't trying to kill Judge Collin Lamont – and ended with a bomb threat.

The Czech has tried repeatedly to stop his sentencing for attempted murder and kidnapping, linked to a drug deal gone wrong.

Krejcir told Lamont he believes the judge is a liar who is biased against him, but Lamont wouldn't have any of it.

… Krejcir believes Lamont should not be allowed to sentence him for that crime, calling him biased, unobjective and dishonest.

Krejcir further went on to state that he knew where the judge lived, saying he had read it in a newspaper.

In the end, however, Lamont stood firm and dismissed both Krejcir's recusal application and his attempt to postpone the sentencing."

- '"I believe you stay in Bedfordview' - Krejcir to Judge Lamont", *ENCA* 23 February 2016 (https://www.enca.com/south-africa/i-believe-you-stay-bedfordview-krejcir-judge-lamont)

JUDGE TATI MAKGOKA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 13 February 1968

B.Proc, University of the North (1992)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (June – November 2016, November 2017)

Acting Judge of Appeal, Labour Appeal Court (June – November 2015)

Acting Judge, Lesotho High Court, Constitutional Division (April 2015)

Judge of the Gauteng High Court, Pretoria (September 2009 -)

2009 to date: Judge of the High Court (Gauteng Division).

Acting Judge of the High Court, Transvaal Provincial Division (2007)

Director, Stroh Coetzee Inc (2004 – 2007)

Director, Goodman & Jacobs Inc (2001 – 2003)

Partner, Makgoka Attorneys (1994 – 2001)

Admitted as an Attorney of the High Court (1994)

Candidate Attorney, Seriti Mavundla & Partners (1992 – 1993)

Member of Disciplinary Committee, Law Society of the Northern Provinces (2006 – 2007)

Black Lawyers' Association

Faculty Member, Legal Education Centre (2010 -)

Member (1992 – 2004)

Deputy Chancellor & Chancellor, Anglican Church of Southern Africa, Diocese of Pretoria (2011 -).

Board member, Loreto School Parents Association, Queenswood, Pretoria (2009 -)

Chairperson, Loreto School Parents Association, Queenswood, Pretoria (2006 – 2008)

SELECTED JUDGEMENTS

PRIVATE LAW

GN v JN 2017 (1) SA 342 (SCA)

Case heard 23 August 2016, Judgment delivered 4 November 2016

At issue in this case was the question of the correct interpretation of sections 7(7) and (8) of the Divorce Act, and specifically whether a pension interest formed part of the assets to be divided on divorce. A related issue concerned the effects of a clause in the settlement agreement between the parties relating to the division of their joint estate. The court a quo had found that the subsections could only be invoked by the court dissolving the marriage, and that they could not be invoked post – dissolution. Without an order from the divorce court declaring a pension interest to be part of the estate, the pension interest did not form part of the joint estate.

On appeal, the majority of the SCA (Petse JA, Mpati AP and Swain JA concurring) overturned the decision, holding that the pension interest did indeed form part of the joint estate.

Makgoka AJA (Seriti JA concurring) dissented:

"My interpretation of the settlement agreement signed by the parties, and the circumstances in which it came into existence, leads me to a different conclusion, namely that the parties had, on a proper construction of the settlement agreement, agreed to exclude their respective pension interests from the division of their joint estate. With that conclusion it is unnecessary for this court to consider the effect of s 7(7) of the Divorce Act. …" [Paragraph39]

"To my mind, the starting point, before considering the effect of s 7(7) of the Divorce Act, should be whether the settlement agreement as framed is to be interpreted so as to include the parties' pension interests. Only if that question is answered positively would it be necessary to consider the issue of principle in terms of s 7(7). The question in my view should be answered in the negative, for two reasons. First, the clear language of the settlement agreement militates against that. Second, the circumstances in which the settlement agreement came into being do not lend themselves to that interpretation." [Paragraph 49]

"My colleague and I are agreed that there is no conflict between the heading and the body of the relevant clause in the present case. What then was intended by the inclusion of the heading with the particular words 'Immovables and movables' in relation to the division of the joint estate? Those words should be given meaning. One cannot treat those words as if they do not exist. …" [Paragraph 54]

"One has sympathy for the appellant because clearly she was assisted by an unqualified person in drafting her papers in the regional court. She was apparently unrepresented when she signed the settlement agreement, which she appears not to have had any role in negotiating its terms. One option open to her would have been to approach the court for the rectification of the settlement agreement on the basis that it did not correctly reflect the intention of the parties. But she, on advice I suppose, elected to seek an order in terms of s 7(7) and 7(8)*(a)* of the Divorce Act on the

basis of a settlement agreement which, in my view, patently does not permit of such an order. I would, very reluctantly, non-suit her on this portion of the appeal. …" [Paragraph 65]

In the majority judgment, Petse JA responded to the dissent:

"I regret that I cannot subscribe to the process of reasoning and the conclusion reached by my colleague. I have difficulty with the interpretation placed on the parties' settlement agreement in relation to the division of their joint estate. My colleague says that because the relevant clause is headed 'Immovables and movables', this means that the body of the clause which reads 'The joint estate shall equally be divided between the parties' must be taken to mean that only immovables and movables are encompassed thereby and nothing else. And that the concept of 'immovables and movables' does not include the pension interest of a member spouse. In my view there is a glaring difficulty with this approach." [Paragraph 32]

"Central to the reasoning in my colleague's judgment is, in my view, the notion that a pension interest is neither immovable nor movable. And that because the clause under consideration provides that only immovables and movables shall be divided equally between the parties, anything else not expressly mentioned is excluded. To my mind such a notion is unsound in law. …" [Paragraph 35]

In a commentary on the case, Makhado R Ramabulana argues:

> "Even if the majority disagreed with the minority on the incorrect classification of pension interest as neither an immovable or a movable asset, there was nothing preventing the parties from including the third heading of incorporeals under which pension interest could be counted. Thus, the reasoning of the majority in this aspect contradicts the maxim *expressio unius est exclusio alterius* and confirms the suggestion by the minority that the majority may have adopted a sympathy approach, which under the circumstances was woefully inappropriate as the judgment on this issue was still unenforceable against the fund. …
>
> If the majority in the *Ndaba* matter had intended its decision to be the final word on the matter, the well-reasoned minority judgment is the fly in the ointment and it does not appear that the SCA has succeeded in permanently putting this issue to bed."

- **"Ndaba v Ndaba – reconciling the irreconcilable",** ***De Rebus*** **2017 (June)** ***DR*** **51** (available at http://www.derebus.org.za/ndaba-v-ndaba-reconciling-irreconcilable/)

ADMINISTRATIVE JUSTICE

AFRIFORUM V EMADLANGENI MUNICIPALITY 2017 JDR 0917 (GP)

Case heard 9 March 2016, Judgment delivered 27 May 2016

This was an appeal against the dismissal of an application to compel the respondent to furnish certain information in terms of the Promotion of Access to Information Act (PAIA), read with the Municipal Regulations on Minimum Competency Levels.

Makgoka J (Ranchod J and Canca AJ concurring) held:

"PAIA is the national legislation contemplated in section 32(2) of the Constitution. PAIA was enacted to give effect to the right of access to information. The Constitutional Court has held that where Parliament enacts legislation to give effect to the rights in the Constitution, a litigant must found her or his cause of action on such legislation, and not directly on the Constitution, unless it is alleged that the legislation in question is deficient in the remedies it provides. As a result, PAIA is the principal legal source defining the right of access to information, and the promotion of access to information in South Africa is now almost entirely regulated by the PAIA because of the principle of subsidiarity. The purpose of PAIA is two-fold: to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to promote a society in which the citizens have effective access to enable them to more fully exercise and protect their rights. In the preamble to PAIA, it is recognized that the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public bodies, which often lead to an abuse of power and human rights violations." [Paragraphs 4 - 5]

"To my mind, the position of the respondent is analogous to that of administrative bodies, where such bodies are generally, not permitted to furnish new or additional reasons to those they furnished when they took impugned decisions." [Paragraph 26]

"Given the above authorities, I am of the view that the court a quo should have found that it was impermissible, and not open to the respondent, for it to raise and place reliance on new grounds of refusal in the answering affidavit, to bolster its decision to refuse the applicant's request for access to the records. The matter should therefore have been determined on the ground relied on by the respondent in its letter dated 20 November 2013." [Paragraph 28]

"The respondent should be ordered to furnish the records requested by the appellant in parts (a) and (b) of its request. To avoid any further technical points of ambiguity with regard to part (b), I propose to make an order to facilitate the furnishing of further particulars by the appellant to the respondent as to the specific report it seeks. In that way, I will be adopting an approach which is consonant with the objects of PAIA, and giving effect to the right of access information held by public bodies." [Paragraph 39]

The appeal was upheld.

ENVIRONMENTAL LAW

HARMONY GOLD MINING COMPANY LTD V REGIONAL DIRECTOR: FREE STATE DEPARTMENT OF WATER AFFAIRS AND OTHERS (68161/2008) [2012] ZAGPPHC 127 (29 JUNE 2012)

Case heard 24 October 2011, Judgment delivered 29 June 2012

The main issue in this case was whether a directive issued in terms of section 19(3) of the National Water Act, which requires measures to be taken to prevent or control pollution, became invalid once a person ceased to be a landowner.

Makgoka J held:

"It is not in dispute that the existence of a particular relationship between the landholder and the affected land is a jurisdictional prerequisite for the issuing of a valid directive under s 19(3) of the Act. Put differently, it is common cause that the Minister's directive-issuing power in terms of s 19(3) is limited to a landholder. However, the applicant contends that the Minister's power is further limited to the extent that the Minister may only direct the landholder to take preventive measures for as long as it remains the landholder." [Paragraph 11]

"... Among the reasons for the issuance of the directive, is the failure by some mining houses to fully comply with the previous directives. They failed to submit, or inadequately submitted, information necessary to determine and calculate the joint and several responsibility and liability of each individual mining house for contribution towards the costs incurred to remedy pollution caused by these mining houses. The mining houses had also failed to share the costs necessary for taking measures to prevent pollution. ... It is to be borne in mind that the directive was issued pending the implementation of an agreement and joint proposal towards long-term sustainable management of water arising from mining activities ... The mining houses, including the applicant, failed to reach such an agreement. Therefore it does not assist the applicant to decry the indefinite nature of the directive. The perpetuity referred to by the applicant remains only to the extent that the applicant and other mining houses fail to reach and implement the envisaged agreement." [Paragraphs 26 – 27]

"... [I]t is clear that the rationale is the preservation of the environment. The Minister is empowered to direct a landholder to take preventative measures for as long as it takes to address the risk of pollution. As a result, the rationale of the section, and of the directive, does not fall away when the landholder, who had been validly directed to take certain measures, severs ties with the affected land. ..." [Paragraph 29]

"... [W]here the directive was issued while a person was in control to take the preventative measures, his unfulfilled obligations do not become discharged or nullified once he ceases to be in control. If he severs ties with the land, fully knowing that his validly imposed obligations remained unfulfilled, he can hardly complain if it is insisted that he should comply with those before he is discharged from them. In this regard, s 28(6) of NEMA, which is concerned with rehabilitative and remedial work on another's land, comes into play, to the extent he has to access another person's land." [Paragraph 32]

"The directive required of the applicant to take measures, among others, for pollution which occurred while the applicant was the landholder. The nature and extent of that duty is clearly defined in the directive. There is therefore a clear causal and moral link between the directive and the applicant's pollution activities. …" [Paragraph 37]

The application was dismissed with no order made for costs in terms of the *Biowatch* principle. An appeal to the SCA was dismissed in **Harmony Gold Mining Company Ltd v Regional Director: Free State Department of Water Affairs and Others (971/12) [2013] ZASCA 206; [2014] 1 All SA 553 (SCA); 2014 (3) SA 149 (SCA) (4 December 2013)**:

> "The court a quo correctly dismissed Harmony's application. Makgoka J was also correct in following '. . . the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise'." [Paragraph 31 of the SCA judgment].

CRIMINAL JUSTICE

VISSER V MINISTER OF CORRECTIONAL SERVICES 2012 JDR 2455 (GNP)

Case heard 26 August 2016, Judgment delivered 3 October 2016

The applicant sought to review and set aside the decision of the parole board not to recommend her for conversion of her sentence to correctional supervision.

Makgoka J held:

"In terms of s 73(7)(c) of the Correctional Services Act … an inmate must have served at least a quarter of her sentence before he or she is considered for conversion of sentence. It is common cause that the applicant qualifies in this regard ... The next step in the process is a finding by the parole board that the inmate is fit and suitable to be referred to the sentencing court for reconsideration of their sentence. In this regard the parole board decided … that the applicant is not suitable. …" [Paragraph 5]

"It is common cause that the decision of the parole board was taken without the social worker and psychologist's updated reports. These reports are extremely important for the fourth respondent's recommendation to the parole board for it to properly exercise its discretion as to whether the applicant is a suitable candidate for reconsideration of sentence. That discretion must be exercised considering a range of considerations, including the contents of the reports by the social worker and/or psychologist." [Paragraph 10]

"In addition, the views of the victims and their families need to be considered …" [Paragraph 11]

"In the absence of all the above information, the decision of the parole board was taken without all the prescribed information being available. To that extent, it was arbitrary and capricious. On that basis alone, the parole board's decision has to be set aside. What remains is what should be ordered in its stead. … [C]ounsel for the applicant, urged me, quite forcefully, not to refer the matter back to

the parole board. Instead, counsel proposed, I should refer the applicant directly to the sentencing court to reconsider the sentence. ...” [Paragraph 12]

“I have a conceptual difficulty with the above proposition. … [T]he jurisdictional factor which must be present before a referral to the court for sentence reconsideration, is the opinion of the parole board that an inmate is a suitable candidate for such reconsideration. On a proper construction of the enabling section … the only functionary body entrusted with that task is the parole board. I find nothing in the plain language of the section that a court can, without further ado, usurp that power and substitute the decision of the parole board with its own. Of course, the court retains the residual discretion in terms of s 8(1)(ii) (aa) of PAJA, where exceptional circumstances justify such a decision. In the present application no such circumstances exist. ...” [Paragraph 13]

The decision of the parole board was reviewed and set aside, and the board was ordered to convene and consider the applicant’s suitability for conversion of sentence.

ADMINISTRATION OF JUSTICE

MAGIDIWANA AND ANOTHER V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (37904/2013) [2013] ZAGPPHC 292; [2014] 1 ALL SA 76 (GNP) (14 OCTOBER 2013)

Case heard 25 – 26 September 2013, Judgment delivered 14 October 2013

Applicants sought to review and set aside decisions to refuse them legal aid in the proceedings of the commission of inquiry into the Marikana massacre. Applicants included those who had been injured and arrested during the Marikana shooting, and those who had bene injured or subsequently arrested and prosecuted. Legal Aid was only provided to the families of deceased victims.

Makgoka J held:

“… It is of no consequence that the commission is not of a judicial or quasi-judicial nature. That does not, in my view, place the Commission outside the scope of s.34 of the Constitution. At conceptual level, the general proposition that the proceedings of commissions of inquiry fall outside the scope of s 34 at the outset, is, to my mind, an over-simplification of a complex situation involving constitutional rights and a distinct possibility of those rights being adversely affected by the outcome of the commission. A preferable view is that the right to legal representation at commissions is not an absolute one, but depends on the context. …” [Paragraph 37]

“Counsel for the opposing respondents down-played the importance of the applicants' participation in the commission. Reduced to its bare essence, the totality of their argument is this: the applicants may participate if they wish - legally represented or not in any event, the evidence leaders are there to assist them, if they do not participate voluntarily, they may be subpoenad and be forced to testify. This is an unfair, heavy-handed and insensitive approach concerning alleged victims of a police shooting.” [Paragraph 62]

“… [I] conclude therefore that s 34 finds application to the Marikana commission of inquiry, and therefore a constitutional right to legal representation before the Marikana commission. Having reached that conclusion, it remains to be determined whether that right translates into a right for State-funded legal representation. …” [Paragraph 67]

"… [C]onstitutionally, the only framework within which legal aid for indigent people is provided, is in terms of Legal Aid Act. Thus, the only channel through which such funding can be accessed is Legal Aid SA, which is a separate juristic person with its own legislative mandate established for that purpose under the Legal Aid Act. Simply put, the only State agency charged with the-responsibility to provide legal aid to the indigent, is Legal Aid SA. That should have been the applicants' first port of call, and not the President or the minister …" [Paragraph 74]

"It seems to me that the differentiation between the families of the deceased and the injured miners is based on the assumption that the deceased miners have left behind destitute widows and orphans, while the injured miners are still able to work and provide-for their families. This is a simplistic and fallacious generalisation, which, without empirical evidence, cannot logically be made." [Paragraph 94]

"I conclude … that the refusal by Legal Aid SA to provide legal aid to the applicants was arbitrary, and not rationally related to the purpose of the Legal Aid Act, and its constitutional mandate of providing legal funding to the indigent It therefore violated the applicants right to equality guaranteed by s 9 of the Constitution, it is not necessary to consider whether this violation was justified. That consideration does not arise as I am not dealing here with a law of general application, and in any event it being common cause now that the Legal Aid Act does not prohibit the provision of funding in commission proceedings." [Paragraph 98]

The application against the President and Minister was dismissed. Legal Aid's decision to refuse legal funding to the applicants was set aside, and Legal Aid was ordered to take steps to provide legal funding to the applicants for their participation in the commission of inquiry. An appeal to the SCA was dismissed due to a settlement agreement having been entered into between the parties: **LEGAL AID SOUTH AFRICA v MAGIDIWANA AND OTHERS 2015 (2) SA 568 (SCA)**. A further appeal to the Constitutional Court was dismissed in **LEGAL AID SOUTH AFRICA V MAGIDIWANA AND OTHERS (CCT188/14) [2015] ZACC 28; 2015 (6) SA 494 (CC); 2015 (11) BCLR 1346 (CC) (22 SEPTEMBER 2015).**

JUDGE YVONNE MBATHA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 19 July 1960

BProc, University of Zululand (1983)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (December 2016 – November 2017)

Judge of the KwaZulu Natal High Court (June 2011 -)

Acting Judge, KwaZulu Natal High Court (2005, 2006, November 010, May 2011)

Director, Y.Y. Mbatha & Partners Inc (December 2008 – May 2016)

Director, Y.T. Mbatha van Rensburg Inc (October 2006 – November 2008)

Sole Proprietor, Ms Y.T. Mbatha & Partners (January 1989 – form does not specify end date]

Professional Assistant, E.A Jadwat & Co (June – November 1988)

Admitted as attorney (April 1987)

Articled Clerk, Botha, du Toit & Saville (1985 – 1987)

Unregistered articles, Charmaine Pillay & Associates (June 1984 – November 1984)

Member, South African Chapter : International Association of Women Judges (2017 -)

Board member, Attorneys Insurance Indemnity Fund (May 2010 – March 2012)

Law Society of South Africa

Committee member, Intellectual Property (2005 – 2010)

Committee member, Insolvency (2008 – 2010)

Black Lawyers' Association

Chairperson, Northern Natal region (2008 – 2010)

Executive member (2003 – 2009)

Member (1992 – 2010)

KwaZulu Natal Law Society

Council member, gender cmmittee, complaints committee, HR committee (2005 – 2010)

Vice President (2006 – 2007)

Board member, St Anthony's Childrens' Home, Newcastle (2005 – 2010)

Trustee, Eyethu Educational Trust, Memel (2002 – 2010)

Chairperson, Blaauwbosch Development Community (1992 – 2010)

Legal Advisor, Northern Natal Tenants & Farm workers (2009)

SELECTED JUDGMENTS

PRIVATE LAW

PASSENGER RAIL AGENCY OF SOUTH AFRICA V MOABELO (1082/2016) [2017] ZASCA 144; [2017] 4 ALL SA 648 (SCA) (2 OCTOBER 2017)

Case heard 23 August 2017, Judgment delivered 2 October 2017

Respondent sued for damages for injuries sustained following an accident just outside a station. The high court found that the injuries were caused by the appellant's negligence, a finding that was confirmed on appeal by a full bench. On appeal to the SCA, the issues were whether the trial court had been correct in accepting the version of the respondent and rejecting the version of the driver, that the respondent had run in front of the train.

Mbatha AJA (Seriti JA and Mokgohloa AJA concurring) held:

"The appellant's witnesses including the train driver, the guard and the signal man confirmed that the trains were running late on the day in question. The guard, Beauty, confirmed that the train coach's doors were not closed. Taking all these factors together, one can only conclude that the respondent fell off the train." [Paragraph 39]

"The trial court had rejected the evidence of the train driver. It found that it lacked credibility and was improbable and accepted the evidence of the respondent and Baloyi. The train driver gave a completely different version when he reported the incident, shortly after it had occurred. Whereas, a different version was pleaded in the plea and he testified to a different version in court. It is my view that the trial court correctly rejected the train driver's evidence as a fabrication." [Paragraph 40]

The appeal was dismissed. Ponnan JA (Leach JA concurring) dissented, finding that the respondent's version did not establish liability:

"… [W]e would do well to carefully distinguish inference from conjecture or speculation. The trial court inferred that: first, Mr Moabelo was on train 0547; and, second, he 'fell from [that] train in and around the area of cross over by train 1886 to usl'. I am far from persuaded that each of those inferences are indeed the most readily apparent and acceptable inference in the circumstances … Moreover, with respect to the trial court, it appears to have impermissibly reasoned by way of an inference upon an inference. As I have already shown, Mr Moabelo was neither able to identify train 0547 as the one on which he travelled, nor point out where train 1886 collided with him. Even if it were permissible for the trial court to have drawn the first inference, the second, which lacked a proper factual foundation and was clearly dependent upon the first, was impermissible. What is more, in straining to find for Mr Moabelo, the trial court appears to have reasoned backwards from effect to cause." [Paragraph 61]

INGONYAMA TRUST AND OTHERS V UMLALAZI MUNICIPALITY AND OTHERS (1421/2016) [2016] ZAKZPHC 89 (10 OCTOBER 2016)

Case heard 31 August 2016, Judgment delivered 10 October 2016

Applicant sought to interdict the respondent from interfering with their use and enjoyment of certain land. Second respondent, a company, had purchased land from the first respondent and was seeking to develop the land to build a shopping centre. Second and other applicants claimed occupancy of the land as members of a traditional community, and were found to have informal rights to the land in terms of the Interim Protection of Informal Land Rights Act (IPILRA). Applicants further argued that the Trust remained the holder of title over the land.

Mbatha J held:

"I do not share the views expressed in the *Outdoor Network Limited* case on the basis that no one should be evicted without a legal process irrespective whether he is a *de facto* or *de iure* holder of rights. It is my view that a threatened spoliation need to be prohibited where it would result in the violation of human rights or would amount to an injustice." [Paragraph 34]

"There are a number of judgments which state that no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. There are various cases which state that no legislation may permit arbitrary evictions …" [Paragraph 35]

"The municipality has a role to play in giving priority to the basic needs of the community, a role which is in line with the Constitution, a role which it should not have abandoned in favour of a commercial venture. … Besides the Constitution, Parliament has also put on safeguards by the promulgation of relevant legislation in protecting people against unlawful evictions. Evictions are governed in terms of the PIE Act and section 4 thereof provides that the courts may grant an order for eviction if it is just and equitable to do so after considering all the relevant circumstances. … In this case the respondents did not even follow the PIE Act route. …" [Paragraphs 36 – 37]

"Had the matter been taken to court it would have been clear that their occupation of the place was old as the hills of Eshowe, it was a *bona fide* occupation, that the first respondent was aware of their occupation when it sold the property to the second respondent and that the first respondent, the municipality, still had a Constitutional duty to provide them with alternative accommodation." [Paragraph 39]

The rule nisi was confirmed. First applicant was ordered to apply for a declaratory order within 60 days to determine the status of the land.

ADMINISTRATIVE JUSTICE

MAHAEEANE AND ANOTHER V ANGLOGOLD ASHANTI LTD 2017 (6) SA 382 (SCA)

Case heard 7 June 2017, Judgment delivered 7 June 2017

Appellants were medically boarded by the respondent, their former employer, having contracted silicosis. The mine where appellants had worked was listed in a prospective class action, in which certification had been granted pending an appeal. Appellants fell within the class of plaintiffs, but were not named. Appellants had requested information under s 50(1) of the Promotion of Access to Information Act (PAIA), but the respondent had successfully resisted the application in the high court, on the basis exclusions in section 7(1) of PAIA concerning information relating to legal proceedings.

For the majority, Gorven AJA (Maya AP, Fourie AJA concurring) held that: "It seems clear that the underlying reasons given for why the records are required do not relate to the exercise of the right to claim damages but to the evaluation of whether the appellants should do so or not. The reasons given, therefore, do not meet the test of the records being required to 'exercise or protect' the right relied upon. …" [Paragraph 17]. Gorven AJA further held that the appellants did not require the requested records in order to formulate their claim [paragraphs 20 & 22], and dismissed the appeal.

Mbatha AJA dissented:

"In my respectful view the appellants have satisfied the criteria set out in s 50(1) of PAIA, and the civil proceedings in question have not commenced for purposes of s 7(1) thereof. The appeal should accordingly succeed …" [Paragraph 30]

"The initial right which the appellants sought to protect was the right to assess their potential claims for damages against the respondent for having contracted silicosis at the respondent's mines during the tenure of their employment. However, when the matter was argued before us, the appellants' argument had shifted in that they requested the information for purposes of making a decision of whether or not to

opt out of the class action. But this is understandable as their appeal had been overtaken by the events. Certification had since been granted … which also stipulated a date by which they should opt out of the class action, should they so wish." [Paragraph 35]

"… Class actions are sui generis in nature, and should not be considered as the ordinary issuing of proceedings. Section 38 of the Constitution provides that 'anyone listed in the section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened'. It can be an individual person or anyone acting as a member of a class. This is a dualistic approach which allows individual persons to exercise their rights and approach the courts in their own regard or as a class. In the latter instance, a member of a class is automatically a co-plaintiff in a matter, which may affect his rights, of which he may have no knowledge. The process may become known to him only after the certification application has been granted or later, when he is invited to exercise the right to opt out. A certification application should therefore not be a bar to individuals from approaching the courts in the exercise and protection of their rights." [Paragraph 42]

"When a court deals with such matters the ambit of justice should not only be limited to substantive relief but it must also be extended to procedural justice as well. In light of the nature of such proceedings, it cannot be said that they have commenced before an opportunity is extended to members of the class to make an informed decision whether to continue to be part of the class or opt out. A fair balance needs to be achieved in line with rights of the individual members as enshrined in the Bill of Rights." [Paragraph 48]

"… [T]his court in Unitas held that it was not appropriate to formulate a positive, generally applicable definition of 'require' because ultimately whether or not information was required depended on the particular facts of the case. The facts in Unitas are distinguishable from the facts in this matter as the respondent is in possession of all the material that the appellants require to exercise their rights, unlike Mrs Van Wyk in Unitas. The knowledge of the attorney or his involvement in a class action is knowledge to a broader claim of the member of the class action, but not sufficient to give legal advice to these particular clients. There is no alternative source for the appellants, save for the PAIA process to access their personal records from the employer." [Paragraph 59]

Molemela AJA also dissented, for different reasons.

CRIMINAL JUSTICE

S V BOTHA 2017 JDR 1769 (SCA)

Case heard 15 August 2017, Judgment delivered 8 November 2017

Appellant was convicted on one count of murder, and sentenced to 12 years' imprisonment. The conviction was based on circumstantial evidence. On appeal, the legal issues were whether the appellant had bene entitled to be discharged at the close of the state case, and whether the trial court had committed an irregularity in allow the state to re-open its case to lead further evidence.

Mbatha AJA (Mokgohloa AJA concurring) held:

"The question whether the court a quo should have granted a discharge, entails an exercise of a discretion by the court a quo, which discretion must be exercised judicially. It is my view that the court a

quo correctly exercised its discretion as the credibility of the witnesses play a very limited role in the s 174 application." [Paragraph 34]

"The court a quo may in the exercise of its discretion and at any stage of the proceedings, grant leave to a party to the proceedings to re-open its case. The State provided sufficient reasons for the application, such as the inexperience of the State advocate, which led to the failure to call certain material witnesses. The State indicated that it had started with the re-examination process of the exhumation of the deceased's body as the doctor who conducted the first autopsy was not a pathologist. The State also intended to recall certain state witnesses. This application, which was brought after the refusal of an application to discharge the appellant, cannot be said to be supplementing the State's case. It was in the interest of justice that the truth be told. The court a quo had already ruled that the appellant had a case to answer. In these circumstances there was no prejudice to the appellant in the re-opening of the State's case." [Paragraph 36]

Mbatha AJA then considered the appeal against sentence:

"... [T]here is no evidence to support that she armed herself with a firearm, planned to kill the deceased and that she had prior access to the letter of wishes. It is therefore clear that premeditation was not established and that the court a quo committed a material misdirection in this regard. The appellant should therefore have been sentenced in terms of s 51(2) of the CLA. This requires a minimum sentence of 15 years' imprisonment absent substantial and compelling circumstances warranting a reduction. In fact no one knows how the events of the night unfolded except the appellant. The killing of the deceased could have been premeditated or not premeditated. That leaves this court at large to consider the sentence afresh and giving the benefit of the doubt to the appellant." [Paragraph 39]

"A synopsis of the appellant's emotional and physical state was completely disregarded by the court a quo. The court a quo over emphasised the seriousness of the offence by stating that 'the sentence to be imposed should send out a clear message that the crime of murder would not be countenanced, particularly if it involves premeditation'. The court a quo ignored the evidence of the appellant, Pieter, Phillip, and ... a specialist forensic psychiatrist, with regard to the abusive behaviour of the deceased towards her and other family members. Both the appellant's sons testified of the prolonged abuse meted on the appellant by the deceased and related their own personal experiences of abuse at the deceased's hands. It is significant to note that the intensity of the abuse was of such a nature, that it resulted in Nannie and Phillip leaving the farm for good." [Paragraph 41]

The appeal against conviction was dismissed, but the appeal against sentence succeeded, and the matter was remitted to the court a quo to impose sentence afresh. Rogers AJA dissented, finding that the court a quo had acted irregularly in allowing the state to reopen its case, and that the appeal against conviction should have succeeded as the remaining evidence did not prove guilt beyond a reasonable doubt. Gorven AJA (Cachalia JA concurring) wrote a separate judgment:

"I agree with Mbatha AJA that the appeal against conviction should be dismissed. I agree with her judgment on sentence and the order proposed. I disagree with her that the re-opening of the state case was not irregular. I agree with Rogers AJA that it was irregular but I disagree that the irregularity was of such a nature that the proceedings were thereby vitiated. The effect should be to disregard the evidence led after the reopening. If this is done, no failure of justice takes place. I disagree with Rogers AJA that the version of the appellant was reasonably possibly true." [Paragraph 145]

S v MBOKAZI 2017 (1) SACR 317 (KZP)

Case heard 14 July 2016, Judgment delivered 17 July 2016

Appellant was convicted on one count of rape of a child under the age of 16, and sentenced to life imprisonment. The appeal was against conviction and sentence. The appellant argued inter alia that the complainant had not been properly admonished to tell the truth before testifying.

Mbatha J (D Pillay J concurring) held:

"Upon perusal of the record it is clear that the magistrate was alert to the fact that the complainant was a child witness. … the learned magistrate determined that the complainant understood what it meant to tell the truth. The word 'straight', as used by the interpreter when he related to the court what the complainant was stating, is synonymous with the words 'unswerving, direct and undeviating and unbending'. The *Oxford English Dictionary* gives various examples of the definition of the word 'straight'. One of its definitions, which I consider to be relevant to the context of this matter, is this one: 'Not evasive; honest: a straight answer [;] thank you for being straight with me.'" [Paragraphs 10 – 11]

"The finding by the learned magistrate that she was competent to give evidence is also reinforced by the manner in which she gave evidence. Her evidence is clear and her answers to cross-examination questions reflect her maturity and competency." [Paragraph 16]

Mbatha J held that the complainant had bene a competent witness, and that her evidence was admissible.

"The DNA results were inconclusive … and the court was alive to this favourable factor for the appellant. However, she considered that there were factors that led to such inconclusive results, like in the case where the perpetrator used a condom, but found that the direct evidence of the complainant and her witnesses was true and consistent. This was also corroborated by the evidence of Dr Shoba and her findings in the J88 medical report." [Paragraph 23]

The appeal against both conviction and sentence was dismissed.

MEDIA COVERAGE

"Judge Mbatha spoke about what it means to be a judge and said that this question should always be at the back of the mind of every judge, and more particularly someone aspiring to become a judge. 'Being a judge is not something that should be taken very lightly or merely as some kind of a social status,' she said.

Judge Mbatha said that South African courts and judicial officers are bound by the Constitution and by their oath of office to apply the law impartially and without fear, favour or prejudice. She added that a judge is regarded as a community leader because of those attributes, and also because judges cannot command respect if they do not uphold the rule of law and behave in a manner unbefitting of their office.

According to Judge Mbatha 'dignity and respect does not arise from being feared, but from humility and hard work. These attributes are earned by giving people an opportunity to state their case before you, in order for you as a judge to weigh both sides of the story first before giving a ruling or judgment.'

Judge Mbatha said that good ethics are paramount and should be second nature to a judicial officer. She noted: 'Ethics do not only relate to how you behave outside the court, but also require that you treat litigants, colleagues and counsel with dignity, respect and impartiality. Matters should not be forejudged, but rather counsels' arguments should first be listened to, as many a time they may have a valid point.'

…

Judge Mbatha concluded by saying: 'For a judge to be able to give effect to her or his mandate, she or he must know the law, must keep abreast with the developments in the law, must know what is expected of her or him. Judges read extensively; they research their matters and apply their minds to the facts before them. It is, therefore, important that as aspirant judges, you also update your IT skills as processes will soon be done online. This is part and parcel of your skills.'"

- Nomfundo Manyathi-Jele, "What it means to be a judge tackled at Judicial Skills Training course", *De Rebus* 2017 (Sept) DR 18 (http://www.derebus.org.za/means-judge-tackled-judicial-skills-training-course/)

"The law is not only for people like Sifiso Zulu, but for everyone.

This is according to Pietermaritzburg High Court Judge Yvonne Mbatha, who tore into the Durban socialite for flying to Dubai on business instead of going to court for his culpable homicide appeal hearing late last month. …

While the State did not oppose his application, Judge Mbatha called Zulu "reckless" for not cancelling his business trip to be in court.

She said that although Zulu claimed that he was only informed the night before the appeal was to take place, he should have got his priorities in order and not gone on a business trip to Dubai.

"Instead of the applicant appearing in person the next day and asking for assistance from the court, he decided to go on a business trip… A reasonable person would have stayed in the country and sought assistance from the court," said Mbatha.

She said that Zulu knew when his appeal was going to be heard 15 months in advance and to claim he had left it solely in the hands of his lawyer was "irresponsible".

"It is shocking that a person for 15 months ignores his case and only learns the night be- fore he is to come the court," Mbatha said

"It is very improbable that for 15 months the applicant did not bother to contact his legal representative out of interest to find out what was happening with his appeal.

"I can only speculate that he is not telling the truth, but there is no evidence (to prove otherwise)… With a heavy sentence hanging over his head, a reasonable person would have not ignored the appeal.

"The court would like to emphasise that in the future he must treat the court with respect. Justice is not only for him," Mbatha said."

- Lee Rodganger, "Judge's sharp rebuke to Sifiso Zulu", *Sunday Independent* 10 October 2011 (https://www.iol.co.za/sundayindependent/judges-sharp-rebuke-to-sifiso-zulu-1153535)

JUDGE PIETER MEYER

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 7 December 1960

BA (Law), University of Stellenbosch (1981)

LLB, University of Stellenbosch (1983)

CAREER PATH

Acting Justice, Supreme Court of Appeal (April – November 2013, October 2014 – May 2015, October – November 2017)

Judge, Gauteng High Court, Johannesburg (November 2007 -)

Acting Judge, Gauteng High Court, Johannesburg (March 2005 ; February, May – June & October - November 2006 ; April – May & August – November 2007)

Advocate, Johannesburg Bar (1986 – 2007)

Senior counsel (2004 – 2007)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

RED ANT (PTY) LTD V MOGALE CITY MUNICIPALITY AND OTHERS (16813/2012) [2013] ZAGPJHC 301 (22 MARCH 2013)

Case heard 4 – 6 March 2013, Judgment delivered 22 March 2013

Three companies, including the applicant, had applied for a tender that had been advertised by first respondent. The tender was awarded to Mafoko Security Patrols. Initially, Red Ant and Fidelity Security Services, the unsuccessful tenderers, took the decision to award the tender to Mafoko on review. Despite this, applicant went on to enter into an agreement with Mafoko wherein Mafoko ceded 35% of its business in the tender to Red Ant, and Red Ant withdrew its review application. Fidelity, however, proceeded with its challenge, and also challenged the validity of the subsequent agreement between Mafoko and Red Ant.

Meyer J held:

"… The clear and unambiguous language used in paragraph 38(1)(c) of the SCM Policy and in regulation 38(1)(c) of the Municipal Supply Chain Management Regulations … refutes the contention … that a bidder is to be disqualified ab initio if it or any of its directors was listed on the National Treasury's database at the time of the submission of its bid. …." [Paragraphs 27-28]

"Mogale's City's counsel submitted that for the decision makers to have considered Fidelity's bid in the light of Jack's resignation would have constituted a material amendment to the bid that would have amounted to unlawful administrative action. I disagree … It is not Mogale City's case that the directorship of Jack was in any way material in Fidelity having been chosen as one of the front runner bidders or that the appointment of Mahlangu as a director of Fidelity would have adversely affected Fidelity's position as such or that such circumstances would have had any impact on the points awarded to Fidelity in the assessment of its bid. … [S]uch information in the circumstances amounted to no more than an update regarding the personnel and directors of Fidelity. The 'ever-flexible duty to act fairly' entitled the BEC in the unusual circumstances … to have requested Fidelity to clarify the position with regard to Jack's directorship and it enjoined the BEC to take the information it had obtained in consequence thereof into account in its deliberations. …" [Paragraph 29]

"Fidelity, to the knowledge of the BEC and BAC, did not have a director whose name was listed on National Treasury's database at the time when the decision to disqualify Fidelity was taken. … The order of the North Gauteng High Court that set aside the decision to place Jack's name on the National Treasury's database of restricted suppliers and in terms whereof his name is for all purposes deemed never to have been included on the National Treasury's database of restricted suppliers, in my view, removes the decision to list his name and the legal consequences thereof from the range of the principle that invalid administrative action 'exists in fact and has legal consequences that cannot simply be overlooked.' The decision to disqualify Fidelity for the reason that Jack's name was listed on the National Treasury's database of restricted suppliers was accordingly premised on an error of fact even though the decision makers were ignorant of the true factual position. I am accordingly of the view that the decision to disqualify Fidelity was based on a failure to take relevant considerations into account and that it

should be reviewed .. . Such decision was also based on material mistakes of fact and it falls to be reviewed for that reason. ...” [Paragraphs 30-32]

“I am in all the circumstances of the view that the decision to award the tender to Mafoko and the contract that was concluded between Mogale City and Fidelity pursuant to such decision should be reviewed and set aside and that an order ... should be granted remitting the matter for reconsideration by Mogale City.” [Paragraph 38]

The application was granted.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

MAHANO AND OTHERS V ROAD ACCIDENT FUND AND ANOTHER 2015 (6) SA 237 (SCA)

Case heard 9 March 2015, Judgment delivered 20 March 2015

This was a challenge to regulation 3(1)(b)(iv) of the Road Accident Fund Act Regulations, which dealt with the Fund's liability to pay general damages to a claimant, and provided that the threshold requirement for liability for general damages was that the Fund had to be satisfied that the injury had been correctly assessed as serious, in accordance with the method prescribed in the regulations. This required the American Medical Association's Guides to the Evaluation of Permanent Impairment Sixth Edition (AMA Guides) to be applied. The issue in the appeal was whether the regulation made the application of the AMA Guides dependent on the existence of 'operational guidelines'.

Meyer AJA (Lewis, Shongwe and Willis JJA and Gorven AJA concurring) held:

“Regulation 3(1)(b)(iv) must be interpreted in accordance with the established principles of interpretation. ... The language used clearly confers a discretion on the minister to publish operational guidelines and the application of the AMA Guides is not dependent on the existence of operational guidelines. Reference to the context supports this legislative intent.” [Paragraph 13]

“... [T]he words 'if any' in reg 3(1)(b)(iv) denote that the publication of 'operational guidelines' or of 'amendments' thereto is discretionary. An alteration of the punctuation used in reg 3(1)(b)(iv) is required in order to sustain the interpretation contended for by the appellants: the insertion of a comma after the words 'operational guidelines' and the deletion of the comma after the word 'amendments'. ... The distinction which the appellants seek to draw between operational guidelines and amendments is artificial: once operational guidelines, if published, are amended, they remain operational guidelines in accordance with which the AMA Guides must then be applied. The obligation created in reg 3(1)(b)(iv) by the use of the word 'must' is one placed conditionally upon the medical practitioner: the AMA Guides 'must' be applied by the medical practitioner in accordance with 'any' operational guidelines or amendments 'if' published. No obligation is placed on the minister. The publication of operational guidelines is clearly not a condition precedent to the application of the AMA Guides in the assessment whether an injury is 'serious'.” [Paragraph 14]

“The same legislative intent is reinforced when reg 3(1)(b)(iv) is considered contextually. The use of the permissive or facultative word 'may' in the other regulations referred to by the appellants and not in reg 3(1)(b)(iv) is no indication that the publication of operational guidelines is peremptory. The statutory

provision … is not couched in words which have an affirmative or imperative character, such as 'shall' or 'must'. There is also no other provision in the regulations, or in the Act, which imposes an obligation on the minister to publish operational guidelines in order for the AMA Guides to find application." [Paragraph 15]

"… [T]he interpretation contended for by the appellants … will result in the absurdity that the AMA Guides, which take centre stage in the administrative determination of whether an injury is 'serious' to qualify for an award of general damages in terms of s 17(1) of the Act, cannot be applied until such time as the minister publishes operational guidelines, even though the minister may consider the publication of operational guidelines not necessary or expedient. Furthermore, there is no impediment … to the practical application of the AMA Guides in the absence of operational guidelines." [Paragraph 16]

"… The interpretation contended for by the appellants, without intending to be unkind, is rather opportunistic and seems to be an attempt to avoid compliance with the regulations despite the clear and unambiguous wording… [T]he construction contended for by the appellants is linguistically and contextually untenable. I am, therefore, not persuaded that the circumstances of this case warrant a deviation from the general principle that costs should follow the event." [Paragraph 18]

The appeal was dismissed with costs.

ENVIRONMENTAL LAW

HARMONY GOLD MINING CO LTD V REGIONAL DIRECTOR, FREE STATE DEPARTMENT OF WATER AFFAIRS, AND OTHERS 2014 (3) SA 149 (SCA)

Case heard 25 November 2013, Judgment delivered 4 December 2014

The acting regional director of water affairs issued a directive under s 19(3) of the National Water Act (NWA) to various mines conducting operations in an area of the North West Province, directing them to take anti-pollution measures in respect of ground and surface water contamination caused by their gold mining operations. Appellant argued that the directive was only valid as long as the person to whom it was issued owned, controlled or occupied the land in question, and that the directive became invalid and unenforceable against it from the date on which the land was transferred to another company (Pamodzi). The appellant's application to have the directive set aside failed in the High Court.

Meyer AJA (Navsa ADP, Brand and Shongwe JJA and Zondi AJA concurring) held:

"… Harmony exercised control over and used the land from September 2003 until 27 February 2008. It was indisputably a person within the meaning of ss (1) who controlled, occupied and used land on which an activity was performed or undertaken which caused or was likely to cause pollution of a water resource at the time when the regional director issued the directive. It was not the owner of the land in question and its contention that it remained a landowner until the land was transferred to Pamodzi on 6 January 2009 is obviously wrong." [Paragraph 17]

"The limitation contended for by Harmony is not expressly provided for in ss (3) and will thus have to be read into it by implication. … I am of the view that effect can be given to the NWA 'as it stands' without

the need to limit the Minister's wide discretionary powers under ss (3) as Harmony would have it." [Paragraph 22]

"The wording of ss (3) makes it plain that the legislature intended to vest the Minister with wide discretionary powers and to leave it to him or her to determine what measures a defaulting landholder must take and for how long it must continue to do so. I find nothing in the wording of ss (3) or in the other provisions of s 19 which warrants the conclusion that the Minister's powers under ss (3) are intended to be limited in that he or she may only order the landholder to take anti-pollution measures for as long as it remains a landholder. …" [Paragraph 23]

"The rationale of ss (3) is to direct the landholder to address the pollution or risk of pollution however long it may take to do so. That rationale does not fall away when the landholder ceases to own, control, occupy or use the land. The limitation of the Minister's power as contended for by Harmony is not only unnecessary to give effect to the purpose of ss (3), but on the contrary defeats its purpose and renders it ineffective. ... Harmony's restrictive interpretation … would result in the absurdity that a polluter could walk away from pollution caused by it with impunity, irrespective of the principle that it must pay the costs of preventing, controlling or minimising and remedying the pollution." [Paragraph 24]

"An interpretation that does not impose the limitation … contended for by Harmony is consistent with the purpose of the NWA (reducing and preventing pollution and degradation of water resources); accords with the NEMA principles that pollution be avoided or minimised and remedied and that the costs of preventing, minimising, controlling and remedying pollution be paid for by those responsible for harming the environment; and gives expression and substance to the constitutionally entrenched right of everyone to an environment that is not harmful to health or wellbeing and to have it protected through reasonable measures that, amongst others, prevent pollution and ecological degradation." [Paragraph 25]

"Harmony at the hearing of the appeal for the first time argued that on its own terms the directive was not envisaged to operate against a 'non-landholder' and that it ceased to have effect vis-à-vis Harmony when it severed its ties with the land. ... There is no merit in this argument. The obligations arising from the terms of the directive do not address the issue whether they can only be performed by a landholder. ..." [Paragraph 28]

"The court a quo correctly dismissed Harmony's application. Makgoka J was also correct in following 'the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise'. Each party should also bear its own costs of the appeal." [Paragraph 31]

The appeal was dismissed.

LABOUR LAW

MAROGA V ESKOM HOLDINGS LTD AND OTHERS (A5021/11) [2011] ZAGPJHC 171 (16 NOVEMBER 2011)

Case heard 31 October 2011, Judgment delivered 16 November 2011

Appellant appealed against the judgment of the court *a quo* dismissing his application for specific performance of his employment contract – for re-instatement as the Chief Executive Officer of Eskom - or

for the payment of damages. The Court *a quo* had found that appellant had made a clear and unequivocal resignation offer to the Eskom Board, that the Board had accepted, and that the consensual termination of his contract of employment had been effective once the acceptance of his offer of resignation had been communicated to him during the evening on 28 October 2009.

Meyer J (Makhanya and Coppin JJ concurring) held:

"... On Eskom's version, Mr Maroga informed the board members present at the Eskom Board meeting on 28 October 2009 that he had thought long and hard about the matter and that he had concluded that he could not continue to work with Eskom's Chairperson, Mr Godsell. He then made an offer to resign. Following his offer to resign, Mr Godsell also offered to resign. Mr Maroga and Mr Godsell later recused themselves ... so that the remaining members of the board who were present could decide whose offer of resignation to accept. ... [T]he Eskom Board resolved unanimously to accept Mr Maroga's offer of resignation. ..." [Paragraphs 3 - 4]

"... The reasons given by the Court a quo for accepting Eskom's version and rejecting that of Mr Maroga are convincing and lead me to conclude that the veracity of the disputes raised by Eskom can at face value not be questioned. It is clear ... that the Court a quo was, correctly in my view, not satisfied as to the inherent credibility of the appellant's factual averments on the disputed issues ..." [Paragraph 7]

"It was submitted on behalf of Mr Maroga that even if Eskom's version is accepted the offer of resignation made by Mr Maroga was not clear and unequivocal and is accordingly not legally effective or that it was conditional. ... On Eskom's version, which must in these proceedings be accepted, there is no room for finding that Mr Maroga's words and conduct did not evince a clear and unambiguous intention on his part not to go on with his contract of employment should his offer of resignation be accepted or that the Eskom Board's conclusion that he did not intend to fulfill his part of the contract in such event did not meet the reasonable person requirement or that Mr Maroga's offer to resign had been made in the heat of the moment. The undisputed facts also do not support the contention that Mr Maroga's resignation offer had been a conditional one ..." [Paragraph 8]

"Article 10.4 ... empowers the Minister to appoint a CEO. This is a power given to the shareholder to appoint a CEO to the board of directors. The Minister is not empowered to appoint a CEO as employee of Eskom or to conclude an employment contract with a CEO. Article 16.1 vests the board, and not the shareholder, with all the powers of the company, except those expressly reserved to its members in general meeting. The powers to appoint, implement, enforce and terminate contracts of employment form part of the usual management and control powers of a board of directors, the exercise of which powers have not in this instance been conferred upon the shareholder, which is the Minister in his representative capacity. The CEO of Eskom enjoys a dual status of director and of employee. His or her appointment as Chief Executive/ Managing Director of Eskom falls within the prerogative of the member, who is the Minister, after consultation with the board of directors and his or her appointment as such is followed by the conclusion of a contract of employment between Eskom and the CEO. The Eskom Articles of Association do not contemplate that the Republic of South Africa, or its representative, the Minister, becomes the employer of the CEO. ..." [Paragraph 13]

CRIMINAL JUSTICE

NDWAMBI V S (611/2013) [2015] ZASCA 59 (31 MARCH 2015)

Case heard 11 March 2015, Judgment delivered 31 March 2015

Appellant and a co-accused were convicted of fraud, following the sale of a fake rhinoceros horn in a police trap. Appellant was sentenced to six years' imprisonment. On appeal, he argued that the elements of the crime of fraud had not been proved.

Meyer AJA (Navsa ADP, Leach JA and Schoeman AJA concurring) held:

"… Intent to defraud has two principal aspects: intention to deceive and intention to induce a person to alter or abstain from altering his or her legal position. The intention to defraud can be with direct intent or by dolus eventualis. …" [Paragraph 13]

"The appellant found himself on the horns of a dilemma … saying that he honestly believed the imitation was real could potentially have exposed him to conviction of attempt on the alternative statutory charge … whilst saying that he did not hold such belief, would have exposed him to a conviction of fraud. Instead, he falsely distanced himself from the transaction. He denied knowledge of what was contained in the bag or wrapping that his co-accused carried … and he testified that to his knowledge his co-accused was going to meet a client in connection with her works of art. His evidence and that of his co-accused having been rejected left the trial court without the benefit of credible evidence from either of them and, with only the State evidence to determine their respective guilt or innocence of the charges they faced. It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a prima facie case has been established and the accused fails to gainsay it. …" [Paragraph 16]

"… The prima facie inference, unless gainsaid by credible and reliable evidence, is that the false representation had been made knowingly, or without belief in its … or without knowledge whether it was true or false but knowingly exposing Oberholzer or the State to a risk that it may be false and deceitfully leaving him ignorant of the exposure. Any suggestion that they did not know that the representation was false lacks a factual foundation and would therefore amount to impermissible speculation or conjecture. It lay exclusively within the power of the appellant and his co-accused to show what the true facts were but they failed to give an acceptable explanation. The prima facie inference became conclusive in the absence of rebuttal." [Paragraph 17]

"… The appellant contends that because the State's evidence was to the effect that the police had no intention to pay for the rhino horn there could be no prejudice. This contention, however, ignores the longstanding principle that the law looks at the matter from the point of view of the deceiver and not the deceived." [Paragraph 18]

"In the present case, an intention to deceive was proved. It was calculated to prejudice. Objectively, some risk of harm could have been caused. It need not be financial or proprietary or necessarily even to the person it was addressed … In assessing prejudice it is significant to note that even though the transaction in question involved fake rhino horn it must indubitably be so that transactions of this kind contribute to the illegal trade in rhino horn, which we as a country must all be concerned about. The appellant was thus rightly convicted of fraud." [Paragraph 22]

The appeal was dismissed. Willis JA dissented, holding that the accused should have been convicted on the alternative charge of contravening the Nature Conservation Ordinance.

CHILDRENS RIGHTS

CENTRAL AUTHORITY OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER V B 2012 (2) SA 296 (GSJ)

Case heard 5 December 2011, Judgment delivered 7 December 2011

This was a case brought under the Hague Convention on the Civil Aspects of International Child Abduction, whereby the second applicant mother sought the return to Australia of her 13 year old son (K), then residing with his father (respondent) in Johannesburg. The mother and father had married in Australia, and on their divorce entered into a settlement agreement whereby the son would reside with the mother, with the father having reasonable rights of contact. The agreement was made an order of the Family Court of Australia.

Meyer J held:

"The respondent's retention of K in South Africa is wrongful within the meaning of art 3 of the Hague Convention and I must order his return to Australia pursuant to the provisions of art 12, unless the respondent or K establishes the defence raised ... The defence raised in this instance, that K objects to being returned to his mother in Australia, requires an interpretation of art 13 ..." [Paragraph 4]

"It is clear ... that the exercise of a discretion arises under art 13. It provides that, notwithstanding the provisions of art 12, which require in mandatory terms that the child wrongfully abducted or retained be returned, the court 'may also refuse to order the return of the child' if it is found that the stated requirements have been met. ..." [Paragraph 6]

"Ms Mansingh submitted that, in the exercise of the discretion arising under art 13, the court may not have regard to welfare considerations, but must only balance the nature and strength of the child's objections against the Hague Convention considerations. There is ... no merit in counsel's submission ... It is not consistent with the obligation to treat as paramount, in every decision affecting a child, the wellbeing or best interests of that child — the paramountcy principle — which is enshrined in s 28(2) of our Constitution. Counsel's submission is also in conflict with clear authority of the Constitutional Court. ..." [Paragraph 7]

Meyer J considered English and Scottish case law on the exercise of a court's discretion under article 13, and continued:

"... K's legal representative ... informed this court that K impressed him 'as an intelligent young man, who understands the nature of the present proceedings and knows what he wants'. ... I interpolate to add that I observed K carefully during the hearing, which lasted several hours. He sat listening attentively throughout. My subsequent interview with K in chambers confirmed to me the recommendation of the family counsellor and the observations of K's counsel ... K ... was nervous, but confident, and he addressed me appropriately. He is articulate. He answered my questions appropriately and directly without touching on unrelated matter. When I required elucidation, he furnished it without hesitation. His views are firm and cogent. He fully appreciates that the present proceedings are only jurisdictional in

nature. I have no hesitation in finding that he is of above-average intelligence, despite his academic performance at school. It is, in my view, not only appropriate to take K's views and strength of feelings into account, but they should be given considerable weight." [Paragraph 11]

"K has maintained his objection to returning throughout this year. He raised his objection to his parents, to the family counsellor, to his counsel and ultimately to me during my interview with him in chambers. His reasons are consistent and of substance. … " [Paragraph 15]

"The active involvement and participation of the respondent in the life and activities of his son do not amount to undue influence of the child. Such involvement and participation form part of parenthood. Such involvement and participation might have influenced K's objection, but cannot be said to have manipulated or unduly influenced him." [Paragraph 16]

"K has settled well and to move him back to Australia now would be a disruption in his life, physically and emotionally. The assumption of the Hague Convention is that the return of a child to a foreign jurisdiction, if concluded within a very short time, will not ordinarily cause irreparable harm to the child. The longer the delay, the greater the potential for harm to the child. …" [Paragraph 17]

"A balancing of all the relevant considerations leads me to conclude that this is a matter in which the child's objection should prevail." [Paragraph 20]

The application was dismissed, with no order as to costs.

JUDGE PRESIDENT MAHUBE MOLEMELA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 March 1965

BA, University of Fort Hare (1986)

B Proc, University of Fort Hare (1992)

Advanced Diploma in Labour Law, University of Johannesburg (1998)

LLB, University of the Free State (2000)

LLM (Mercantile Law), University of Free State (2002)

Certificate in Advanced Military Law, Thaba Tshwane College, SANDF (2003)

CAREER PATH

Acting Justice, Supreme Court of Appeal (December 2016 – September 2017)

Acting Justice, Constitutional Court (January – May 2015)

Judge President, Free State Division of the High Court (2015 – present)

Judge of Appeal, Labour Appeal Court (2014 – present)

Acting Judge, Competition Appeal Court (2012 – 2014)

Acting Judge, Labour Appeal Court (2012 – 2014)

Judge, Free State Division of the High Court (2008 – present)

Acting Judge, Gauteng Local Division of the High Court, Johannesburg (2007 – 2008)

Acting Judge, Free State Division of the High Court (2005, 2006, 2007)

Military Judge (2004)

Director, Smith Tabatha Buchanan Boyes (2005 – 2007)

Director, Claude Reid Inc (2003 – 2004)

Part-time lecturer, University of Free State (2001 – 2003)

Arbitrator, CCMA (1999 – 2004)

Partner, Kubushi Molemela Attorneys (1997 – 1999)

Sole practitioner, M B Molemela & Partners (1995 – 1997)

Admitted as a Notary (1996)

Admitted as a Conveyancer (1996)

Candidate attorney and attorney, Peete, Jake Moloi & Partners (1989 – 1995. Admitted as attorney 1993)

Prosecutor, Thaba Nchu Magistrates Court (1987)

Member, International Association of Women Judges (2009 – present)

Member, Black Lawyers Association (1997 – 1999)

Councillor, Law Society of the Free State (1987 – 2008)

Central University of Technology

Chancellor (2016 – present)

Council member (2013 – 2015)

Member, Catholic Women's League (2016)

Council Member, St Rose Parish Church Council (2004)

SELECTED JUDGMENTS

COMMERCIAL LAW

JORDAAN V LIBERTY LIFE LTD (3890/2007) [2011] ZAFSHC 217

Case heard 5, 6 and 8 May 2009; 25, 26 & 28 May 2010 and 1, 2 & 3 December 2010, Judgment delivered 29 July 2011

The plaintiff instituted action against the defendant for the payment of the proceeds of an insurance policy issued by the defendant. The main issue to be decided was whether the plaintiff had ceded his rights in terms of the policy.

Molemela J held:

"It is noteworthy that, according to the evidence of the deceased's attorney, the deceased was very knowledgeable in insurance matters. … Being such an expert in insurance matters, his various attempts to register the latter cession despite being specifically informed by the defendant and his own broker that the Plaintiff was still the owner of the policy as no other cession was registered is rather odd and, in my view, just goes to show how irrational he had become. Under such circumstances, it is not unthinkable (and I state this with respect) that he could, knowing that he was no longer able to obtain new insurance cover due to his ill-health and in desperation to obtain cover that could pacify the already impatient Opperman, resort to forging the plaintiffs signature on the cession document. He clearly had a lot to gain from doing so. On the other hand, the fact that the plaintiff was willing to cede the policy to Opperman merely upon being released from suretyship tends to show that he was not driven by greed to benefit unfairly from the policy. Significantly, even after tearing the second cession up, he was still willing to cede the policy as soon as he was released from suretyship. … As it was at that stage common knowledge that the deceased's health had already deteriorated drastically, the plaintiff could simply have decided to cling to the policy in the hope that the deceased's death was imminent. Instead, he still expressed his willingness to cede the policy once he had been released from suretyship." [Paragraph 33]

"… I find that the disputed signature is not the plaintiff's signature and constitutes a forgery. This finding is … bolstered by the evidence of Paula Smith, who testified that the plaintiff had, a few days after being advised by the defendant in writing about the registration of the cession, denied having signed any cession document. On the basis of all the afore-mentioned factors, I find it more probable that the disputed signature is not the plaintiffs signature." [Paragraphs 41]

"The plaintiff came across as an honest and credible witness and his version bore no material contradictions. In my view, the probabilities in this case are overwhelmingly in favour of the plaintiff. … I therefore find that as at the time of the deceased's death the plaintiff was still the owner and sole beneficiary of the policy. As such, the proceeds of the policy ought to have been paid to him and not to the estate of the deceased." [Paragraph 44]

The special plea was dismissed and the plaintiff's claim was allowed.

CIVIL PROCEDURE

HARRIELALL V UNIVERSITY OF KWAZULU-NATAL [2017] ZASCA 25

Case heard 16 February 2017, Judgment delivered 27 March 2017

Appellant had sought an order directing the respondent to admit her into the first year of study for the MBChB degree, for the academic year of 2016. On appeal, appellant abandoned the previous grounds relied upon, and a new ground was advanced for the first time on appeal which had not been contained in the founding affidavit. For this reason, the majority, Swain JA and Mbatha AJA (Cachalia JA and Gorven AJA concurring), held that the appeal was dismissed with costs.

Molemela AJA agreed that the appeal must fail, and whilst agreeing that the Biowatch principle was not applicable, disagreed on the costs order:

'...The nature of the right the appellant was seeking to protect is another important consideration. Her litigation was not in pursuit of a commercial interest; rather it was in a bona fide pursuit of admission to her preferred field of study. In the broader scheme of things, her litigation was about access to education. Moreover, it was not based on spurious grounds, as the respondent had previously admitted under-graduates on the strength of the provisions of clause 3a of Annexure D.' [Paragraph 26]

'Having considered all the facts of this case, I am of the view that mulcting the appellant with costs may discourage those who may legitimately wish to challenge the respondent's policy on other grounds. This may have an unintended chilling effect on access to justice. Such an order would militate against the 'just and equitable' remedy envisaged in Section 8(1)(f) of the Promotion of Administration Justice Act 3 of 2000, which dictates that costs be determined in a manner that is fair to both parties. For all the reasons alluded to above, I am of the view that there are special circumstances that justify a departure from the general rule that costs must follow the event. I would therefore make no order as to the costs of the appeal.' [Paragraph 29]

Swain JA wrote a separate judgment responding to the judgment of Molemela AJA :

'I disagree with the conclusion that 'mulcting the appellant with costs may discourage those who may legitimately wish to challenge the respondent's policy on other grounds. This may have an unintended chilling effect on access to justice'. No other grounds were raised by the appellant as a basis for challenging the respondent's policy. The concern raised is not based on any evidence and amounts to unjustified speculation.' [Paragraph 37]

An appeal on costs was upheld by the Constitutional Court in **Harrielall v University of KwaZulu-Natal (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (31 October 2017).** The court held that the Biowatch principle should have been applied in determining costs, and criticised the High Court and the SCA for departing from the Biowatch principle [paragraphs 10 – 11]. No order as to costs was accordingly made.

CRIMINAL JUSTICE

S V PILANE [2017] ZASCA 71; 2017 (2) SACR 154 (SCA)

Case heard 3 May 2017, Judgment delivered 1 June 2017

The respondent had been convicted of rape in the regional court, and sentenced to 10 years' imprisonment. On appeal, the high court found that insofar as the oath taken by the three witnesses for the state was administered by the interpreter and not the judicial officer, it had been done irregularly. It found the evidence of such witnesses to be unsworn and therefore inadmissible. It held that by allowing the court interpreter to administer the oath, the regional court had committed an irregularity that vitiated the proceedings. It consequently set aside the conviction and sentence.

Molemela AJA (Cachalia and Wallis JJA and Gorven and Mbatha AJJA concurring) held:

'Where a witness testifies through the interpreter, the interpreter is empowered to administer the oath if the judicial officer so prefers and if the interpreter does so in the presence or under the eyes of such judicial officer. In doing so, judicial officers are not abdicating their responsibilities; they are doing what is permissible in terms of the CPA. The phrase 'in the presence or under the eyes of the presiding judge or judicial officer' reflects the legislature's intention to ensure that the process unfolds under the observation of the judicial officer. As correctly mentioned in S *v Mahlaba & others*, s 165 complements s 162 by extending the authority to administer the oath, affirmation and admonition to sworn interpreters and intermediaries, if witnesses that are about to be examined testify through them. The swearing in of witnesses under those circumstances constitutes a proper administration of the prescribed oath.'

In the result, the appeal was upheld and the order of the high court was set aside.

M V S (A229/2013) [2014] ZAFSHC 121

Case heard 4 August 2014, Judgment delivered 8 August 2014

This was an appeal against conviction and sentence for housebreaking with intent to rape and rape. The grounds of appeal were that the court a quo erred by finding that the State proved its case beyond reasonable doubt and specifically insofar as it found (i) that the identification of the rapist by the complainant was reliable, and (ii) that the DNA evidence served as objective evidence corroborating the complainant's version despite the fact that the official who had drawn the appellant's blood sample was not called as a witness.

Molemela J (Wright AJ concurring) held:

"While the prosecution should be criticised for not calling the official who drew the appellant's blood sample as a witness so as to complete the chain evidence in the face of a denial of all allegations, it must be taken into account and is of utmost significance to note that when warrant officer Whelan testified to

having been handed a blood sample bearing the appellant's initial and surname, this was not disputed in any way by the appellant's legal representative. His evidence of his laboratory's rigorous procedures that eliminate a wrong result was also not disputed. Furthermore, it needs to be taken into account that the appellant was adamant that he requested that his blood be drawn for analysis and testified that his blood sample was indeed taken. Another consideration is that from the outset the complaint fingered only the appellant as the perpetrator of the rape and only the appellant was arrested in connection with the complainant's rape. Considering that the DNA of the appellant was found on the vulva swab, it is safe to accept that the appellant's DNA could only have been deposited onto the complainant's private parts through penetration by way of sexual intercourse, an activity that the appellant vehemently denied having engaged in with the complainant. Considering the evidence in totality, it is simply farfetched that the police could have known the real rapist, drawn his blood and then put the name and initial of the appellant on the blood sample. Under the circumstances, the ineluctable inference is that the blood sample was not tampered with and no adverse inference can be drawn from the state's failure to adduce the evidence of the official who drew the blood." [Paragraph 18]

"I am of the view that the circumstances of this case are such that the identification of the appellant as the person who raped the complainant was proven beyond reasonable doubt. There was no bad blood between the complainant and the appellant and they had been cordial to each other on the very day of the rape when the appellant went to fetch his son's jersey. The appellant knew beforehand that the window latch of the pantry at the complainant's home did not lock properly. He was able to confirm this state of affairs when he suggested and facilitated access by a child through the same window." [Paragraph 19]

"The rape of a child is an abhorrent act. It is truly unfortunate that such reprehensible deeds are so rampant in our country. The prevalence of this scourge places a duty on all courts to impose heavy sentences on those who where she was expected to be safe, is another significant aggravating factor. Any civilised society views any form of abuse to its children in a very serious light. The moral blameworthiness of rapists that target children must weigh heavily on the minds of the sentencing courts. … I am satisfied that the only appropriate sentence for the appellant is a lengthy custodial sentence." [Paragraphs 23-24]

The appeal against conviction was dismissed. The appeal against the sentence was upheld and the sentence substituted with a sentence for 22 years.

S V NYATHI (262/2013) [2013] ZAFSHC 200

Judgment delivered 7 November 2013

This was a case for special review under section 304(4) of the Criminal Procedure Act. The accused, an 18 year old Malawian national, was charged with contravention of section 49(1)(a) of the Immigration Act in that he entered and remained in the Republic of South Africa without a valid passport or permit. He was also charged with the attempted theft of vouchers valued at R200.00. The accused pleaded guilty and was duly convicted by the court a quo. The two offences were taken together for purposes of sentencing and the accused person was sentenced to four months' imprisonment. The court a quo further ordered that after serving his sentence, the accused person be deported to his country of origin. The trial

magistrate referred the matter to the High Court on special review. The sentence had been imposed two years previously and the accused had since been deported.

Molemela J (Lekale J concurring) held:

"The Immigration Act … provides that a person who has contravened section 49(1) thereof shall, on conviction, be liable "to a fine or to imprisonment not exceeding three months". I agree that in imposing a heavier sentence than the one stipulated in that Act, the court a quo acted ultra vires and imposed an incompetent sentence that falls to be set aside. It is indeed a pity that the incompetent sentence was only detected well after the sentence was served in full. According to the learned magistrate, the error was only discovered at an inspection that took place two years after finalisation of the matter. This case demonstrates how failure to conduct inspections on a regular basis or failure to have internal quality control measures in place can defeat their purpose and impact negatively on the rights of accused persons. It is a regrettable state of affairs. It is hoped that quality control inspections will be conducted more regularly in future." [Paragraphs 4]

"… I am of the view that the offences committed by the youthful accused person in this particular matter … clearly do not fall in the category of serious offences. Their prevalence does not, in my view, elevate them to the category of serious offences. The circumstances of this case thus cried out for the rehabilitation objective of sentencing to come to the fore. Instead, the court a quo sacrificed the accused person's personal circumstances at the altar of deterrence and failed to individualise his sentence. The zeal to send a message that commission of a particular sentence will not be tolerated must never be allowed to supersede the discretionary sentencing powers of imposing a sentence that fits the offence, serves the interests of society and is fully cognisant of the accused person's mitigating factors." [Paragraphs 10]

"I also noted that in the process of sentencing the accused, the court a quo stated as follows: "He [accused] was also found guilty of a very serious offence of attempted theft, there at Sindalowitch where he attempted to steal voucher papers and that is another problem with illegal immigrants in this country. It happens quite often that they are the persons being arrested for crimes being committed in this country, just like the accused." These remarks are rather unfortunate. In the first place, attempted theft of vouchers valued at R200.00 does not warrant being classified as a serious offence. Secondly, without any statistical backing, the general remark that illegal immigrants "quite often" commit crimes in this country is as unwarranted as the harsh sentence that was imposed on this young accused person." [Paragraphs 13]

"…It cannot be denied that members of the community have, at various forums, verbally expressed their frustrations about what they perceive as the state's shortcomings in addressing the problem of the presence of illegal immigrants in this country. The community expects the state to deal decisively with the matter. The judiciary, as one of the arms of the state, needs to do its part. It can only do so by imposing appropriate sentences that are dictated to by the facts of each case. I agree that any sentence that is imposed must, of necessity, be coupled with an order of deportation. Such orders, coupled with effective use of state resources to curb entry of illegal immigrants into the country will significantly reduce the prevalence of this offence." [Paragraphs 15]

The conviction on both counts was upheld and the sentence was set aside and replaced with a fine of R600.00 or one month's imprisonment, wholly suspended for two years on condition that the accused

was not again convicted of contravention of section 49(1)(a) of the Immigration Act or any offence with an element of dishonesty committed during the period of suspension.

CUSTOMARY LAW

RASELLO V CHALI AND OTHERS, CHALI AND OTHERS V RASELLO AND OTHERS (A69/2012, 683/2011) [2013] ZAFSHC 182

Case heard 16 September 2013, Judgment delivered 24 October 2013

The first to fifth respondents, applicants in the court a quo, sought an order setting aside an alleged customary marriage entered into on the 19th March 2005 between the late David Masakale Chali, who died on the 23rd of May 2005, and the appellant. They further sought an order for the removal of the 6th respondent as executor of the deceased estate. The first respondent was the mother of the deceased and the third, fourth and fifth respondents the children of the deceased. The second respondent was previously married to the deceased, but they were divorced on the 20th May 2002. Her interest in the application related to the unfinalised administration of the joint estate which subsisted between her and the deceased prior to their divorce. The appellant, first respondent in the court a quo, together with the executrix of the estate (7th respondent) opposed the application on the basis that she and the deceased had entered into a valid customary union.

Molemela J (Ebrahim and Van Zyl JJ concurring) held:

"For a union to be regarded as a customary marriage, it must be concluded in accordance with custom. One of the important elements that distinguish a customary marriage from a common law marriage is that the former establishes marital bonds between the family of the bride and the family of the groom whereas the latter establishes bonds of marriage between the groom and the bride only. The ceremony referred to by the appellant, having taken place before payment of lobola and without the involvement of the appellant's family, is in my view not in conformity with custom and does not enjoy customary recognition. In Fanti v Boto … the court found, correctly in my view, that "it is totally inconceivable and in fact impossible for only one side of the two families to be involved in these ceremonies"." [Paragraph 16]

"… [T]he appellant made no averments whatsoever to counter the respondent's contention that there was no delivery of the bride as required by custom. In my view, the appeal could thus be dismissed on this basis alone. To the extent that the ceremony that allegedly took place in Lesotho may be regarded as some challenge to the respondent's averments pertaining to the delivery of the bride, then that challenge was on the basis of clearly untenable and far-fetched assertions that warranted rejection on the papers. This view is based on the fact that on the appellant's own version, the ceremony in question occurred in April 2002, approximately a year before lobola was allegedly paid. As lobola had not yet been paid, logic dictates that there could not have been any makoti (bride) to talk about at that stage, let alone to deliver or to "introduce". A ceremony held before payment of lobola thus cannot constitute delivery of the bride as this is not in conformity with custom." [Paragraphs 17]

The appeal was dismissed with costs.

JUDGE ASHTON SCHIPPERS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 19 June 1958

BProc, UNISA (1982)

LLB, UNISA (1986)

LLM, UCT (1988)

LLM, Harvard (United States) (1991)

CAREER PATH

AJA

Judge, Western Cape High Court (2013 -)

Advocate (1993 – 2012)

Senior Associate, National Centre for Dispute Resolution (1992 – 1993)

Attorney, Fulbright & Jaworski Attorneys, Washington D.C. (1991 – 1992)

Attorney, Fairbridges Attorneys (1989 – 1990)

Magistrate, Department of Justice (1987 – 1988)

Prosecutor, Department of Justice (1986 – 1987)

Articled clerk, Bester, Cooper, Grove & Wolfaardt (1985 – 1986)

Articled clerk, Buchanans Inc (1983 – 1984)

Cape Bar Council

Chairperson (2005, 2006)

Vice chairperson (2004)

Member, Advocates for Transformation, Western Cape (1999 – 2012)

Member, New York Bar (1996 – present [as per form])

Assistant, school of ministry, legal advisor, Baptist Union of South Africa (2000 -)

Legal Advisor, Church of Englang in South Africa (2010 -)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

SCALABRINI CENTRE, CAPE TOWN AND OTHERS V MINISTER OF HOME AFFAIRS AND OTHERS (1107/2016) [2017] ZASCA 126 (29 SEPTEMBER 2017)

Case heard 4 September 2017, Judgment delivered 29 September 2017

This case challenged the decision by the Director-General of the Department of Home Affairs to close the Cape Town Refugee Reception Office. The issue was whether the decision was unlawful and thus reviewable.

Schippers AJA (Cachalia, Majiedt and Saldulker JJA and Lamont AJA concurring) held:

"The above provisions of the Act point to the need to establish and maintain a functional refugee reception office. They also show that an asylum seeker must repeatedly report to the refugee reception office to exercise his or her rights under the Act. Indeed, it is common ground that an asylum seeker must report to a refugee reception office to obtain and renew a s 22 permit; to be interviewed by a refugee status determination officer; to collect the decision on his or her application for refugee status; to lodge an appeal to the Refugee Appeal Board; and to attend the hearing and collect the decision of the Board." [Paragraph 26]

"The appellants accept, as they must, that the question whether a refugee reception office is necessary for achieving the purposes of the Act is quintessentially one of policy. ..." [Paragraph 27]

"Thus, a decision to close a refugee reception office in terms of s 8(1) of the Act constitutes executive rather than administrative action, and is not subject to PAJA." [Paragraph 28]

"In exercising his s 8(1) power, the Director-General is nevertheless constrained by the constitutional principle of legality, namely that 'the exercise of public power is only legitimate where lawful'. ..." [Paragraph 29]

"As to rationality, the first question is whether the Cape Town Refugee Reception Office was necessary when the Director-General decided to close it. Section 8(1) of the Act requires the Director-General to establish as many refugee reception offices as are 'necessary for the purposes of [the] Act'. This implies the power to disestablish a refugee reception office, as long as the Director-General acts rationally in determining that the relevant office is no longer necessary for purposes of the Act." [Paragraph 31]

"As the Constitutional Court has explained, a failure to take into account relevant considerations in the process of making a decision can render it irrational where: (1) the factors ignored are relevant; (2) the failure to consider the material concerned is rationally related to the purpose for which the power was conferred; and; (3) ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational." [Paragraph 51].

"This is such a case. The Director-General ignored relevant considerations, rendering his decision irrational. He also failed to properly consider whether the Cape Town Refugee Reception Office was necessary for the purposes of the Act as contemplated in s 8(1), and thus failed to comply with the empowering provision." [Paragraph 52]

"This Court has said that in order to be rational, a decision must be based on accurate findings of fact and a correct application of the law. The Director-General wrongly took the position that satellite offices were impermissible under the Act, and thus made an error of law." [Paragraph 59]

"I turn now to consider whether the impugned decision should be set aside because it is tainted by an ulterior purpose. ..." [Paragraph 60].

"The Director-General plainly exercised the s 8(1) power for a purpose contrary to that for which it has been given. The touchstone for the exercise of the power to establish or disestablish a refugee reception office is whether it is necessary for purposes of the Act. First, the disestablishment of the Cape Town Refugee Reception Office - which was and is necessary - in order 'to restrict access to RROs in urban areas' constitutes the exercise of a power for an impermissible purpose. In so doing the Director-General misconstrued the s 8(1) power and for this reason also, his decision is reviewable. Second, the denial of access to a refugee reception office to 23% of genuine asylum seekers (and consequently, denying them economic opportunities in Cape Town), is not only the exercise of a power for an ulterior purpose, but simply arbitrary. And third, the Director-General cannot cut across the provisions of the Act relating to the determination of refugee status, and restrict benefits which the lawgiver has conferred on asylum seekers, by closing the Cape Town Office. Regardless of the merits of their application, all asylum seekers are entitled to a s 22 permit which entitles them to live, work, study and receive public healthcare in this country, while their claim for refugee status is being determined. This is subject only to the power of the Standing Committee to set conditions relating to study or work of asylum seekers. No such conditions have been set in this case." [Paragraph 62]

"The reason that very few asylum seekers enter South Africa in Cape Town rather than through the northern borders of the country, which, the Director-General says, 'militates against

reopening/maintaining a fully functional RRO in Cape Town', is likewise unsustainable. It is inconsistent with the statutory scheme. ..." [Paragraph 63]

"It is true that courts should afford appropriate deference to executive and administrative decisions, which involves a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative (and executive) agencies. However, judicial deference within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution: courts are responsible for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated and effective remedies are provided for violations of the Constitution." [Paragraph 67]

"In my opinion, given that the impugned decision is substantively irrational and unlawful, the only effective remedy is an order directing the first to third respondents to maintain a fully functional refugee reception office in or around Cape Town for the following reasons. First, asylum seekers and refugees have been prejudiced by the closure of the Cape Town Refugee Reception Office since June 2012 - more than five years. Second, the impugned decision is substantively irrational and unlawful, as opposed to *Scalabrini 1* where the decision was procedurally irrational. Third, an order remitting the impugned decision to the Director-General for reconsideration is likely to be ignored, as happened in the case of the Crown Mines Refugee Reception Office, where, six years later, there has been no compliance with the order to reconsider the decision to close that Office. Finally, the order is identical to that granted in *Somali Association*, save that the respondents have been given more time to reopen the Cape Town Refugee Reception Office, and the office may be located outside of Cape Town in an area accessible by public transport. ..." [Paragraph 71]

The appeal was upheld.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

DEMOCRATIC ALLIANCE V SOUTH AFRICAN BROADCASTING CORPORATION LIMITED AND OTHERS 2015 (1) SA 511 (WCC)

Judgment delivered 24 October 2014

The applicant applied for an urgent interdict directing the immediate suspension of the chief operations officer of the SABC pending the finalisation of disciplinary proceedings and review of decisions by the board and minister to recommend and confirm his appointment. The application was based on the findings and recommendations of remedial action by the Public Protector. The main issue was whether such findings and remedial action were binding and enforceable.

Schippers J held:

"... The powers and functions of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear and determine causes. The Report itself states that in the enquiry as to what happened the Public Protector relies primarily on official documents such as memoranda and minutes, and less on oral evidence. In the enquiry as to what should have happened the Public Protector assesses the conduct in question in the light of the standards laid down in the Constitution, legislation, and policies and guidelines." [Paragraph 50]

"Further, unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of state. If it was intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so. Instead, the power to take remedial action in s 182(1)(c) of the Constitution is inextricably linked to the Public Protector's investigatory powers in s 182(1)(a). Having regard to the plain wording and context of s 182(1), the power to take appropriate remedial action, in my view, means no more than that the Public Protector may take steps to redress improper or prejudicial conduct. But that is not to say that the findings of the Public Protector are binding and enforceable, or that the institution is ineffective without such powers." [Paragraph51]

"The wide powers of investigation …and the power to take remedial action in s 182(1)(c), illustrate both the flexibility and effectiveness with which the institution can operate by comparison to more traditional institutions of dispute resolution, such as courts. The functions of the Public Protector include identifying instances of maladministration – a much looser and malleable concept than strict legal tests applied by courts. And a maladministration test is more relevant to the grievances of the complainant, and offers the potential of real and relevant outcomes - as illustrated by the facts of this case." [Paragraph 52]

"The Public Protector's investigative role in addressing citizens' complaints about public sector administration means that the complainant is not required to put together a case against a public official or body. The Public Protector simply investigates the complaint to determine whether it is valid and requires redress. This process has many procedural and cost advantages for the complainant, and gives effect to the constitutional requirement that proportionate and accessible redress mechanisms are made available to citizens - hence the power to take appropriate remedial action." [Paragraph 53]

"The Constitutional Court has said that the office of the Public Protector is modelled on the institution of the ombudsman. This, I think, is significant for two reasons. First, as in the case of ombudsmen who operate independently of the executive and public authority more generally, the Public Protector is independent and subject only to the Constitution and the law. Second, and in contrast to their investigatory powers, ombudsmen ordinarily do not possess any powers of legal enforcement." [Paragraph 55]

"However, the fact that the findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these findings and remedial action are mere recommendations, which an organ of state may accept or reject." [Paragraph 59]

"It seems to me that before rejecting the findings or remedial action of the Public Protector, the relevant organ of state must have cogent reasons for doing so, that is for reasons other than merely a preference for its own view. …" [Paragraph 66]

"There can be no question that a decision whether or not to accept the findings or remedial action of the Public Protector constitutes the exercise of a public power. Rationality is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. It is a requirement of the principle of legality that decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary." [Paragraph 71]

"There are no grounds, let alone rational grounds, for the Board's decision to reject the Public Protector's findings and remedial action." [Paragraph 78]

"In the light of the Minister's reasons for permanently appointing Motsoeneng as the COO, the question then arises whether, in the circumstances, her decision to reject the findings and remedial action of the Public Protector and prefer her own view, is rational. In my judgment, it is not." [Paragraph 82]

"The conduct of the Board and the Minister in rejecting the findings and remedial action of the Public Protector was arbitrary and irrational and consequently, constitutionally unlawful. They have not provided cogent reasons to justify their rejection of the findings by the Public Protector of dishonesty, maladministration, improper conduct and abuse of power on the part of Motsoeneng." [Paragraph 83]

"… I consider that an effective, just and equitable order is one directing the Board to institute disciplinary proceedings against Motsoeneng as contemplated in paragraph 11.3.2.1 of the Report." [Paragraph 88]

"In these circumstances, and in the light of the allegations of abuse of power in the Report, in my opinion there can be no doubt that it is just and equitable that Motsoeneng should be suspended, pending finalisation of disciplinary proceedings to be brought against him. Good administration of the SABC, and openness and accountability, demand his suspension." [Paragraph 97]

CIVIL PROCEDURE

KLD RESIDENTIAL CC V EMPIRE EARTH INVESTMENTS 17 (PTY) LTD 2017 (6) SA 55 (SCA)

Case heard 9 May 2017, Judgment delivered 6 July 2017

The issue in this case was whether an acknowledgment of indebtedness by a debtor, embodied in a letter written for the prupose of settling litigation, and thus 'without prejudice', may nonetheless be admitted in evidence for the limited purpose of showing that the period of prescription has begun to run afresh in terms of s 14 of the Prescription Act. The majority, per Lewis JA (Tshiqi and Mbha JJA and Fourie AJA concurring) held that it could.

Schippers AJA dissented:

"In my opinion such an exception would negate the without prejudice rule, which operates to encourage parties to a dispute to settle their differences amicably in full and frank discussions, and 'to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.'" [Paragraph 43]

"… In my view, to allow an admission against interest of the kind sought … would fly in the face of the underlying rationale for the without prejudice rule, and would create legal and practical uncertainty. Viewed objectively, as it must be, the Letter plainly was a without prejudice offer of compromise to bring an end to the litigation that Empire instituted, and to avert future litigation by KLD. That is precisely why Empire acknowledged that KLD was entitled to commissions. The protection of this acknowledgment is the most important practical effect of the without prejudice rule." [Paragraph 72]

"The necessity of admitting certain facts so as to achieve a compromise and the practical difficulty of admitting in evidence those facts, is illustrated by this very case. What of the remaining content of the Letter, if the acknowledgment of liability for commissions were to become admissible in evidence? Could it exist independently of the acknowledgment? I think not. The acknowledgment has a direct bearing on the subject matter in dispute. It cannot be detached from the offer of compromise in the last paragraph of the Letter. Indeed, the Letter is meaningless without the offer of compromise of which the acknowledgment of liability forms an integral part. It seems to me that on any view, the acknowledgments in paras 2 and 4 of the Letter that KLD was entitled to commissions, as was held in *Naidoo*, '. . . were not merely reasonably incidental to . . . settlement negotiations, they were actually

part of them.'; and cannot be said to be unconnected with, or to fall outside the ambit of, the offer of compromise in the Letter. It should therefore not be admissible in evidence against Empire." [Paragraph 74]

"What all of this shows, is the practical difficulty that arises when dissecting out identifiable admissions from without prejudice communications. But it also shows that to do so, particularly in the circumstances of this case, would render the operation of the without prejudice rule nugatory and meaningless." [Paragraph 77]

"… the Letter was a bona fide attempt to compromise the dispute … and to avoid the litigation by KLD, which at that stage had not yet commenced. It contains statements and an offer genuinely made with a view to settling disputes. Had that offer of compromise been accepted, that would have brought an end to Empire's case and KLD would not have brought its claim for commissions. As such, the Letter, in my view, falls under both the public policy and implied agreement justifications for the without prejudice rule: parties are encouraged to settle their disputes out of court; and they impliedly agree to the consequences of offering to negotiate without prejudice - that what they say will not be used against them subsequently." [Paragraph 79]

"This being so, it cannot be suggested that the Letter constitutes some sort of 'abuse' of the without prejudice rule, to justify an exception of the kind sought by KLD. There has been no 'unambiguous impropriety' on the part of Empire, either generally or in claiming the benefit of the rule and by raising prescription. …" [Paragraph 80]

"In these circumstances, I consider that the without prejudice rule should not be restricted to permit KLD to rely on the Letter as an acknowledgment of liability interrupting prescription." [Paragraph 81]

"In my opinion, the recognition of the exception sought would contradict the public policy and contractual foundations of the without prejudice rule. The exception is at odds with the rationale for the rule as expounded in *Naidoo* and by the English courts. I would therefore dismiss the appeal with costs." [Paragraph 94]

BLASTRITE (PTY) LTD V GENPACO LTD 2016 (2) SA 622 (WCC)

Judgment delivered 1 June 2015

The case dealt with the question of whether a demand that a foreign company furnish security for costs constitutes a violation of the right to equality in s 9 of the Constitution.

Schippers J held:

"In deciding whether a party should furnish security, a court has a judicial discretion, having regard to the particular circumstances of the case and considerations of fairness and equity to both the *incola* and the *peregrinus*. The court should not adopt a predisposition in favour of or against granting security, and must carry out a balancing exercise: it must weigh the injustice to the respondent if prevented from pursuing a proper claim by an order for security, against the injustice to the applicant if no security is ordered.**"** [Paragraph 10]

"As to delay, the general rule is that a party is expected to apply expeditiously for security but may seek additional security at any stage, although an unreasonable delay in doing so may be decisive in the exercise of the court's discretion. …" [Paragraph 14]

"The fact that a litigant may have to proceed abroad if it obtains a costs order in its favour, with the associated uncertainty, inconvenience and additional expense which that entails, is one of the fundamental reasons why a *peregrinus* should provide security. The reasons for this approach are not far to seek. The successful party would have to work across thousands of kilometres, instruct lawyers in a country it did not choose and with no connection to the original suit; and it may happen that the expense of recovering its costs may exceed the judgment debt or party-and-party costs. …" [Paragraph 16]

"Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. This means, at the very least, that everybody is entitled to equal treatment by our courts of law; that no one is above or beneath the law; and that all persons are subject to law impartially applied and administered." [Paragraph 23]

"A practice that differentiates between categories of people will violate s 9(1) of the Constitution if there is no rational relationship between the differentiation and a legitimate government purpose. The question as to whether there is unfair discrimination under s 9(3) ordinarily would arise only if there is such a rational relationship. In that event the party challenging the constitutionality of the differentiation must establish that the differentiation constitutes unfair discrimination." [Paragraph 24]

"… [T]he alleged differentiation upon which the applicant relies is irrelevant. The question is whether in terms of the practice, security for costs is required purely on the basis that the litigant is a *peregrinus* which owns no immovable property in this country. The answer is, no. The court has a discretion to order security, and must take into account the particular circumstances of the case and considerations of fairness and equity to both parties. Even before the advent of the Constitution, the Appellate Division in *Magida* held that there was no justification for the principle that a court should exercise its discretion in favour of a peregrinus only sparingly." [Paragraph 28]

"The fact that the practice regarding security treats a *peregrinus* plaintiff differently from an incola plaintiff is not itself a violation of s 9(1) of the Constitution. As was said in *Prinsloo*, it is impossible to govern a modern country or regulate the affairs of its inhabitants without differentiation and without classifications which treat people differently and which impact on people differently. Contrary to the respondent's assertion that the practice violates the right to equality, it does exactly the opposite – its purpose is to ensure equality between litigants. Where a *peregrinus* does not reside or conduct business in South Africa and does not own sufficient assets to satisfy a costs order, it is not at risk on an equal footing with the *incola*or resident party. The practice relating to security for costs thus has the effect of restoring a measure of equality between the parties." [Paragraph 31]

"For the above reasons I am of the opinion that the common law practice in terms of which a non-resident plaintiff who does not own immovable property in this country can be called upon to give security for the costs of a lawsuit, is consistent with the Constitution." [Paragraph 35]

JUDGE IRMA SCHOEMAN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 17 September 1952

BA, University of Pretoria (1973)

LLB, University of Pretoria (1975)

CAREER PATH

Acting Justice of the Supreme Court of Appeal (2013 – 2016)

Judge of the Eastern Cape High Court

- Port Elizabeth (2010 – present)
- Mthatha (2000 – 2010)

Acting Judge of the Labour Court (2003)

Acting Judge

- Eastern Cape High Court (1999 – 2000)
- Free State High Court (1997)

Advocate (1991 – 2000)

Partner, Schoeman Kellerman & Kotze (1982 – 1990)

Professional Assistant, Schoeman Kellerman & Kotze (1979 – 1982)

Articled Clerk, Schoeman Kellerman & Kotze (1977 – 1979)

Public Prosecutor, Department of Justice (1976)

Junior Lecturer, University of South Africa (1975)

Member, Free State Bar Council (1997 – 2000)

Member, Free State Bar (1997 – 2000)

Member, Free State Law Society (1979 – 1990)

SELECTED JUDGMENTS

PRIVATE LAW

SH v EH 2011 (5) SA 496 (ECP)

Case heard 14 October 2010, Judgment delivered 27 January 2011

The issue in this case was whether the defendant, a former husband, was obliged to pay maintenance to the plaintiff, his former wife, who was involved in a relationship with another man, after divorce.

Schoeman J held:

"It is also clear from the wording of s 7(2) of the Divorce Act that the legislature did not determine that maintenance should cease when the person receiving the maintenance is in a relationship akin to a marriage but only on remarriage. It is usually by way of an agreement between the parties that the additional condition relating to the cessation of payment of maintenance on the cohabitation with a third party is added." [Paragraph 31]

'Marriage entails that the parties establish and 'maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another'. One of the effects of marriage is the reciprocal duty of support.' [Paragraph 32]

"I am of the opinion that in the circumstances of this case it cannot be said that it is against public policy that the defendant should be liable to pay maintenance to the plaintiff; there is no legislative prohibition and I find that there is no general public policy to that effect or moral prohibition." [Paragraph 42]

Accordingly, the defendant was ordered to pay R2000 per month towards the maintenance of the plaintiff.

COMMERCIAL LAW

FIRSTRAND BANK LTD V KJ FOODS CC (IN BUSINESS RESCUE) 2017 (5) SA 40 (SCA)

Case heard 26 April 2017, Judgment delivered 26 April 2017.

This appeal concerned the question whether it was reasonable and just, in terms of s 153(7) of the Companies Act of 2008 (the Act) for the High Court (the court a quo) to have set aside a vote by the appellant against the adoption of a business rescue plan in respect of the respondent. The appellant's vote had resulted in the rejection of the plan. The ancillary question that the SCA was called upon to determine was what the consequences were for business rescue proceedings, once the result of such a vote had been set aside.

For the majority, Schoeman AJA (Mpati AP, Theron and Van der Merwe JJA concurring) held:

"Whilst s 153(1)(*a*)(ii) makes provision for a company seeking to be placed under business rescue to apply to a court to set aside 'the result of the vote', s153(7) confers on that court a discretion to order that 'the vote on a business rescue plan be set aside' if it is satisfied that it is reasonable and just to do so, having regard to the factors listed in subsec (7)(*a*) to (c). It is clear from a reading of those factors that the vote that may be set aside is not the entire vote on the business rescue plan, but only the vote exercised against the approval or adoption of the plan. The factors referred to apply only in respect of the person or persons 'who voted against the proposed business rescue plan'. It follows that once the vote against the approval of the plan is set aside the result thereof, namely the rejection of the plan, will be nullified. The difference in the wording of subsecs (1)(a)(ii) and (7) of s 153 is, therefore, of no real consequence." [Paragraph 71]

"It is clear, when taking Firstrand's interests into consideration, that the only negative feature for it would be that it would not be paid its full claim immediately, but payment would be in terms of the contracts entered into between the parties. Therefore, it would still be paid in full albeit, not immediately. Taking all these factors into consideration, being the interests of Firstrand, the employees of KJ Foods CC and other creditors, it is indeed reasonable and just to set aside the vote

against the approval or adoption of the rescue plan in terms of the provisions of s 153(7) of the Act." [Paragraph 85]

Regarding the consequences for business rescue proceedings once the result of such a vote had been set aside, Schoeman AJA held that the contention by Firstrand that the business rescue plan must again be put to the vote at the resumption of the postponed meeting did not result in a businesslike interpretation, for if the creditor who voted against the adoption of the business rescue plan were to vote once more against it, the whole process would start all over again, causing a possible never-ending loop. Schoeman AJA held that the Act clearly does not envisage another round of voting. Therefore, once the result of the vote is set aside the business rescue plan is adopted by operation of law, and no further voting is envisaged. At the resumption of the meeting of creditors, it would only be necessary for the business rescue practitioner to report on the outcome of the application to court. [Paragraphs 88 – 89]

The majority accordingly dismissed the appeal. Seriti JA dissented, holding that on the facts, it was reasonable and just for the business rescue plan to be set aside.

CRIMINAL JUSTICE

TSHOGA V S [2016] ZASCA 205; 2017 (1) SACR 420 (SCA)

Case heard 11 November 2016, Judgment delivered 15 December 2016

This was an appeal against a sentence of life imprisonment imposed for the rape of a ten-year-old girl. Appellant argued that the sentence was shockingly inappropriate, and that he was never warned that he faced a sentence of life imprisonment prior to the commencement of his trial, or during the trial.

On the failure by the trial court to alert the appellant to the provisions of s 51 of the Act, Schoeman AJA (Dambuza JA and Nicholls AJA concurring) held:

"The appellant…had opportunities in five separate proceedings to raise a complaint of possible prejudice in the proceedings: in the regional court after conviction, during two sentencing procedures in the high court and during two appeals to the full court. He failed to do so and only belatedly raised it in this court. He was not ambushed as the charge sheet set out that he was charged with the rape of a ten-year-old girl, which brought the offence within the ambit of s 51(1) … He was convicted of the rape of a girl under 16 years, which is a conviction that attracts the

minimum sentencing regime in terms of the Act. He had effective legal representation throughout the trial until his conviction and the transfer to the high court. Furthermore, he was legally represented during both sentencing proceedings in the high court and in both appeals to the full court. There was no objection in the regional court after his conviction to the fact that the matter was being transferred to the high court and to the prospect of life imprisonment being imposed. He participated fully in the trial and pleaded not guilty. He did not raise any prejudice prior to either of the two sentencing procedures in the high court or raised it in either of the two appeals to the full court. In both sentencing proceedings he knew the consequences of his conviction, as the magistrate informed him that he faced life imprisonment, but he chose not to testify during the sentencing procedures." [Paragraph 23]

Accordingly, the court held that the appellant suffered no prejudice and he did have a fair trial.

On the issue of whether there were substantial and compelling circumstances to impose life imprisonment, Schoeman AJA held:

"I am of the view that there are no substantial and compelling circumstances to deviate from the prescribed sentence. Furthermore, the prescribed sentence would not be unjust, for even if there were no prescribed sentence, life imprisonment, in my view, would have been the appropriate sentence. The appellant's counsel suggested that the sentence should be substituted with a sentence of 25 years' imprisonment. This sentence, however, will not give effect to the gravity of the offence or be fair to the complainant and society at large. I am of the view that a life sentence is the only suitable sentence in the circumstances of this case." [Paragraph 35]

Accordingly, the appeal was dismissed. Bosielo JA (Tshiqi JA concurring) dissented, and would have replaced the sentence with one of 10 years' imprisonment.

S V GR 2015 (2) SACR 79 (SCA)

Case heard 9 September 2014, Judgment delivered 26 September 2014

Appellant was charged in the regional court with the rape of a young girl ,who was 11 years old at the time of the incident. He did not have a legal representative at the time the trial commenced. He was convicted of rape. The provisions of s 51 of the Criminal Law Amendment Act read with part 1 of schedule 2 were applicable, as the victim was under the age of 16 years, and therefore the case was transferred to the high court for sentencing purposes, as life imprisonment is the prescribed minimum sentence. In the Limpopo High Court, the appellant was sentenced to life imprisonment.

The appeal to the SCA, where the accused was legally represented, was against both conviction and sentence. Several grounds of appeal that were raised mainly related to the irregular conduct of the trial.

Schoeman AJA (Cachalia JA concurring), held that it was clear from the record that no indication why and when the appellant supposedly changed his mind and waived his right to obtain legal representation between the date when his rights were explained to him and when the trial commenced. The court further held that it was clear that the trial magistrate did not embark on any inquiry to determine the circumstances that led to the appellant's waiving his right after initially expressly indicating that he wanted legal representation. In order to find that the appellant waived his right to legal representation, the majority held that the state had to prove that the appellant had waived his right in the full knowledge of what he was doing.

"Waiver is a question of fact and the mere say so of the prosecutor, without more, that the appellant has elected to conduct his own defence, was not sufficient to prove that the appellant was aware and fully informed of his right to legal representation and that he was aware and informed that he could have a legal practitioner assigned to him at state expense if substantial injustice would otherwise result. The appellant could only abandon and validly waive his right to legal representation if he had full knowledge of the right that he decided to abandon and therefore make an informed decision. The record does not reflect that the right was fully explained to the appellant and the affidavit of the magistrate who allegedly explained his rights, does not set out that those rights had been fully explained. I should add that the fact that the appellant elected to engage the services of a legal representative prior to the commencement of the trial and again at sentencing stage is indicative that he did not make an informed decision at the stage when he elected to conduct his own defence. I am of the view that the magistrate failed in his duty to properly inform the appellant of his rights in respect of legal representation and the consequences of not exercising those rights. The magistrate did not encourage the appellant to make use of a legal representative, as was required, and the appellant did not validly waive this right, as he was not fully informed of the right. This constitutes a material irregularity." [Paragraph 16]

"A judge or magistrate is not merely an observer but has a duty to prevent unfair questioning of an accused. This obliges a magistrate to stop a prosecutor from asking unfair questions and putting incorrect statements to an accused, especially if there is no legal representative to object on behalf of an accused….It is unfair to allow cross-examination of an undefended unsophisticated accused on his failure to cross-examine and that should not have been held against him. It is apparent that there

are incongruities and other matters where proper legal representation might have made a difference in the presentation of the appellant's defence.'[Paragraphs 24 - 25]

The majority therefore held that not explaining the appellant's right to legal representation constituted an irregularity. This prejudiced the appellant in the presentation of his case and therefore vitiated the entire trial. The appeal was upheld and the conviction and sentence were set aside. Willis JA dissented, and would have dismissed the appeal.

S V THUNZI; MLONZI V S [2009] ZAECMHC 30; [2009] ZAECMHC 13

Case heard N/A, Judgment delivered 5 August 2009

This matter concerned the constitutionality of section 4 of The Dangerous Weapons Act 71 of 1968 (the DWA), which was only applicable in the jurisdiction of the Eastern Cape High Court, Mthatha (the area of the erstwhile Transkei) but not in the rest of South Africa.

Schoeman J (Miller J concurring) held:

"The preamble of the DWA states that the act is to provide for the imposition of prescribed sentences where dangerous weapons have been used in the commission of offences involving violence. The rationale of the DWA is surely to curb the violence being perpetrated with dangerous weapons by imposing consistent, severe, sentences. However there is no rationale in distinguishing perpetrators in the former Transkei from perpetrators in the rest of South Africa. For example, there is no indication, through crime statistics or otherwise, that violent crime, per capita, in the areas of Libode or Elliotdale (magisterial districts in the former Transkei) is any higher than in the magisterial districts of Cape Town or Johannesburg. There is thus no rationale for applying s 4 to the whole of the former Transkei, just because it was in operation prior to 1994." [Paragraph 40]

'The effect of the discrimination is that all the accused in the erstwhile Transkei are subjected to much harsher punishment that would otherwise have been the case had s 4 of the DWA (Tk) not been in operation.' [Paragraph 41]

The court held that there was no rational reason for s 4 of the DWA (Tk) to be in operation, and the operation should be declared unconstitutional.

JUDGE MOROA TSOKA

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born : 19 April 1956

BProc, University of the North (1981)

LLB, Wits University (1983)

CAREER PATH

Acting Deputy Judge President, Gauteng Local Division of hte High Court, Johannesburg (January – May 2017)

Acting Justice, Supreme Court of Appeal (December 2015 – May 2016, July 2017 – November 2017)

Judge, Gauteng High Court, Johannesburg (2004 -)

Acting Judge, Gauteng High Court, Johannesburg (May 2004) & Pretoria (October – December 2003)

Attorney

MP Tsoka & Partners (1987 – 2004)

Mtetwa Tsoka & Partners (1985 – 1987)

Admitted conveyancer (1992)

Professional Assistant, Sello Monyats Khosa & Partners (1984)

Articled clerk, W Huftel and Klavansky (1983 – 1984)

Clerk, Webber Wentzel (1981)

Member, Black Lawyers' Association (1984 – 2004)

Member, Johannesburg Attorneys' Association (1987 – 2004)

Law Society of the Northern Provinces

Councillor (1993 – 1996)

Chairperson, Property Law Committee (1996)

Member (1984 – 2004)

SELECTED JUDGMENTS

PRIVATE LAW

ODINFIN (PTY) LTD V REYNECKE 2018 (1) SA 153 (SCA)

Case heard 25 August 2017, Judgment Delivered 21 September 2017

The issue was whether an employer, who is a registered financial services provider in terms of the Financial Advisory and Intermediary Services Act, acted wrongfully, in the delictual sense, in debarring an employee who was a representative in terms of s 14 of the FAIS Act without affording him procedural fairness as required by s 3 of the Promotion of Administrative Justice Act (PAJA) and whether such non-compliance entitled the latter to delictual damages.

Tsoka AJA (Bosielo and Petse JJA and Plasket and Rogers AJJA concurring) held:

"The case thus reduces to the question whether administrative action which is procedurally unfair in terms of s 3 of PAJA is delictually wrongful. The answer to that question must turn not on the provisions of the legislation pursuant to which the administrative action was taken (here, the FAIS Act) but on the provisions of PAJA itself. There is nothing in PAJA to suggest that the lawmaker intended there to be a delictual remedy for non-compliance with its provisions in general or its provisions relating to procedural fairness in particular. On the contrary, PAJA deals at some length with the rights of an aggrieved person affected by unfair administrative action, namely judicial review in terms of s 6 and the remedies provided for in s 8. Here Reynecke exercised his right of judicial review and obtained an order setting aside Odinfin's procedurally unfair administrative action. Although the matter was not formally remitted to Odinfin for decision, Odinfin would have been entitled – perhaps obliged – to decide the matter afresh after observing the requirements of procedural fairness." [Paragraph 19].

"The fact that PAJA does not afford a delictual remedy for damages does not necessarily mean that unjust administrative action will not be delictually wrongful if there was a breach of the statute pursuant to which the administrative action was taken and if such statute on a proper interpretation confers a

delictual remedy. In the instant matter, however, Reynecke does not allege that there was a breach of the FAIS Act. And even if there had been a breach of s 14 of the FAIS Act, I do not consider that the FAIS Act envisages a delictual claim for damages. The primary aim of s 14 is not to protect the interests of employed representatives such as Reynecke but to advance the public good. Odinfin had no option but to debar Reynecke once it found him lacking honesty and integrity. The imposition of liability for damages would have a 'chilling effect' on the performance by FSPs of their statutory duty imposed by s 14 and on the administration of the FAIS Act. There is no difficulty in imposing liability where the decision-maker acts dishonestly or corruptly but our courts have been slow to find that statutes accord delictual remedies for mere negligence. Here Reynecke wanted the court a quo to go even further and impose strict liability." [Paragraph 21].

"In the present matter, the interest of the public looms large. It is entitled to know that representatives possess honesty and integrity, otherwise even rogue persons could act as representatives without the public at large knowing. The victims would not only be members of the public but financial institutions as well. A country which allowed rogue persons to act as representatives would be poorer for it. To impose liability for damages for the negligent performance of an administrative function would have a chilling effect on the administration of the FAIS Act." [Paragraph 22].

"I conclude that Odinfin's breach of PAJA did not give rise to a delictual claim for damages. Its actions, in the absence of any allegation or evidence of *mala fides,* were not wrongful." [Paragraph 23].

The appeal was upheld.

BROOKSTEIN V BROOKSTEIN 2016 (5) SA 210 (SCA)

Case heard 26 February 2016, Judgment delivered 24 March 2016

The issue in this case was whether the value of an accrual should be determined, ie, at the close of pleadings, or at the dissolution of the marriage, either by death or by divorce.

Tsoka AJA (Maya AP, Swain JA and Baartman and Kathree-Setiloane AJJA concurring) held:

"The provisions of the MPA are clear and unambiguous. In terms of s 3 thereof, a spouse acquires a right to claim an accrual at the 'dissolution of a marriage'. An exception arises in terms of s 8 of the MPA. In terms of this section, a spouse is entitled to approach the court for immediate division of the accrual, where his or her right to share in it at dissolution of the marriage 'will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse'. It is only then that the date for determination of an accrual is brought forward, instead of at 'dissolution of the marriage'. Furthermore, in terms of s 4 of the MPA the net value of the accrual of the estate of a spouse is determined at the dissolution of the marriage." [Paragraph 16].

"The other problems averted to … which may result from this determination of the date upon which the accrual must be calculated, cannot obscure what is the clear meaning of the Act. As stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality.* 'Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. . .' Consequently, *MB v NB* and *MB v DB* as well as *KS v MS* which held that the date for determination of accrual is at litis contestatio rather than at the dissolution of marriage, were wrongly decided." [Paragraph 20].

The appeal was dismissed with costs.

BOSASA OPERATION (PTY) LTD V BASSON AND ANOTHER 2013 (2) SA 570 (GSJ)

Judgment delivered 26 April 2012

The plaintiff sued the defendants, claiming damages for defamation. The issue was whether the defendant journalists had a valid objection to revealing the identity of their sources.

Tsoka J held:

"In the discovery affidavits, the party making the discovery shall, separately, specify such documents or tape recordings in his possession or possession of his agent or if he or his agent no longer has such documents or tape recordings must state their whereabouts, if known. Such party is, however, in terms of paragraph (b) of subrule (2) not expected to disclose documents or tape recordings to which "he has a valid objection"." [Paragraph 11]

"The crisp issue in the two applications is whether the defendants have a valid objection to revealing the identity of their sources." [Paragraph 13]

"... Freedom of expression as guaranteed under section 16 of the Constitution is thus juxtaposed with the object of discovery and of further particulars." [Paragraph 16]

"It is therefore imperative to determine whether indeed it is so that the plaintiff is entitled to the identity of defendants' sources or not. If so, one should then determine whether section 16 of the Constitution, and the fact that the journalists gave undertakings to their sources that their entity would not be revealed, constitute a valid reason for refusal to reveal such sources." [Paragraph 17]

"Having regard to the authorities cited ... it is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and sine qua non for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded." [Paragraph 38]

"... The sources in the employment of the plaintiff, believing that the department acted in breach of its obligations, supplied the defendants with the information on which the article is based. The revelation of the information, in the view of the sources, is in compliance with the PFMA and the Constitution. This, in my view, is a laudable civic duty expected of every citizen in a democratic society founded on openness and fairness. This civic duty is in the interest of the public and serves the public good in determining whether the Department of Correctional Services lives up to expectations in awarding tenders fairly, equitably, transparently and in the most competitive and cost effective way." [Paragraph 48]

"It is self-evident that the defendants are not entitled to a blanket privilege. In a case where a journalist obtains information concerning the commission or pending commission of a serious crime, it would be foolhardy for a journalist to raise the provisions of section 16 of the Constitution as his defence, in refusing to reveal his/her sources. In the present matter, the sources appear to have acted out of civic duty, to expose, what in their view, constitutes corruption. The sources appear to have acted in the

public interest and for the public good. The right to freedom of the press is limited in terms of section 36 of the Constitution. However, in the present matter, I find no basis to limit such right. Neither did the plaintiff argue for such limitation." [Paragraph 52].

"In the circumstances of this matter I find that the plaintiff has failed to prove that its right to a fair trial has been infringed. On the contrary, to order the defendants to reveal their sources would infringe their freedom of the press. Had it not been the defendants' sources, the public's right to know whether the plaintiff won the tender fairly would never have been known. The public would be poorer for it. The public interest will, in my view, be served by not revealing the identity of the defendants' sources at this stage. The defendants have a valid objection to revealing their sources." [Paragraph 55]

SOCIO ECONOMIC RIGHTS

MAZIBUKO AND OTHERS V CITY OF JOHANNESBURG [2008] 4 ALL SA 471 (W)

Case heard 3 - 5 December 2007, Judgment delivered 30 April 2008

The applicants were residents in a low economy township. They challenged the lawfulness and constitutionality of the respondents' disconnection of their unlimited water supply at a fixed rate and the installation of the prepayment meters; introduction and continued use of prepayment water meters; and the amount of free water of 25 litres per person per month or 6 kilolitres per household per month.

Tsoka J held:

"It is apparent that in the established democracies, prepayment meters are illegal as they violate the procedural requirement of fairness by cutting off or discontinuing the supply of water without notice and representation. Our Constitution enjoins the Courts to consider foreign law to interpret the Bill of Rights. The Constitution further enjoins the Courts in interpreting any provision of any statutory enactment to prefer an interpretation that is reasonable and consistent with the Bill of Rights." [Paragraph 91].

"... [T]he implementation of the prepayment meters with automatic shut off mechanism is both unlawful and unreasonable. The prepayment meters violate the provisions of section 33 of the Constitution read with the provisions of PAJA. In terms of the Constitution and PAJA, everyone has a right to a lawful, reasonable and procedurally fair administrative action. In the present matter, once the allocated basic free water of 25 litres per person per day or 6 kilolitres per household per month is exhausted, the prepayment meter automatically shuts off, until the consumer activates it with the purchased tags for the supply of additional water. If the consumer has no money, he/she will have no water until the next allocation. In the case of the present applicants, the 6 kilolitres per household per month cannot sustain them for a month. The 6 kilolitres lasts until about the 15th of each month. For the remainder of the month, they survive without water as they are unable to purchase more water credits for additional water as they are unemployed and have no other source of income other than the State pension or grant which they receive monthly." [Paragraph 92].

"The prepayment meters discriminate between the applicants and other residents within the municipality of the City. While other residents of the City for example Sandton, get water on credit from the respondents, the applicants do not. If the residents of Sandton, a wealthy and formerly white area,

served by the respondents, fell in arrears with their water bills, they are entitled to notices in terms of By-law 9 before their water supply is cut off. Moreover, they are given an opportunity to make arrangements with the respondents to settle their arrears. Before their supply is cut off, they are not only afforded reasonable opportunity to settle the arrears, but are afforded a reasonable opportunity to make representations concerning the arrears and settlement thereof. The applicants, the residents of Phiri, a poor and predominantly a Black area, are denied this right. This is not only unreasonable, unfair and inequitable, it is also discriminatory solely on the basis of colour. …" [Paragraph94].

"The City derived its authority to set conditions for the provision of water through its by-laws. What is undisputed is that the conditions set by the by-laws must be fair and equitable. A consumer must be given a reasonable notice of the provider's intention to limit or discontinue water services. Furthermore, no consumer is to be denied access to basic water services for non-payment where such a person proves to the relevant water services authority that he/she is unable to pay for the services. It is therefore of crucial importance to scrutinize the terms and conditions to limit or discontinue the water supplies to determine whether the terms and conditions comply with the provisions of section 4 and in particular subsection 3. If the terms and conditions do not comply, they lack legality and they have no source in law." [Paragraph 117].

"The various policies adopted to alleviate the plight of the applicants and all other residents of Phiri appear irrational, particularly if the Court has regard to the reasons for the Mayoral Committee in-principle approval of 18 October 2007. The policies are unreasonable as they are inflexible. Although they appear attractive, they are less attractive if subjected to closer scrutiny. On face value the policies sound reasonable, however their reasonableness can only be tested in the implementation thereof. Pending the envisaged implementation of the revised Social Package in July 2008, the residents of Phiri are not in a better position that they were on 14 June 2002 when the Special Cases Policy was first introduced." [Paragraph 148].

"The Constitution guarantees equality. It is therefore inexplicable why some residents of the City are entitled to water on credit plus free allocation of 25 litres per person per day or 6 kilolitres per household per month yet the people of Phiri, such as the applicants, are denied water on credit. In spite of the fact that they are poor, they are expected to pay water before usage. Their counterparts, who are affluent and mainly in rich and white areas, irrespective of how much water they use, are entitled to water on credit. The differentiation, in my view, contravenes the right to equality." [Paragraph151].

"To deny the applicants the right to water is to deny them the right to lead a dignified human existence, to live a South African dream: To live in a democratic, open, caring, responsive and equal society that affirms the values of dignity, equality and freedom. The denial would perpetuate the decades long poverty, deprivation, want and undignified existence of the recent past. The Bill of Rights guaranteed in the Constitution would, as a result of the denial, remain a distant mirage of unfulfilled dream. The denial is unconstitutional and therefore unlawful." [Paragraph 160].

"To expect the applicants to restrict their water usage to compromise their health by limiting the number of toilet flushes in order to save water, is to deny them the right to health and to lead a dignified lifestyle. It is common cause that the people suffering from HIV/AIDS need more water than those not afflicted by the illness. Such persons require water regularly to wash themselves, drink, wash their clothes, and cook. Their caregivers are also constantly expected to wash their hands. In this context waterborne sanitation is a matter of life and death. In this context the 25 kilolitres per person per day is woefully insufficient." [Paragraph 179].

This case was successfully appealed. The Constitutional Court held in **Mazibuko and Others v City of Johannesburg and Others (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009)** that neither the Free Basic Water policy nor the introduction of pre-paid water meters in Phiri constituted a breach of section 27 of the Constitution.

Patrick Bond in his article **"Water Rights, Commons and Advocacy Narratives"** ***SAJHR*** **(2013) 29**, indicated that the hope from the judgment was that "Tsoka had begun a new era of ecological, rational and more egalitarian water provision. However, 11 months later, the Supreme Court judgment ordered, whimsically, a decline in free water available per person from 50 litres each day to 42, if the consumer can prove household 'indigency.'"

D McKinley contended in his article **"Water Struggles from Johannesburg and Beyond" (June 2008) (**http://aidc.org.za/water-struggles-johannesburg-beyond/**)** that "While the judgement has already been appealed by the respondents, and will most probably go all the way to the Constitutional Court, this does not detract from the political and social significance of this victory. It is a case which does not only have applicability to South Africa but which, by its very character, enjoins the attention and direct interest of billions of poor people around the world who are suffering under neo-liberally inspired water policies, alongside the governments that are implementing such policies and their corporate allies who seek to turn water into nothing less than another profit-making stock market option."

In her article, **"Current Developments. Rights, Regulation and Resistance: The Phiri Water Campaign" (2008) 24** ***SAJHR***, Jackie Dugard indicated that the judgment was a victory, "For the water campaign activists, this resource is the substantial legitimacy derived from legal authority, which I suspect will continue to empower and shape struggles for water in Phiri and beyond." She contended that the case "played a fundamental role in reinvigorating water-related struggles around the country. … It has also provided erstwhile sceptics with a platform for viewing at least some manifestations of the law as potentially progressive. Indeed, Mazibuko has quickly achieved almost mythical status and the effects of the judgment continue to reverberate in unanticipated ways."

JUDGE JEROME MNGUNI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 11 February 1964

Bachelor of Laws (B Juris), University of Zululand (1987)

Bachelor of Laws (LLB), University of Zululand (1991)

Certificate in Legislative Drafting, University of Johannesburg (2005)

CAREER PATH

Assistant Manager, Nongoma Hardware (1988 - 1989)

Legal Advisor at Centre for Legal Services, University of Zululand (1990 – 1991)

Article Clerk, Msimang, Rutsch & Co. (1992 – 1994)

Professional Assistant, Msimang, Rutsch & Co. (1994 – 1995)

Professional Assistant, Shepstone & Wylie Tomlinson Attorneys (1995 – 2004)

Director, Shepstone & Wylie Tomlinson Attorneys (1999 – 2004)

Director, Tomlinson, Mnguni James (2004 – 2008)

Acting Judge, High Court of South Africa, KwaZulu Natal (Apr, May and Sept 2007, Aug, Oct and Nov 2008)

Judge, High Court of South Africa, KwaZulu Natal (Jan 2009 – to date)

Acting Deputy Judge President, High Court of South Africa, KwaZulu Natal (Jan 2016 – 30 Apr 2016)

KWAZULU NATAL LAW SOCIETY

Member (1994 – 2008)

BLACK LAWYERS ASSOCATION

Member (2004 – 2008)

SHEPSTONE & WYLIE TOMLINSON

Executive Committee Member (2000 -2004)

TOMLINSON MNGUNI JAMES

Executive Committee Member (2004 -2008)

HIGH COURT OF SOUTH AFRICA, KWAZULU NATAL DIVISION

Appointment of Acting Judges Committee Member (2010 – Jan 2012)

HIGH COURT OF SOUTH AFRICA, KWAZULU NATAL DIVISION

Human Resources Management Committee Member (2010 – to date)

HIGH COURT OF SOUTH AFRICA, KWAZULU NATAL DIVISION

Interpreters' Committee Member (2010 – to date)

ROMAN CATHOLIC CHURCH – ST. VINCENT PARISH

Parish Pastoral Council Chairperson (2017 – to date)

Member (2014 – to date)

RULES BOARD FOR COURTS OF LAW

Member (2006 – 2008)

SELECTED JUDGMENTS

COMMERCIAL LAW

HOSKEN CONSOLIDATED INVESTMENTS LTD & ANOTHER V THE COMPETITION COMMISSION (154/CAC/SEPT17)

Case heard 2 October 2018, Judgment delivered 30 October 2018

Hosken Consolidated Investments (HCI) shared control of Tsogo Sun Holdings Ltd with SABMiller plc. When the latter decided to divest from Tsogo, HCI notified the Competition Commission of its intention to acquire sole control of the entity, and that it anticipated itself surpassing a 50% holding thereof. The approval was granted. Although HCI's shareholding ended up reaching only 47.5%, it nevertheless exercised de facto control over Tsogo. It then decided it would consolidate and restructure its gaming interests by integrating one of its separately-owned subsidiaries into Tsogo, which would result in boosting its shareholding past the 50% mark. HCI maintained transparency by approaching the Commission to enquire whether notification would be required for the proposed transaction, which would see its shareholding increase over 50%, but would not in reality effect the nature of its control over the entity, given that it already boasted sole control.

The Commission responded with an advisory opinion averring that notification was imperative. Aggrieved by the Commission's stance, HCI approached the Tribunal for a declaratory order stipulating that the transaction was not notifiable. The Commission challenged HCI's application on the grounds that advisory opinions ought not to be challengeable via litigation. It stressed that HCI would effectively circumvent the investigative process if it were to be awarded the relief it sought. The Tribunal found that it did not have jurisdiction to entertain the matter. In view of the advisory opinion's non-binding nature, there could not be said to be a 'live dispute' between the parties.

HCI then appealed to the CAC, where Mnguni AJA and Victor AJA, in a co-written judgment, found that the transaction was not notifiable, and did not require further scrutiny from the competition authorities:

"…The Tribunal contends that, despite the fact that the Tribunal had previously made orders relating to a determination of whether a transaction constitutes a merger, this did not apply to advisory

opinions of the Commission. It applied to mergers where there has already been notification to the Commission. In our view this conclusion by the Tribunal is a misdirection." [paragraph 24]

"Ordinarily the High Court would, but for the exclusive jurisdiction provisions contained in the Act, have the power to grant the declaratory relief sought in this application. It therefore follows that a party who seeks declaratory relief regarding the notifiability of a transaction under the Act would not be able to approach the High Court for such relief. The only body that HCI and Tsogo can approach for such declaratory relief is the Tribunal and, on appeal, this court… [I]f this court were to endorse the Tribunal's finding that it did not have the power to grant declaratory relief…[i]n the circumstances, this will result in an untenable situation where a party will be deprived of their right to access to courts enshrined in s 34 of the Constitution." [paragraph25]

"…HCI and Tsogo have a legal interest in the declaratory relief as it relates to whether there is a legal obligation to notify the competition authorities about the proposed transaction. There is a live dispute between the appellants and the respondent regarding the notification of the transaction. There is legal uncertainty and the Commission has already indicated a set intention that the transaction is a notifiable merger." [paragraph 34]

"We are of the view that it is significant that HCI did command majority votes of Tsogo." [paragraph 41]

"The grant of a declaratory order in this kind of case must be considered very carefully. The power should be exercised sparingly, lest the investigative powers of the Tribunal be undermined. But this case is one of those rare exceptions. As already stated, it is common cause that HCI was granted approval to, and did in fact, acquire sole control of Tsogo following the 2014 merger approval… There is no further acquisition of establishment of control that is brought about by its acquisition of over 50 percent of the shares of Tsogo within the meaning of s 12(2)(a) of the Act and this is a further implementation of an existing sole control structure which was approved by the Tribunal in 2014 and which permitted HCI to conduct the operations of Tsogo as it saw fit." [paragraph52]

"Having carefully considered the particular facts of this case we are driven to conclude that the Tribunal has the jurisdiction to grant declaratory relief; that the requirements for the exercise of that jurisdiction are met and that the proposed transaction in this case does not amount to a notifiable merger under the Act." [paragraph 59]

The appeal was accordingly upheld.

DISTELL LTD V KZN WINES AND SPIRITS CC 2013 BIP 263 (KZD)

Case heard: 18 April 2013; Judgment delivered: 23 May 2013

This matter concerned a claim against the alleged infringement and 'passing off' of a registered trademark. The applicant was the proprietor of a whisky selling under the name of 'Knight's Gold', while the respondent – incorporated only years later after the just-mentioned trademark was registered – traded in a whisky under the name 'Black Knight'. It was contended that when the products were compared visually, aurally and conceptually the latter infringed on either or both of the former's registered trademarks.

Mnguni J held:

"The visual, aural and conceptual similarities of the trademarks in question must be assessed by reference to the overall impressions created by the marks bearing in mind, in particular, their distinctive and dominant components." [paragraph 10].

"Importantly, the question… is a matter of first impression…The court must not consider the question of confusion or deception as if the purchaser of the goods will have had the opportunity of carefully considering the marks and even comparing them side by side." [paragraph 11]

"Whether the likelihood of confusion or deception arises is a question of fact which the court must determine in the light of the circumstances of each case and care must be taken not to surrender the court's judgment to that of a witness or to allow what is essentially an expert witness's opinion to be introduced in the guise of scientifically established facts." [paragraph 13]

Mnguni J found that the respondent had taken sufficient measures to distinguish its product from that of the applicant and that there was 'no probability that a notional customer may be confused or deceived into believing that there is a causal connection between [them]'.

BUSINESS PARTNERS LTD V WORLD FOCUS 754 CC [2015] 4 ALL SA (KZD)

Case heard 21 May 2015, Judgment delivered 12 August 2015

Business Partners Ltd successfully obtained interim and final wind-up orders against World Focus 754 CC, but a full court set aside this order on appeal, finding that the winding-up proceedings constituted an abuse of process on the facts. World Focus 754 accordingly claimed for the damages it incurred as a result of the defective winding-up proceedings under s 347(1A) of the Companies Act. Applicants countered with several arguments against the respondent's reliance on this section, most pertinently targeting its reliance on s 15 of the Insolvency Act (arguing that while it is materially similar to s 347(1A) it was inapplicable to the respondent), and contending further that the semantic construction of s 347(1A) permits only the court hearing the winding-up application to apply the section in a claim invoking it.

Mnguni J held:

"To my mind it would be unjust to penalise the respondent for its misplaced reliance on the provisions of s 15 of the Insolvency Act. In any event, one of the fundamental reasons why the applicant's contention cannot succeed is that no prejudice has been shown to have been suffered by the applicant in consequence of the respondent's subsequent reliance of s 347(1A) as the statutory basis for the relief that it seeks herein." [paragraph 12]

On the wording of s 347(1A), Mnguni J held:

"As alluded to, counsel for the applicant has relied heavily on the use of the word 'forthwith' in support of the stance that only the court hearing the winding-up application is empowered to apply s 347(1A). To my mind this sophisticated semantic analysis is not the best way to ascertain the intention behind the enactment of s 347(1A). It seems to me that the emerging trend in statutory construction is to have regard to the context in which words occur, even where the words to be construed are clear and unambiguous." [paragraph 19]

"In the circumstances, I find it idle to content that the respondent ought to have brought the application before the full court, having regard to its jurisdiction. Critically, the decision of the full court is binding on this court and the correctness thereof is not an issue before this court. If this submission were to be endorsed, it would mean that only the common-law remedy would be available to the aggrieved party. In that instance the respondent would be confronted with the difficulty of having to prove inter alia things like fraud on the part of the applicant, which in my view is the same evil the legislature seeks to prevent by enacting this section. I do not believe that this point can in any way avail the applicant." [paragraph 21]

Mnguni J therefore ruled in favour of the respondent and referred its damages claim under s 347(1A) to trial.

JUDGE BASHIER VALLY

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 23 May 1959

B COM, University of Witwatersrand (1982)

BA (Hons) (Industrial Sociology), University of Witwatersrand (1983)

MA (Sociology), University of Warwick, UK (1985)

LLM (Labour Law), University of Witwatersrand (1994)

LLB, University of Witwatersrand (1996)

CAREER PATH

Tutor, Medical Sociology, University of Witwatersrand, (1982)

Organizer, Negotiator & Educator, Commercial, Catering and Allied Workers Union of South Africa (1985 – 1986)

Junior Lecturer, Dept of Sociology, University of Witwatersrand (1989 – 1990)

Mediator with Independent Mediation Services of SA, Self-Employed (1991 – 1996)

Arbitrator with Independent Mediation Services of SA, Self-Employed (1993 – 1996)

Advocate (1996 – 2012)

High Court Judge, Gauteng, Department of Justice (2012 – to date)

Acting Judge, Department of Justice (Apr 2016 – to date)

INDEPENDENT MEDIATION SERVICES OF SA

Member Panel (1991 – 1996)

Member of Board of Trustees (1993 -1995)

Trainer of Mediators and Arbitrators (1993 – 1996)

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Senior Commission Trainer of Commissioners (1996 – 2002)

EDUCATON LABOUR RELATIONS COUNCIL

Member Arbitration Panel (2000 – 2009)

BLACK ADVOCATES FORUM

Member (1996 – 2003)

ADVOCATES FOR TRANSFORMATION

Member (2003 – 2012)

Treasurer (2010 – 2012)

Member Access to Justice Committee (2009)

JOHANNESBURG SOCIETY OF ADVOCATES

Group 16 Group of Advocates Member (1996 -2002)

Group 16 Financial Manager (1999 – 2002)

Professional Committee Member (1997)

Bridge Group Member (2002 – 2003)

Duma Nokwe Group of Advocates Co-founder and Member (2002 – 2007)

Duma Nokwe Financial Manager (2005 – 2007)

Maisels Chamber Group 111 Management Committee Member Finance Committee member (2007 – 2012)

Trainer on Advocacy Training Programme (2008)

Professional Committee Member (2010 – 2012)

SELECTED JUDGMENTS

COMMERCIAL LAW

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED AND OTHERS V MULTICHOICE PROPRIETARY LIMITED AND OTHERS [2016] ZACAC3

Judgment delivered 24 June 2016

This matter concerned whether a 'commercial and master channel distribution agreement' between the South African Broadcasting Corporation (SOC) Ltd and MultiChoice (Pty) Ltd constituted a merger under s 12 of the Competition Act.

The Competition Tribunal found that there was no transfer of productive capacity in the transaction: it held that the SABC did not transfer market share or business to Multichoice. It bolstered this finding with the contention that the five-year resolutive period of the contract meant that it lacked the necessary permanence for such a classification. It held further that it had not been proven that the 'encryption' issue should have been determined by government policy and firms respectively and thus it fell outside the scope of s 12(2)(g). The main judgment of the CAC, delivered by Davis JP and Boqwana AJA, held that the information before the court could not provide a sufficient basis to conclude that a merger had taken place. However, it found that the Competition Tribunal should have more generously exercised its inquisitorial powers to extract vital information considering the notable public interest in this matter concerning the national broadcaster. The majority therefore referred the case back to the Tribunal.

Agreeing with this order but offering different reasons, Vally J held:

"It is now established that the general approach to a s 12 analysis has to be broad in scope, otherwise the value of the section could be lost and the intention of the legislature would be defeated." [paragraph 41]

"Section 12(1) specifically provides that where there is a transfer of part of a business from one firm to another a merger has been effected. It is by now well established in international competition law that a transfer only of intellectual property rights in a product could result in a merger. It goes without saying though that while a transfer of part of a business or a transfer of intellectual property rights in a single product may constitute a merger the decision on whether there actually has been a merger or not is fact-specific. In our law an important consideration is whether there has been a "direct or indirect acquisition" or "direct or indirect control" over the transferred business or part of a business. The appellants' case is fought on both fronts: they claim that there has been a direct or indirect acquisition of the archival material of the SABC by MultiChoice; and, there has been indirect control over the policy of the SABC by MultiChoice." [paragraph 42]

"There is no doubt MultiChoice is given extensive say over the material that is distributed through the entertainment channel as that channel is part of its bouquet of channels and is made available only to its subscribers. It is also possible to conceive of the entertainment channel as being a separate business that is born out of the agreement and that it involves a combination of the assets of the SABC with that of MultiChoice. There is also no doubt that the SABC is considerably constricted in its ability to re-use that material on its own channels." [paragraph43]

"In my view, however, on their own these two facts do not allow for a conclusion that MultiChoice has acquired control over part of the business of the SABC as contemplated in ss 12(2)(a) –(f) of the Act… I cannot agree … that the established facts demonstrate on a balance of probabilities that the agreement has resulted in a merger of assets and that such a merger has effectively allowed MultiChoice control over parts of the business of the SABC." [paragraph 44]

"Turning my focus then to whether MultiChoice has increased its market share at the expense of the SABC, it is obvious that MultiChoice wishes to attract the customers of the SABC who have yet to join

the ranks of its five million (5m) subscribers. It can, therefore, be accepted that by virtue of it offering the exclusive archival material of the SABC on its bouquet the attraction of its services increases. But, whether this will translate, or has translated, into an actual transfer of customers from the SABC to MultiChoice is something that cannot be, or has not been, established from the facts revealed thus far." [paragraph 46]

"As long as the agreement is threatened the SABC remains handcuffed. It cannot revert to its original position. The key to unlocking this handcuff rests with MultiChoice. Should it give up its right to terminate the agreement if the SABC were to change its policy on encryption then the SABC would be free to re-examine its position or re-evaluate its volte face. It may be true that the ultimate decision on whether encryption should be compulsory or not rests not with the SABC but with the government, but the value of the position adopted by the SABC cannot be underestimated. It is a very important participant in the television broadcasting market. In fact, it is the only public broadcaster available. It is established by statute. It has a specific and very important role to play in the dissemination of information and ideas, and in the provision of entertainment, to the public. It is a recipient of a significant subsidy from the public purse. Unlike MultiChoice, TopTV and e-TV, all of which are its competitors, it bears a general duty towards the public and is required to act in the public interest. The policy it adopts on this important issue of encryption is central to its role as public broadcaster acting in the public interest." [paragraph 48]

"Should government persist with its view that encryption should be non-compulsory then if the SABC, upon re-examination of its present stance, decides that this policy is in conflict with its duty to serve and/or act in the public interest it would have to make known its opposition to the government decision and take whatever legal steps are available to it in order to protect its role and duties as a public broadcaster. At present it is unable to re-examine its policy without risking the early termination of the agreement. To the extent that the power to bring this early termination rests wholly in the hands of MultiChoice, it can be safely inferred that MultiChoice has a significant influence over the policy of the SABC. The policy, as stated above, is of crucial import." [paragraph 50]

"If regard is had to these aspects of the agreement then on the face of it (prima facie) the appellants have shown that the SABC and MultiChoice have constructed a merged business as contemplated in s 12 of the Act." [paragraph 51]

"By arriving at this conclusion I do not ignore the fact that whether the influence MultiChoice has acquired over the SABC's policy choice results in it actually exercising control in the ordinary course of business (bearing in mind that an important part of the SABC's business is to serve and advance the public interest) over the SABC is not entirely clear. An inference to this effect can be drawn, but it would certainly not be the only one that can be drawn… The balance of probability standard deals with proof that is certain and final. The proof required to show a prima facie case, on the other hand, is one that is tentative. It is one that points to a possible rather than a definitive conclusion. The Tribunal in my view made an error by conflating the two tests. It is an error that is significant enough to constitute a misdirection warranting interference by this Court. It resulted in the Tribunal

incorrectly refusing the alternative relief. An error refusing relief (main or alternative) when relief is due constitutes a material misdirection." [paragraph 52]

CIVIL PROCEDURE

DEMOCRATIC ALLIANCE V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA [2017] 3 ALL SA 124 (GP)

Case heard 4 May 2017, Judgment delivered 9 May 2017

This interlocutory application arose from the applicant's review proceedings of President Zuma's cabinet reshuffle in March 2017. The applicant sought to bring the review of the executive action under rule 53 and opted to do so in conjunction with rule 6(12), which facilitates truncated time-periods regarding the filing of papers in urgent matters. Respondent had failed to observe the dictates of rule 53 within the shortened windows requested by the applicant as a matter of urgency, and missed further deadlines indulged by it. This application sought to obtain the reasons for and record of the reshuffle. Respondent argued that both the interlocutory and main applications were not 'urgent', and further, that his decision, made under s 91 of the Constitution, fell outside the ambit of rule 53.

Vally J held:

"The executive power to appoint and dismiss Ministers and Deputy Ministers is wide-ranging. But it is not as unfettered as its predecessor, the royal prerogative … a relic of an age past. The executive power conferred upon the office of the President by s 91(1) of the Constitution is circumscribed by the bounds of rationality and by sections 83(b) and (c)…The President accepts at the very least that the exercise of the power has to meet the test of rationality." [paragraph 18]

"The President…contend[s] that the provisions of rule 53 do not apply to an application to review an executive decision. The President's case is that since an 'executive decision' is not listed in sub-rule 53(1) it is excluded from the ambit of rule 53 … [It] was promulgated at a time when executive decisions were not subject to review. Subsequently, with the enactment of the Constitution and the development of the common law since its enactment these decisions, as the President acknowledges, are subject to review. It is true that rule 53 has not been amended to cater for this, but to decide on its applicability to a review of executive decisions it is necessary to subject it to a purpose interpretation." [paragraph 21]

"Relying on the purposive interpretation there is no logical reason not to utilise it in an application to review and set aside an executive decision. The judicial exercise undertaken by the court in such a review is no different from the one undertaken in review applications of an 'inferior court, a tribunal, a board or an officer performing judicial, quasi-judicial or administrative functions'…Its

provisions, in my judgment, should be applied unless it can be shown that its application in a particular case would result in a failure of justice." [paragraph 29]

"On the basis of the above, I hold that the provisions of rule 53 apply mutatis mutandis to an application for the reviewing and setting aside of an executive order or decision." [paragraph 30]

"It should therefore be utilised in the main application. After all, there is no contention by the President that its utilisation in the main application would result in a failure of justice." [paragraph 31]

"The consequence of utilising rule 53 in the main application is that the applicant is entitled to call for the President to furnish the reasons for his decisions as well as the relevant part of record that formed the basis upon which the decisions were taken. This is catered for in sub-rule 53(1)(b). The President's contention is that the decisions are subject to the doctrine of legality and therefore the applicant is entitled to the reasons for the decisions, but not to the record. The President's stance was conveyed in oral submissions, but not in the answering affidavit filed in opposition to the application. The difficulty with this submission is that it goes against the grain of all the authorities cited above…In my judgment there is no merit in this submission." [Paragraph 33]

"The applicant demands that 'all documents and electronic records (including correspondence, contracts, memoranda, advices, recommendations, evaluations and reports) that relate to the making of the decisions' be provided. The President has not raised any issue about their existence or non-existence… In the same vein, the President has not indicated what documents or electronic records exist and which of those he objects to disclosing on the ground that their disclosure would be unlawful for one reason or another. In these circumstances this Court has no choice but to issue an order that calls for a record as canvassed…[in the] notice of motion in the main application." [paragraph 35]

The application was granted.

MEDIA ARTICLES

Personal Attach on Bashier Vally, who ruled against Jacob Zuma is "disturbing", *Business Day*, 11 May 2017, available at https://www.businesslive.co.za/bd/national/2017-05-11-personal-attack-on-bashier-vally-who-ruled-against-jacob-zuma-is-disturbing/

"The Law Society of SA has condemned the "disturbing personal attack" on a judge who ruled against President Jacob Zuma in his Cabinet reshuffle case."

"Judge Bashier Vally was harshly criticised by a branch of the ANC Youth League and former government spokesperson Mzwanele Manyi, after his ruling last week that Zuma produce the record and reasons for the reshuffle."

"Manyi claimed that the ruling indicated that there was corruption within the judiciary."

"The Law Society said such unwarranted attacks appeared to have the "sole aim of undermining the judiciary". Co-chairs Walid Brown and David Bekker said in a statement that it was Zuma ' right to appeal against the decision made by the High Court in Pretoria...It is, however, established law that executive decisions are subject to a challenge based on legality and rationality, as was conceded by the President in this matter," they said. "But even if this were not the case, we are shocked by the disturbing accusations against Judge Vally – and the judiciary in general –and regard them as an attack on the rule of law and the independence of the judiciary," they said."

Commission must 'possibly fire' judge Bashier Vally, says ANC Youth League, *Business Day*, 5 March 2017, available at https://www.businesslive.co.za/bd/national/2017-05-05-commission-must-possibly-fire-judge-bashier-vally-says-anc-youth-league/

"Cibane said the league would be writing to the JSC to request that the commission "investigate and possibly fire this judicial officer".

"In a constitutional democracy there can never be a court order forcing an elected president to account on matters vested in his office least of all to a party that was rejected by the majority of our people in the polls. Such a judgment is misconduct," he said.

"The JSC must sanction this judge in order to restore the credibility of the judiciary. This clear attempt at violating the constitution must be challenged and exposed for what it is, an attempt at overthrowing the democratically elected government of the people."

JUDGE MARGARET VICTOR

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 1 November 1949

B Soc Sc, University of Cape Town, (1971)

LLB, University of KwaZulu Natal, (1982)

Diploma in Arbitration, University of Pretoria (1996)

Diploma in Advanced Tax Law, University of Witwatersrand, (2000)

CAREER PATH

Nurse, Frontier Hospital, Queenstown (1969)

Social Worker, Department of Social Welfare (1972)

Travels around the world (1975 – 1977)

Community Worker, St. Philomenas Children's Home (1977)

Articled Clerk, Millar Reardon Attorneys, (1982)

Articled Clerk, HR McLaren Attorneys (1983 – 1984)

Advocate, Advocate at the Johannesburg Bar (1984 – 2008)

Judge of the Gauteng High Court (2008 – to date)

SHAWCO (UCT)

Voluntary Community Work as a student (1970 – 1973)

STUDENT CHRISTIAN ORGANISATION

Member (1965 -1970)

NADEL

Member (1998 – 2008)

AFT

Member (2004 – 2005)

SOUTH AFRICAN CHAPTER OF INTERNATIONAL ASSOCIATION OF WOMEN JUDGES

Member and presently Vice President (2008 – to date)

METHODIST CHURCH

Member (more than 10 years)

SELECTED JUDGMENTS

COMMERCIAL LAW

LEKOA FITMENT CENTRE V ALTECH NETSTAR (PTY) LTD (132/CAC/DEC14)

Judgment delivered 22 April 2015

Lekoa had levelled a series of complaints against Netstar on the grounds of unfair commercial practices.. Lekoa attempted to bring these complaints before the Tribunal within the parameters of the Competition Act. Netstar opposed the claim via an exception, arguing that Lekoa had failed to disclose a cause of action. The Tribunal upheld the exception.

Victor AJA (Davis JP and Rogers AJA concurring) held that:

"Lekoa could not point to any credible evidence or provide any objective assessment of the clauses of the agreement which resulted in the Netstr agreement having the effect of a substantial lessening of competition. The business model analysis by Mr Sibanda which demonstrated that Lekoa earned less profit than Netstar per installation does not suffice to show that Netstar's conduct lessened competition. There was no evidence of harm to consumer welfare. There were no credible or objective facts proferred to suggest that Netstar's conduct resulted in some form of foreclosure or non competitive effect." [paragraph 20]

"More is required than the mere fact of dominance by a firm in the upstream market based on vertical restriction. Lekoa did not pass the hurdle of demonstrating Netstar's dominance in the market." [paragraph 21]

"In my view, the Competition Tribunal correctly found that the amended complaints did not support the jurisdictional facts necessary to found a cause of action in terms of s 5(1)…" [paragraph 22]

"A dominance assertion requires justification based upon credible evidence. In terms of s 7, dominance has to be at least 45% of the relevant market; or 35% unless it can show it does not have market power or less than 35% but where it has market power. Lekoa was unable to establish Netstar's dominance in any credible way." [paragraph 24]

"The alleged price discrimination by Netstar has to have the effect of lessening competition…[T]here has to be evidence to show that price discrimination has the ffect of substantially lessening competition which would undermine the competitive process and ultimately harm consumers. Lekoa has not shown this in any way." [paragraph 24]

"After evaluating the complaints raised by [Lekoa] and a perusal of the fitment centre agreement…together with the absence of any credible evidence demonstrating a contravention of s 5(1), 8(1) and 9(1) the appeal must inevitably fail. Any one of the complaints could have been dealt with in terms of the contract including a severance of any of the offending clause [sic] as per clause 28.5 of the agreement but these aspects fall outside the ambit of this appeal or this Court's jurisdiction." [paragraph 25]

"I conclude that the Competition Tribunal was correct in upholding the exception." [paragraph 26]

The honourable judge found further that Lekoa's appeal ought to be dismissed with costs:

"The finding of the Competition Tribunal could not have been clearer. Lekoa should have considered its position more carefully before proceeding to this Court, particularly in light of the issues raised by Netstar before the Competition Tribunal…The question as to whether Lekoa should pay the costs of this appeal has to be considered in the light of its continued failure to try and prove its case in the absence of some form of objectively ascertainable evidence necessary to sustain a cause of action in the field of competition jurisprudence…Netstar has had to incur the expense of an appeal and there is no reason why some form of cost order should not follow the result." [paragraph 27]

OMNICO (PTY) LTD; COOL HEAT AGENCIES (PTY) LTD V COMPETITION COMMISSION AND OTHERS (142/CAC/JUNE16)

Judgment delivered 19 December 2016

At issue in this case was whether silent participation by firms at meetings where cartel activity was discussed could amount to a violation of s 4(1)(b)(i) of the Competition Act.

Victor AJA held:

"Once there is sufficient evidence put up by the Commssion that there is cartel conduct it is incumbent on the firm to put forward rebuttal evidence to establish that its participation was without any anti-competitive intention. This it did not do. As stated in Mac Neil Agencies (Pty) Ltd v Competition Commission (121/CAC/Jul12) it is not necessary to apply rigid concepts found in our common law of contract to prove offer and acceptance. It is clear from the record that Coolheat did not demonstrate to its competitors that it was participating for a purpose inconsistent with anti-competitive behaviour…The United States definition of an agreement as: 'conscious commitment to a common scheme'…is helpful in this regard." [paragraph 55]

"The Tribunal determined that a positive meeting of minds is not the same as understood in the law of contract… It is sufficient to be a passive participant…" [paragraph 56]

"The evidence, as I have evaluated it, reveals that neither Omnico nor Coolheat distanced themselves at the meeting after consensus had been reached. They gave no indication thereafter that they disagreed and they placed no evidence before the Tribunal that the increased RRP following the September meeting was as a result of an independent decision without anti-competitive effect." [paragraph 57]

"In my view, the Commission provided sufficient evidence that there was an agreement in place regarding the RRP. It was then incumbent on Omnico and Coolheat to provide sufficient evidence to the contrary. Upon scrutinising the Commission's evidence it demonstrated that the conduct in question would have the effect of undermining competition… The claimed non-participation at the meeting does not end the evidential enquiry. The undisputed evidence of their failure to overtly disagree or distance themselves from the contents of the final September meeting meets the necessary standard of proof as being consistent, clear and convincing in determining participation in a cartel." [paragraph 58]

"Our competition jurisprudence … has evolved and the time has come to analyse more carefully the context of the alleged cartel behaviour, the evidence read with all the surrounding circumstances of the undertaking's participation or passive participation in meetings. Silence within a specialised context can never equal non-participation." [paragraph 59]

"The principle of passive attendance at a meeting to listen to 'gossip' among companies cannot excuse an undertaking. Consistent with European competition jurisprudence, as it has now developed, there is a duty to speak or to report to authorities or publicly distance oneself from any uncompetitive behaviour." [paragraph 61]

"[T]he evidence adduced by the Commission is sufficient to show that agreement was reached amongst wholesalers that there would be an increase in mark-up in agreed percentages… The Tribunal correctly found that Omnico and Coolheat engaged in conduct directly and indirectly in contravention of s 4(1)(b)(i) of the Act." [paragraph 67]

OCEANA GROUP LTD AND FOODCORP (PTY) LTD V THE COMPETITION COMMISSION (130/CAC/MAY14)

Judgment delivered 6 November 2014

This matter concerned a proposed merger between two renowned South African brands of tinned pilchards: Lucky Star and Glenryk. Oceana owns the former brand and wanted to acquire the total allowable catch ('TAC') quota of pelagic fish from Foodcorp, which owned the latter. Oceana did not wish, however, to purchase the Glenryk label. The issue of the appeal before the CAC was the condition imposed by the Tribunal that Foodcorp's pelagic TAC be disposed of together with the Glenryk brand. The Commission was duly notified of the intended transaction in August 2013. In view of the parties' hefty combined market share (approximately 80%), it found that the transaction would result in the abolishing of an effective competitor because it found that, despite the parties' contentions that Glenryk would remain a viable business through pelagic imports, its market share percentage would diminish and Lucky Star's would be boosted.

Victor AJA (Davis JP and Ndita AJA concurring) disagreed with the Tribunal's approach, finding that it had made its decision on insufficient evidence while ignoring other issues of moment:

"The difficulty confronting this Court is that the Tribunal did not run with one coherent theory of harm." [paragraph 27]

"The Tribunal concluded that even if the same regard be had to the evidence…[it] confirmed the Commission's concerns that Glenryck as a label could not be sustained without the quota. This conclusion however ignores all the undisputed facts about the Namibian quota enjoyed by Bidfish and its expertise, it also ignores the undisputed evidence that Bidvest South Africa, a most formidable organisation will support the marketing of the product in South Africa." [paragraph 28]

"The question which the Tribunal failed to answer and which is critical to the assessment on this theory of harm is what effect the absence of the Foodcorp quota into the general pool would have on existing competitors …" [paragraph 30]

"[E]ven though Oceana enjoyed 72% share in the market, the evidence from the balance of the participants did not support a conclusion that the absence of the Foodcorp quota being reinserted into the general pool would result in a substantial lessening or preventing of competition. Indeed, save for some unsubstantiated averments by Mr Silverman, the other witnesses and documentary evidence provided to the Tribunal pointed clearly in a contrary direction." [paragraph 42]

"Turning to the question of harvesting, and the smaller entities, the situation of the small players would be unchanged insofar as capital requirements are concerned post-merger. The small TAC quota of Foodcorp will not bring about any change in the financial abilities of the smaller players. Smaller players have not been able to overcome this problem pre-merger and endeavours by smaller players to enter into joint ventures or pool their resources to minimise operational costs will remain unchanged, should the merger go ahead." [paragraph 44]

"The consideration of competition for imported fish will remain the same. In fact, the white brands rely entirely on imports and it is undisputed that the sale of their product has increased rapidly. It represents at 10 per cent share of present. There is no evidence to suggest, on the facts presented, that post-merger the players in the field would change in their import demands. It is suggested that because the merging parties are strong they can absorb the cost of importing and therefore the relevant TAC should not be acquired by Oceana. This is a flawed model of the competitive process and a theoretical abstraction as there is no evidence to support this conclusion." [paragraph 45]

"On the question of brand loyalty and access to shelf space there is no credible evidence that Oceana will put more tins on the shelf post-merger. The only gain by Oceana is some 650 000 cartons on local fish source. In any event it is common cause that the Glenryck brand was declining and the white label brand has become a very important competitor for shelf space. The intervention of Bidfish is likely to enhance competition." [paragraph 46]

"[T]he Commission raised the question of the appropriate burden of proof to when the Tribunal considers a merger in terms of s 16 (2) of the Act. The merging parties relied on Primemedia and Others v Competition Commission [2007] 1CPLR (CT) where it was found that in large mergers, the Commission must show that the proposed transaction would likely result in the lessening or prevention of competition. The Commission asserts that when this Court deals with a s 16(2) inquiry, it is hearing an appeal against the original adjudicator, being the Commission and therefore the onus rested on the merging parties." [paragraph 48]

"The argument about onus however obfuscates the critical point. For the Tribunal to reach a proper conclusion there must be sufficient evidence to show justify a conclusion of a prevention of or lessening competition. This cannot be done by simply applying a balance of probabilities test to an untested theory. In my view, in assessing whether there will be a lessening of competition, the enquiry must be much wider than a mere mechanical implementation of an onus." [paragraph 49]

"In this case, the Tribunal has drawn inferences from speculative evidence and ultimately its findings have led to conclusions which, as I have shown are not based on the facts." [paragraph 51]

The appeal was upheld with costs, and the merger was approved subject to the CAC's own conditions provided as an annexure to the judgment.

MEDIA COVERAGE

Manyathi-Jele, Nomfundo, 'Women, the judiciary and transformation.' DR, October 2013: 11 [2013] DEREBUS 185

"Judge Victor spoke about South African women in law and where their future lies. Judge Victor spoke about the women's march to the Union Building in Pretoria in 1956 and said that, 38 years after the march, two women justices were appointed to the Constitutional Court: Justices Yvonne Mokgoro and Kate O'Reagan. She added that it was unfortunate that, 19 years into democracy, there are still only two female justices at the court.

Speaking about the Supreme Court of Appeal, Justice Victor said that with seven women on the Bench, female representation at this court was growing. She noted that there was a record 30% level of permanent and acting female judges at the North and South Gauteng High Courts and she added that this was a magnificent stride for which these divisions needed to be applauded.

Justice Victor said that when she joined the Bar, female lawyers were assigned only divorce cases. She added that to ensure equality and transformation of the legal profession, women needed to incorporate men into the debate as 'we cannot do it without them'. She advised the senior attorneys and firm owners present to engage younger women in their firms and to encourage candidate attorneys to attend court cases and to mentor them. Judge Victor concluded by saying that the challenges for female equality were international and that it was not only a South African based problem."

Poverty won't stop aspiring advocates, Cape Times, 29 December 2017 available at https://www.pressreader.com/south-africa/cape-times/20171229/281681140253002

> "Judge Margaret Victor said the courts were not the gate-keepers in the debtor/creditor relationship between student and university. 'Debtor and creditor relationships are between

the student and the university and not the basis for the courts to keep law graduates out of their profession. 'Keeping a law graduate out of the legal profession is not an appropriate legal tool to satisfy the debt collections.' The judge said poor or disadvantaged students should not be punished because they could not pay their fees."

"But Judge Victor questioned what happened to those graduates who had passed and may not benefit from the transformation and social initiatives of the Bar. 'Their promise of hope to enter the legal profession is dashed. It would seem therefore that our courts must recognise that an individual graduate's poverty may result in grave prejudice at a personal level and prevent entry in the labour market in their chosen profession.' The judge said not only was the dignity of this graduate impaired, but it resulted in a situation where the people who were too poor to pay for their studies were treated unequally and penalised for being poor."

MR RICHARD LAWRENCE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 7 September 1960

B.Proc, Nelson Mandela Metropolitan University (1993)

Master of Laws (LLM), University of South Africa (2002)

CAREER PATH

Acting Magistrate (January 2015 -)

Managing Member, SA Paralegal School, Port Elizabeth (January 2011 – December 2015)

Director, Lawrence Manuel Inc: June 2013 – December 2014

Sole Proprietor, Richard Lawrence Attorneys: (May 2007 – May 2013)

Director, Lawrence Inc (May 2004 – April 2007)

Director, Lawrence Meyer Inc (May 1998 – April 2004)

Sole Proprietor, Richard Lawrence Attorneys (April 1996 – May 1998)

Candidate Attorney, Herbert Liston (March 1994 – March 1996)

.

Board of Control, School for Legal Practice (2012 – 2014)

Member, Nadel (2014 – 2017)

Committee member (2014)

Member, Cape Law Society (1996 – 2016)

Member, SASCO (1991 – 1993)

Member, ANCYL (1991 – 1993)

MS SUNGAREE PATHER

BIOGRAPHICAL INFORMATION AND QUALIFICATION

Born: 21 August 1953.

Bachelors of Arts, University of Durban-Westville (1973-1975)

B.Proc, University of South Africa (1976-1978)

CAREER PATH

Consultant, Vash Choudree & Associates (current)

Member, Electoral Court (2013 – 2017).

Acting Judge

- Eastern Cape High Court (April – July 2002)
- Land Claims Court (October 2005 – March 2006)
- Labour Court (April to July 2011, recess 2014, recess December 2014 – January 2015)
- Gauteng Local Division, Johannesburg (August – September 2017)

Chairperson, Special Pensions Appeal Board, National Treasury (2011 – 2016)

Managing Commissioner, Dispute Resolution Centre (2006 – 2011)

Commissioner, CCMA (1996 – 2006)

Professional Assistant, Krish Govender & Co (1982 – 1996)

Professional Assistant, Yunus Mahomed & Co (1982)

Professional Assistant, Moola & Singh (1979 – 1982)

Candidate Attorney, George Sewpershad (1979 – 1982)

Member, Democratic Lawyers' Association & NADEL

Member, South African Women Lawyers' Association

Member, South African Labour Lawyers (current)

Member, South African Communist Party

SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS

DEMOCRATIC ALLIANCE AND ANOTHER V AFRICAN NATIONAL CONGRESS AND ANOTHER (001/15 EC) [2015] ZAEC 1 (5 MARCH 2015)

Case heard 23 February 2015, Judgment delivered 5 March 2015

The African National Congress had brought an application to set aside the electoral Commission's refusal to register a candidate for a by-election. The application was granted and the Commission was ordered to include the candidate on the list of candidates contesting the by-election. The Democratic Alliance unsuccessfully sought to have the judgment rescinded.

Pather, Member (Shongwe JA and Wepener J concurring) held:

"It is clear therefore that the only reason the Commission refused to register the ANC's candidate was that the cheque for the deposit … did not accompany the nomination form. … [O]n the DA's and the Commission's version the cheque was pushed under the door a few minutes after 17h00 and after Mahlangu had knocked on the door at 17h05 upon her return to the Commission's offices after collecting it from colleagues outside. Even on this latter version, the ANC attempted to tender the cheque approximately five minutes late. There had therefore in my view, been substantial compliance with the requirements of s 17(2) in the submission of all other documents." [Paragraph 14]

"I am persuaded … that the delivery of the cheque, even a few minutes after the 17h00 cut-off time, demonstrated that the ANC's intention to participate in the by-election was not frivolous, although Mahlangu insists that she returned at 16h58, before the cut-off time. On the other hand, the Commission's representative inside the locked office was aware that Mahlangu had returned at the very latest at 17h05 after leaving to fetch the required cheque. The question arises: does the fact that the cheque was submitted a few minutes after the cut-off time and after submission of the nomination form constitute a fatal flaw thereby resulting in the rejection of a candidate's application to contest an election? …" [Paragraph 15]

"While it may be argued that "a more tolerant approach", which clearly accords with the purposive interpretation of the Act and which, in turn, encourages participation in rather than exclusion from an election, would lead to uncertainty, as submitted by counsel for the DA, in my view, reasonableness should always apply in any attempt at adopting a flexible approach to the requirements of the Act, This would entail a court having to consider each case on its own merits; a minimal difference in time coupled with a party's conduct which clearly demonstrates a serious intention to contest an election, must surely favour flexibility in the application of the requirements." [Paragraph 16]

LABOUR LAW

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION OBO GURRIAH V ETHEKWINI MUNICIPALITY AND OTHERS (D350/09) [2012] ZALCD 23 (14 APRIL 2012)

Case heard 26 April 2011, Judgment delivered 14 April 2012

This case concerned the review of an arbitration award by the CCMA, in which the Commissioner found that the employee had failed to prove that in failing to promote him, the employer had committed an unfair labour practice.

Pather AJ held:

"… I will confine myself to the grounds of review based on the contentions that the Commissioner had misdirected himself and that he had exceeded his powers." [Paragraph 16]

"There is no dispute that the Commissioner spent approximately three hours in attempting to resolve the dispute. … While commissioners are entitled in terms of section 138 (3) of the Labour Relations Act … if all the parties consent, to suspend the arbitration proceedings and attempt to resolve the dispute through conciliation, in my view the Commissioner in this case ought to have exercised caution. This is because having invested much time and effort in trying to resolve the issue, one or some or all of the parties stubbornly refused to budge from her/his original position. It is probable that the Commissioner was fatigued after such effort. In my view, the Commissioner entered the arena all too often during the subsequent arbitration hearing. In this regard, the record contains several instances where his interventions and comments are found to be inappropriate. Not only are his comments inappropriate, but there are instances where his prior knowledge of the issue is evident and is inconsistent with the evidence presented. … It is difficult to escape the conclusion that the Commissioner had pre-judged the issue and had decided which documents would lend itself to such an outcome." [Paragraph 18]

"Given the Applicant's submission that the Commissioner had advised it of possible consequences should it have raised the issue of "demographics" coupled with the Commissioner's own comments in this regard, it is clear that the First Respondent's demographic profile was of significance to one or more of the parties. For the Commissioner to have turned off the tape and, when the hearing resumed, to place on record that he had "advised" the Applicant about the matter, creates a further inference that he preferred not to have had the full conversation recorded. … In the result, the Applicant's submission that the Commissioner had misdirected himself in the conduct of the arbitration proceedings is well-founded and reasonable. On this ground alone, the application stands to be granted." [Paragraphs 20-21]

"Turning to the question of the Commissioner's qualification as an arbitrator, it was contended on behalf of the First Respondent that the Commissioner had at the time, yet to complete "the conciliation arbitration course" but that he had been accredited for both "conciliations and arbitrations" for a period of one year. It is difficult to understand this reasoning. If the Commissioner had yet to complete the course, he surely would not have been accredited to perform the functions of a commissioner. The ground upon which it was submitted that the Commissioner exceeded his powers relates only to the lack of accreditation in respect of the functions of an arbitrator. …

Therefore, and supported by the First Respondent's contention, the Commissioner is found not to have been accredited to arbitrate disputes at the time … [B]y arbitrating the matter he had exceeded his powers. Therefore the application stands to be granted on this further ground." [Paragraph 22]

The arbitration award was set aside and the matter was remitted back to the CCMA to be arbitrated by a different Commissioner.

FUEL LOGISTICS GROUP (PTY) LTD V STEPHENS NO AND OTHERS (D902/08) [2011] ZALCD 15 (29 JUNE 2011)

Case heard 14 June 2011, Judgment delivered 29 June 2011

This was an application to review and set aside an arbitration award issued by the first respondent as a commissioner of the CCMA. The commissioner found that the dismissal in question, for alleged acts of misconduct, including damage to the company's property, was unfair and ordered the applicant to reinstate the employees retrospectively from the date of their dismissal.

Pather AJ held:

"… In the absence of any supporting evidence, and preferring the evidence of the fourth respondents to that of Sokhabase, the commissioner correctly concluded that the applicant, who bore the *onus* of proving that the dismissal was fair, had failed to discharge that *onus*." [Paragraph 9]

"The further grounds of review are based in essence on the commissioner's analysis of the evidence and his credibility findings of witnesses. In analysing the two conflicting versions before him, the commissioner considered the demeanour of the witnesses, and the fact that the fourth respondents and their witnesses corroborated one another's evidence. He compared their testimonies and found Sokhabase, the applicant's witness, to have been aggressive during cross-examination. … It is clear that in weighing the evidence presented by the parties, the commissioner gave careful consideration to the demeanour of the witnesses and the probabilities of their respective versions. … His finding that the dismissal was substantively unfair is therefore one that a reasonable decision maker could have made based as it was, on the probabilities of each version; his preference for the fourth respondent's version is based on rational reasons." [Paragraph 10]

"… If only the parties had a better understanding of a constitutional democracy such as South Africa is, there would be no need for such underhand gathering of information as conducted by the applicant … After all, the LRA provides the framework within which parties to an employment relationship relate to each other on the basis of mutual respect and openness. Acts of subterfuge, such as the filming of a group of employees engaged in a meeting has no place in a constitutional democracy and can only lead to a breakdown in relations between employer, the applicant, and its employees and the third respondent being the employees' chosen representative." [Paragraph 11]

The application was dismissed with costs.

MS SHARON CHESIWE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 29 November 1963

LLB, Vista University (2002)

LLM, Free State University (2007)

NDip Labour, Oxbridge Academy (2013)

CAREER PATH

Acting Judge

Free State High Court (2012, 2016 – 2017)

Gauteng High Court (March – May 2017)

Family Advocate (2008 – 2016)

Legal Advisor, Legalwise (2006)

Professional Assistant, Bezuidenhout Attorneys (2005 – 2008)

Acting Magistrate, Bloemfontein District Court (December 2005 – May 2006)

South African Women Lawyers' Association (SAWLA)

Member (2010 -)

Treasurer (2008 – 2010)

Secretary (2006 – 2008)

Member, Lebone Childrens' Home

Member, Democratic Alliance (2006 – 2009)

Member, African National Congress (1998 – 2002)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

QIBING TRANSPORT ASSOCIATION AND OTHERS V REGISTRAR OF PUBLIC TRANSPORT AND OTHERS, UNREPORTED JUDGEMENT, CASE NO.: 3108/2011 (FREE STATE HIGH COURT, BLOEMFONTEIN)

Case heard 1 March 2012, Judgment delivered 26 April 2012

The second to 14th applicants were members of the first applicant, who operated various taxi routes under licenses issued by the first respondent. The fourth to fifty-ninth respondents, also taxi operators, were members of the third respondent, Mohanapuso Taxi Company Limited. Qibing and Mohanapuso are described as rival taxi associations [para 7]. Applicants sought to compel second and third respondents to withdraw the licenses authorising the fourth to fifty-ninth respondents to operate on the same routes, and to interdict and restrain them from operating on such routes.

Chesiwe AJ held:

"From the affidavits before me it is clear that there is a factual dispute and it was such that only the authorities who issued the permits would be able to shed light on whether the applicant and/or the respondents' valid permits for the routes already mentioned." [Paragraph 16]

"In my view this is an administrative matter and the second respondent should have immediately resolved the issue of the error that was discovered at the verification process. If it was resolved at that stage … this matter might not have been before this Honourable Court. Although the license permits have lapsed … and the dispute is now only academic, however, when the application was lodged, the license permits were then still in existence." [Paragraph 22]

"… It is common cause that the interdict is against the withdrawal of the temporary permits … [and] that these permits have expired and the matter is moot and is non-existing. It would therefore be academic to grant such an order" [Paragraph 25]

The application was dismissed, and each party was ordered to pay their own costs.

CIVIL PROCEDURE

MOQHAKA MUNICIPALITY V MABULA (2292/2008) [2012] ZAFSHC 38 (15 MARCH 2012)

Case heard 5 March 2012, Judgment delivered 15 March 2012

Respondent had instituted a claim for damages against the appellant municipality after her minor child fell into an open sewerage drain.

Chesiwe AJ (Claasen AJ concurring) held:

"The Court a quo had to determine whether the respondent complied with section 3(2) of the Institution of Legal Proceedings Against Certain Organs of State, Act … The Court a quo ruled that the appellant condoned the non-compliance of the provisions of the Act by not objecting to the late delivery of the letter of demand, but instead responded with a letter referring the matter to their insurer. …" [Paragraphs 5 – 6]

"It is common cause that the said notice has not been served on the defendant within six months period as required. … To issue summons without first complying with the provisions of section 3(4) for condonation renders that the summons are premature." [Paragraphs 11 – 12]

"The respondent … has already issued summons. The respondent thus has a remedy of applying for condonation. Condonation must be applied for as soon as the party concerned realises that it is required or if the state organ makes an objection to the absence or late service of the notice." [Paragraph 14]

"… [R]espondent should have proceeded with an application for condonation, in view of the fact that the court has a discretion to grant condonation in respect of the appellant's failure to comply with the requirements of section 3(2) of the Act." [Paragraph 16]

The appeal was upheld with costs and the summons removed from the roll.

CRIMINAL JUSTICE

MBELE V S (A/79/2016 [2017] ZAFSHC 157 (14 SEPTEMBER 2017)

Case heard 21 August 2017, Judgement delivered 14 September 2017

Appellant had been convicted by the regional court of the rape of a 13-year-old, mentally impaired girl and sentenced to life imprisonment. The appeal was against sentence.

Chesiwe AJ (Mathebula J concurring) held:

"In every appeal against sentence, the Judges hearing the appeal should be guided by certain appellate principles. The first is that punishment of an offender is primarily for the discretion of the trail court. The second is that such judges should be careful not to erode such discretion. The third is

that the sentence should only be altered, on appeal, if the discretion has not been judicially and properly exercised." [Paragraph 11]

"It is trite that a court of appeal should not replace the sentence imposed by the trial court with its own, unless it is justified to do so. Further that the respondent conceded that the trial court has overemphasised the aggravating factors at the expense of the mitigating factors. Counsel for the plaintiff submitted that the appeal court may interfere in the sentence, as the appellant was not advised on the implications and consequences of the Prescribed Minimum Sentence. Therefore it warrants the appeal court to deviate, in order to restore a balance." [Paragraph 15]

"In view of the aforesaid, I am persuaded that the trial court misdirected itself and that the sentence is shockingly inappropriate." [Paragraph 17]

The sentence of life imprisonment was replaced with a sentence of 15 years' imprisonment.

S V BM 2012 (2) SACR 507 (FB)

Case heard 20 February 2012, Judgment delivered 19 April 2012

Appellant had been convicted by the regional court of the rape of a 9 year old girl. On appeal, it was argued that the complainant and an 11 year old witness had been unable to distinguish between right and wrong because of their youth, and that the investigation conducted by the presiding magistrate in terms of s 164 of the Criminal Procedure Act had fallen short of what was required when admonishing a child witness to speak the truth.

Chesiwe AJ (Ebrahim J concurring) held:

"In my view, the court a quo correctly applied s 164 ... and warned the witnesses to speak the truth. I am not persuaded ... that the witnesses were unable to distinguish between right and wrong and that the magistrate's investigation was insufficient" [Paragraph 8]

"MR's evidence was formalistic in nature ...There was no fumbling or hesitancy ... in giving her testimony. ... The court is an intimidating place for most witnesses and, doubtless, even more so for child witnesses. In the face of such direct scrutiny, bearing in mind that MR was not testifying through the medium of an intermediary, but in person in full view of the appellant, his attorney, the prosecutor, as well as the presiding magistrate, I am convinced that, had she indeed not been telling the truth, this would have been patent to the court by virtue of her demeanour. In court the content of her evidence also speaks volumes as to her veracity in giving it. It was such a straightforward, simple story that she was called upon to tell the court, that it permitted of no fabrication. ..." [Paragraph 8.1]

"It was submitted on behalf of the appellant that the rape was not of such a serious nature, but the fact that the child was 9-years old at the time of the crime, in itself, is very serious. Rape of a child violates the child's dignity. ..." [Paragraph 17]

"In my view the trial court did not accord due weight to the personal circumstances of the appellant: the fact that he was 19 years of age and a scholar when the offence was committed; that he is a first offender with good prospects of rehabilitation, and that he had spent three years and three months in custody while awaiting his trial. ..." [Paragraph 19]

"... [D]espite his lack of remorse ... I am not persuaded that the sentence of life imprisonment ... is warranted in the appellant's case. I say so in light of the fact that the appellant is a youthful first offender who has been assessed by expert evidence to be capable of being rehabilitated, given the opportunity. These are weighty factors, which cumulatively must redound to his benefit as substantial and compelling circumstances justifying the imposition of a sentence less than the minimum prescribed ..." [Paragraph 21]

"..... I am of the view that every judicial officer who has to sentence a youthful offender must ensure that, whatsoever sentence he or she decides to impose, will promote the rehabilitation of the particular youth. ..." [Paragraph 22]

"A fine balance needs to be struck between society's needs to punish crime, whilst not overlooking the right and interest of a juvenile offender to be accorded an opportunity to be rehabilitated in suitable and appropriate cases. Taking into account all the relevant factors ... leaves me with the conviction that a sentence of 15 years' imprisonment would be an appropriate sentence ..." [Paragraph 23]

KHUMALO V S (A175/2010) [2012] ZAFSHC 28 (8 MARCH 2012)

Case heard 13 February 2012, Judgement delivered 8 March 2012.

Appellant, who was HIV-positive, had been convicted in the Regional Court of the rape of a fifteen year old girl who was classified as "mentally retarded" in terms of s 1(1) of the Sexual Offences and Related Matters Amendment Act [footnote 1 of the judgment reads "Although the Act refers to "retarded" I will throughout the judgment use the term "impaired" as it is the most appropriate]. Appellant was sentenced to 18 years imprisonment, and appealed against sentence only.

Chesiwe AJ (Mocumie J concurring) held:

"... [A]ppellant is HIV positive and the possibility exists that he might have infected the complainant although no such medical evidence was led. It is quiet [sic] a concern that the HIV status of the appellant was disclosed at such a late stage, before sentencing, and not during his evidence-in-chief as the State would have had the opportunity to interrogate and establish whether he knew of his HIV status or not before he raped the complainant. This situation also leaves me wondering whether the complainant has been through any counselling or treatment to check on whether she was infected with HIV/AIDS ... and whether the complainant's whole family went through to any family counselling after the rape ..." [Paragraph 3]

"Rape is a very serious offence and the punishment ... must be proportionate to such seriousness. Rape is a violation of a person's constitutionally entrenched rights. It is an invasion of a woman's most valuable of all rights, namely dignity. The courts cannot ignore the frequency at which rape

takes place in the country especially perpetrated against children and worse in this case a mentally impaired child. The interest of the public must be protected against people of the appellant's calibre. …" [Paragraph 9]

The appeal was dismissed.

ADMINISTRATION OF JUSTICE

LAW SOCIETY OF THE FREE STATE V RADEBE (5293/2015) [2016] ZAFSHC 97 (9 JUNE 2016)

Case heard 12 May 2016, Judgment delivered 9 June 2016

Applicant sought an order striking off, alternatively suspending, the respondent from the roll of attorneys. The application stemmed from a complaint that the respondent had failed to properly administer a deceased estate.

Chesiwe AJ (Rampai J concurring) held:

"… [T]he respondent is young and relatively inexperienced in the running of an attorney's office. It was irregular and unethical of him to abuse the funds of the estate and not give proper account to the heirs. He admitted his mistakes, which indicates a measure of remorse. He has not attempted to deceive the applicant nor the court. …" [Paragraph 29]

"We have considered the peculiar circumstances of the misconduct. We are not convinced that a proper case has been made out to justify the finding that the respondent is no longer a fit and proper person to continue practicing as an attorney. […] We have weighed up the respondent's conduct against the conduct expected of a prudent attorney. We found the conduct of the respondent to be wanting. However, his deviant conduct did not, in our view, stem from an inherently irreparable character defect. It append to us that, given a chance, he would probably redeem himself and prudently conduct himself in an honourable manner as a fit and proper attorney is expected to. In the light of all those considerations we are inclined to exercise the discretion entrusted to us in favour of the respondent as regards the second leg of the enquiry. This then is our value judgment." [Paragraphs 30 – 31]

"… [T]he respondent admittedly made withdrawals from the estate account of the deceased. The respondent acknowledged that he had no intention of stealing the funds, but always intended to pay back all the money he took from the estate account. The deposits he made supported his averments. That tended to diminish the moral blame worthiness of his action. He did not have the *mala* fide criminal intent to permanently deprive the estate the actual benefit of its funds. …"

Respondent was suspended from practising as an attorney for his own account for 12 months.

MEDIA COVERAGE

Pieter – Louis Myburg, "Magashule and Daughter in Money-for-Jam Property Scandal", *News 24*, 31 JANUARY 2018.
(https://www.news24.com/SouthAfrica/News/magashule-and-daughter-in-money-for-jam-property-scandal-20180131)

"Controversial ANC secretary general and Free State Premier Ace Magashule is implicated in a dodgy property deal with the Free State Development Corporation (FDC) that saw his long-lost daughter score R9 million for doing nothing. … News24 can reveal that 27-year old Thoko Alice Malembe, Magashule's estranged daughter with whom he was reunited in 2011, scored a contentious property deal with the FDC, a government entity with a chairperson who is said to be a long-time ally of Magashule. … In March 2015, the FDC placed an advert in The New Age newspaper in which it invited "Black persons, Black owned entities or consortia to submit proposals to purchase some of [the FDC's] excess land" … According to the court papers relating to the Botshabelo property, one of the business's long-time owners, Richard Kudhuga, submitted a proposal to buy the property for R5.5m via a family trust. But the FDC instead accepted a significantly lower offer from Botlokwa Holdings, Malembe's company.

In March 2017, the High Court in Bloemfontein dismissed Khuduga's application to review the FDC's bid process and to set aside its decision to sell the property to either Malembe or the MMAT Trust. Acting High Court Judge Sharon Chesiwe ruled that "it is an extremely serious matter for a court to intervene in decisions that were taken by the elected representative of an organ of state [and that] if [an] open court has to intervene at all, it should be done in extreme circumstances". She also ruled that "there were strategic considerations that gave [Malembe or her trust] advantage, despite their considerably less costly bid". Chesiwe's ruling does not elaborate on what these "strategic considerations" were.

The fact that Malembe is in fact the daughter of the province's premier and a business associate of the FDC's chairperson was, of course, not factored into the ruling.

The FDC has also not yet transferred the property to Malembe's trust, pending the outcome of an appeal by the applicant." [Emphasis added].

MR PITSO MOLITSOANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 9 March 1962

BProc, University Zululand (1989)

CAREER PATH

Magistrate and Head of Court, Edenburg Magistrates' Court (November 2008 – present)

Acting Judge, Free State High Court (2016, 2017)

Acting Regional Court Magistrate (2017)

Commissioner, Small Claims Court (date – present)

Acting Magistrate, Bloemfontein Magistrates' Court (2007 – 2008)

Professional Assistant, Legal Aid South Africa (2006)

Professional Assistant, Moroka Attorneys, (2001 – 2006)

Professional Assistant, Myberg, Steyn-Meyer (2001)

Professional Assistant, Maphatchwane Attorneys (1995 – 2001)

Admission as Attorney 17 August 1995.

Clerk, Articled Clerk, Molefi Litheko Attorneys (1990 - 1992)

Investigator, Independent Electoral Commission (1994)

JUDICIAL OFFICERS ASSOCIATION OF SOUTH AFRICA

Treasurer, Free State (2012 – 2013, 2013 – 2014, 2014 – 2015, 2016 - 2017)

Member, Provincial Executive Committee (2015 - 2016)

BLACK LAWYERS ASSOCIATION

Treasurer, Free State (2003 – 2004)

Treasurer (2004 – 2005)

RETHUSANANG DAY CARE CENTRE

Founding Board Member (2016 -)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

VUKANI GAMING FREE STATE (PTY) LTD V THE CHAIRPERSON, FREE STATE GAMBLING AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 877/2015, FREE STATE HIGH COURT

Case heard 10 October 2016, Judgment delivered 8 December 2016

Application to review and set aside a decision by the second respondent to grant a gambling machine operator license to the third respondent ('Restivox').

Molitsoane AJ (Hancke J concurring) held:

"At the time when the licence was granted seven directors of Restivox, who appeared on the Restivox licence application had resigned. … [T]here were no longer directors in the company who were resident in the Free State. … Applicant contends that the changes in the equity and directors were thus clearly material to Restivox's application and as such, provision had to be made for a further public participation process in respect of the amended application prior to the Authority granting a licence to Restivox." [Paragraphs 23 – 24]

"It is my understanding of the submission of Restivox that is does not dispute that the amendments which were made were material, but it contends that even if they were material, the process was not to be subjected to a further public scrutiny as there is no provision in the prescripts for that." [Paragraph 32]

"… The requirement of procedural fairness cannot allow Restivox to be permitted to change the licence application materially without subjecting the application back to public scrutiny as this would give it an unfair advantage over the other applicants and would consequently subvert the very transparency process envisaged by the public hearings. The fact that the applicant also raised important questions which went to the core of the application of Restivox, demanded that the applicant be apprised of the response of Restivox before a final action could be taken by the Authority. This did not happen." [Paragraph 33].

"It is my considered view that the Authority acted unlawfully and irrationally when it allowed crucial amendments to the Restivox application and failed to subject the process to a further public participation. The Authority may only grant a licence if it is satisfied that the applicant has

appropriate knowledge, expertise and experience, or is able to acquire such knowledge and experience, to operate gambling machines ..." [Paragraph 38]

"I am unable to agree with the submissions by the respondent that such material amendment to the licence which was kept away from the board as a result of which the board made a decision on fact which were at the time of the reconsideration of the licence, were not material. If the Authority was not appraised of the resignations of these directors with their professed expertise and skill it cannot be said that in granting of the operator licence the Authority was "satisfied" of the expertise and skill of the directors of Restivox. My view is that had the Authority been made aware of these resignations it would most likely have called for more information in order to comply with section 72 of the Act. [Paragraph 41]

The grant of the license was reviewed and set aside, and the license application was referred back to the second respondent for reconsideration.

CIVIL PROCEDURE

BOTHA AND OTHERS V SCHOLTZ AND ANOTHER; IN RE BOTHA AND OTHERS V MEMBER OF THE EXECUTIVE COUNCIL: LOCAL GOVERNMENT AND HOUSING FREE STATE PROVINCE AND OTHERS (3424/2016, R182/2007) [2017] ZAFSHC 51 (9 March 2017)

Case heard 8 December 2016, Judgment delivered 9 March 2017

Application sought a declaratory order that the first respondent's right to quantify and recover costs had superannuated, alternatively, had prescribed. The bill of costs in question had been presented for taxation six years after the relevant order had been granted.

"The question of superannuation was previously governed by the Uniform Rule 66 of this court which was couched differently from the present rule bearing the same number. In terms of the said rule before it was amended, the executability of a judgment debt lapsed after a certain period with the result that once a judgment debt was superannuated, execution thereon could not be carried out unless the judgment was first revived." [Paragraph11]

"Rule 66 as it currently stands has done away with the aspect of superannuation. On the other hand section 11(a) (ii) of the Prescription Act ... provides that the period of prescription of any judgment debt shall be 30 years. Further section 12(1) of the Act provides that "subject to the provisions of subsections (2) and (3), prescription shall 'commence to run as soon as the debt is due." [Paragraph 14]

"This case should, however, be distinguished from the case of Santam v Ethwar ... In that case plaintiff ... had instituted an action for compensation. Defendant made an offer to the plaintiff in terms of rule 34 for payment of damages and also agreed to pay the costs of the plaintiff as agreed or taxed. The offer was accepted by the plaintiff and payment of the offered damages was made subsequently. The plaintiff, however, did not tax his costs within three years and when he

presented his bill of costs after three years, an objection was raised on the basis that the plaintiff's claim for costs had prescribed. The court held that the issue depended on whether the debt was due on the day of the settlement. As there was no agreement or taxation on costs which was what the parties intended should occur to render them payable, the court held that prescription could not have commenced to run. In that case, that settlement was never made an order of the court as the plaintiff, subsequent to the objection to tax the bill of costs, applied for default judgment … which judgment was granted and a warrant of execution issued, although it was later on stayed. Contrary to that case where the offer and acceptance were not made an order of the court, in the instant case the first respondent was granted costs by the court." [Paragraph17]

"In terms of section 11(a)(ii) of the Act where judgment has been granted for costs, a claim for such costs would only prescribe after thirty years. … It should be noted that when the rule dealing with superannuation was still in existence its effect was only to force the creditor to revive the judgment after every three years when he wanted to execute on it until the thirty year period envisaged in section 11(a)(ii) of the Act had expired. It was never intended to extinguish the debt by way of extinctive prescription. It could, therefore, not have been the intention that where judgment costs have been granted, which order prescribed in thirty years, the right to have them taxed should prescribe while, an order for such costs had not prescribed. In view of the fact that the rule dealing with superannuation was scrapped, the applicants cannot aver that the costs order granted herein was superannuated or prescribed. In my view the first respondent does not enjoy an unlimited right to enforce his claim for costs insofar as he can only quantify his costs and present a bill for taxation as long as the judgment from which his right derives has not prescribed." [Paragraph 18]

The application was dismissed with costs.

CRIMINAL JUSTICE

LIHAMBILE ZWINDE V S, UNREPORTED JUDGMENT, CASE NO. A161/2016, FREE STATE HIGH COURT

Case heard 7 November 2016, Judgment delivered 15 December 2016

This was an appeal against a sentence of 10 years imprisonment for contravention of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

Molitsoane AJ (Molemela JP concurring) held:

"The following factors in my view weigh heavily in favour of the appellant and cumulatively constitute substantial and compelling circumstances warranting deviation from the applicable minimum sentence of 10 years imprisonment:

1. His relative youthfulness. He was 24 years of age and a student at the time of the commission of the offence. Admittedly it cannot be argued that the accused was immature at the time of the commission of the offence. It is my considered view, however, that he was a model student with a bright future lying ahead;

2. Admittedly the accused pleaded not guilty to the charges. But it is clear that he became remorseful. This can be illustrated by the fact that immediately after the incident, and when he was confronted by the complainant, he apologised for having caused her distress. Thereafter, when his seniors confronted him, he again asked for forgiveness even though he denied having perpetrated the offence. During his testimony in mitigation of sentence, he expressed remorse about the incident. His expression of remorse and his age count favourably for rehabilitation purposes.
3. At the time of his sentencing he was already a qualified radiographer, at the prime of both his adulthood and profession. All indications point to his deregistration as a radiographer with the HCPSA. This case would have a profound impact on his future life.
4. He is a first offender;
5. This rape cannot be classified as one of the worst kind;
6. There was no penile penetration with the consequent health risk associated with that kind of rape;
7. Although he is unmarried both his parents are unemployed and he was the breadwinner in the house;
8. There is a strong possibility that he can be successfully rehabilitated;

It is therefore my considered view that these factors taken together with the personal circumstances of the appellant constitute substantial and compelling circumstances that should have warranted the trial court to deviate from imposing the prescribed minimum sentence." [Paragraphs 15-16]

"By abusing the trust of his patients, he committed a dastardly and reprehensible act. Rape in any form is a heinous, despicable and reprehensible crime." [Paragraph 18]

Molitsoane AJ then quoted from *Potgieter v S [2013] JOH 20964 (FB)* where the court said:

> "The incident of finger rape has become very prevalent particularly in cases involving small children. While the offender's moral blameworthiness is an important factor in sentencing of an offender, care must be taken to not put too much emphasis on whether or not rape was committed by means of a penis or a finger. Unless we guard against such danger, the very purpose for which the measure was enacted may well be frustrated." [Paragraph 20].

"I am, therefore, of the considered view that the trial court committed a misdirection when it found that there were no substantial and compelling circumstances warranting a deviation from imposing a prescribed sentence." [Paragraph 24]

The appeal succeeded, and the appellant was sentence to seven years imprisonment, of which three were suspended for five years.

S V RABELE (76/2014) [2016] ZAFSHC 178 (29 September 2016)

Case heard 28 September 2016, Judgment delivered 29 September 2016

This was an application to revoke the release of the accused on warning, and for him to be kept in custody pending the finalisation of a partly heard criminal matter against him.

Molitsoane AJ held:

"It is not in dispute that the accused did not disclose the previous convictions of abduction and theft. It is further not in dispute that while he was released on warning he was arrested on other charges. What, however, is important to consider is whether his failure to disclose his previous convictions and further his subsequent arrest on other charges while on warning warrant that his release on warning be terminated is envisaged in section 72A read with sections 68(1) of the CPA?" [Paragraph 19].

"In terms of section 271A of the CPA, certain convictions fall away as previous convictions after expiration of ten years. It has been submitted by counsel for the state that this related to sentence only and not to section 60 (11B) in bail proceedings. The court shares the same sentiments ..." [Paragraph 23]

"The second consideration is whether the accused poses a risk of threat to others when he has been released on his own recognisance. The state argues that while on warning he was arrested and charged on other matters. ..." [Paragraphs 27-28].

"One must ... bear in mind the primary aim of the release of the accused on warning or on bail, namely, whether if released on warning or bail is granted to him, the accused will stand his trial. Admittedly while the accused was released on warning he was arrested on other similar offences. He has not been convicted of the said offences." [Paragraphs 31- 32]

"The test remains whether the interest of justice requires that his release on warning should be terminated. It needs to be mentioned that at one stage a warrant for his arrest was authorised and his bail money forfeited to state. He however went back to court and gave an explanation to court as to his failure to attend court. The court was satisfied with his explanation and released him on warning. He has since attended court religiously. I can accordingly not find that there are any sufficient reasons to terminate his release on warning and I accordingly cannot therefore find that the interest of justice requires that his release on warning should be terminated. ..." [Paragraphs 34-36

S V MOKHITLANE, UNREPORTED JUDGMENT, CASE NO. R212/2016, FREE STATE HIGH COURT

Judgment delivered 25 November 2016

The accused had been convicted in terms of the Drugs and Drug Trafficking Act. No order was made under the Firearms Control Act. The reviewing judge queried whether an enquiry in terms of the Firearms Control Act had been held, as it did not appear from the record. As the magistrate who had

decided the case had since passed away, the query was not answered and the review proceeded on the basis that no enquiry had been held.

Molitsoane AJ (Lekale J concurring) held:

"Section 103(1) … makes it clear that, unless the court determines otherwise, a person convicted of any of the offences mentioned in such subsections becomes ex lege unfit to possess a firearm." [Paragraph 7]

"The present case falls squarely under section 103(1). It appears from the record of the proceedings that the trial court herein just affirmed the status quo without holding any enquiry 'to determine otherwise' upon conviction." [Paragraph 9].

"A distinction should always be drawn between the provisions of sections 103(1) and 103(2) of the Act. While in section 103(1) a person becomes **automatically** unfit to possess a firearm upon conviction of the offences listed in Schedule 2, in respect of 103(2)(a) the court is obliged to hold an enquiry **before** a person can be declared unfit to possess a firearm." [Paragraph 10]

"In my view the court is obliged, as of fairness and justice, to hear the parties on the issue as to whether or not to "determine otherwise" before deciding the same. The court cannot play a passive role in circumstances where the conviction leads to a resultant incapacity to possess a firearm by operation of the law only to later affirm the status quo of the disqualification as a matter of routine and arbitrarily." [Paragraph 15]

"Whether one calls it an 'invitation to advance reasons' or an enquiry into why the court should determine otherwise the end result is, in my considered view, the same. A determination cannot be made unless the court has facts before it, advanced from the bar or by way of evidence to assist in that regard. The court is, therefore, obliged to play an active role in bringing all the necessary facts before it in order to come to a just decision. Failure to afford any of the parties the opportunity to advance such facts will result in a misdirection on the part of the trial court warranting intervention by this court." [Paragraph 16]

"The trial court, therefore, committed a misdirection when it effectively affirmed that the accused was unfit to possess a firearm without first holding an enquiry or inviting the accused to advance reasons in order to assist it to decide the question as to whether there existed cause for it to "determine otherwise". [Paragraph 17]

The court determined that the accused was not unfit to possess a firearm in terms of s 103(10 of the Firearms Control Act.

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, 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 –)

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

PRIVATE LAW

MPHIRIME V ROAD ACCIDENT FUND (916/2014) [2016] ZAFSHC 24 (25 FEBRUARY 2016]

Case heard 18 November 2015, Judgment delivered 25 February 2016

Plaintiff in this matter was a passenger in a vehicle involved in an accident. The parties settled on an amount payable to applicant, for future loss of earnings or costs to employ a domestic assistant. The issue in dispute was whether the amount settled on was to be paid in a lump sum or in accordance with s 17(4)(a) of the RAF Act. Opperman AJ found that the definition of 'health services' in the relevant section did not include domestic assistance, and that plaintiff was entitled to a lump sum payment. In ***Road Accident Fund v Mphirime*** **(1036/2016) [2017] ZASCA 140 (2 October 2017)**, the SCA considered an appeal in order to obtain "clarity on the issue of what claims may be dealt with by way of an undertaking under the section." [Paragraph 4] The appeal was upheld and the judgment of the high court overturned.

"In my view, had the legislature intended as significant and far-reaching an amendment of s17(4)(a) as is suggested by the Mphirme judgment, then it would have effected it in clear and unambiguous terms. This it has not done." [Paragraph 9]

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.

S V M AND OTHERS (2/2016) [2016] ZAFSHC 41 (18 MARCH 2016)

Case heard 18 February 2016, Judgment delivered 18 February 2016

This was an application for discharge in terms of S174 of the Criminal Procedure Act. Two accused were charged with two counts of housebreaking with the intent to contravene the provisions of section 3 of the Criminal Law Amendment Act (rape) and rape, as well as robbery with aggravating circumstances. Both pleaded not guilty. The state did not oppose the application of accused 1 as it was conceded that the testimony of the single witness was unreliable. The application made by accused 2 was opposed.

Opperman AJ held:"As it was clearly stated above there is not an onus in the usual sense of the law; and specifically not an onus on a prima facie basis to be met by the State" [Paragraph 13]

"... In a criminal matter the accused has a right to silence and against self-incrimination. It often happens that the accused choses to close his/her case after refusal of a 174- application and is nonetheless acquitted. Evidence at the close of the State case does not automatically becomes evidence beyond a reasonable doubt. Here another test will be applied. It is not beyond a reasonable doubt and it is not on a balance of probabilities." [Paragraph 15]

"I do remind myself of the circumstances of the case and the possible tension the witnesses were and are under. But, their testimony is the only instrument with which the court can adjudicate the evidence; if it is lacking it cannot be rescued in any way. A further burden on the evidence of the witness is the caution

with which the evidence of identifying witnesses must be regarded. The witness might be subjectively honest and credible but the evidence itself can lack trustworthiness. Corroboration for the evidence of both witnesses is lacking on this dispute." [Paragraph 22]

"It will be unconstitutional to put the accused on his defence in light of the poor quality of the evidence against him. I do not have any option but to grant the application of accused 1." [Paragraph 24]

"The nature of the evidence against accused 2 is completely different. To begin with, his own version places him on the scene. He admits sexual intercourse, but claims it to be with the consent of the complainant ... The defence disclosed in plea and cross examination is still in the wind and of little value. It must be given substance by way of evidence under oath and be tested under cross examination. In all fairness, there is also little possibility given the defence of the accused, that he will advance the State's case if he enters the witness box. Further, the complainant that stands steadfast in her denial of the version of the accused, is corroborated by the mother and their friend. Corroboration that is lacking in a mere plea explanation and statements in cross examination. Lastly, the version of the accused still lacks detail and is vague and general." [Paragraph 25]

The application for discharge was granted in respect of accused 1, and denied in respect of accused 2.

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."

"E.TV NEWS READER NEO MONYETSANE HAS ESCAPED WITH A FINE AFTER HE WAS FOUND GUILTY OF SPEEDING", ***THE CITIZEN*** **(3 DECEMBER 2013) (**https://citizen.co.za/lifestyle/your-life-entertainment-your-life/entertainment-celebrities/94057/slap-wrist-speeding-news-reader/)

"Justifying the lenient sentence magistrate Lani Opperman said Monyetsane had shown genuine remorse."

"According to the Daily Sun, Magistrate Opperman in court asked the remorseful Monyetsane to give her a good reason why she should not take licence away, to which he replied that he really needs it to get to work every day."

MS. KHOSI QONDENI HADEBE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 15 March 1957

BProc, University of Zululand (1982)

LLB, University of Zululand (1991)

Advanced Diploma in Labour Law, Rand Afrikaans University (2000)

CAREER PATH

Acting Judge

KwaZulu Natal High Court, Pietermaritzburg (January 2010; May – July 2011; August 2011; January – March 2012; January – March 2017; April – May 2017; November – December 2017)

KwaZulu Natal High Court, Durban (July – August 2010; October 2017 – November 2017)

Eastern Cape High Court, Bisho (October – November 2006; April – May 2007)

Regional Magistrate, Pinetown (2005-2016)

Acting Regional Magistrate, Umlazi and Pinetown (2002 – 2005)

Additional Magistrate, Durban Magistrates' Office (2000 – 2002)

Assistant Head and Head of Office, Umzumbe Magistrates Office (1994 – 2000)

Clerk, Interpreter, Prosecutor, Legal Planner & Magistrate, Department of Justice, Kwa-Zula Natal (1979 -1995)

Association of Regional Magistrates (ARMSA)

Member (2005 – 2016)

SEVENTH DAY ADVENTIST CHURCH

Church Elder (2009-2010, 2010-2012, 2013-2014)

LAW, RACE AND GENDER UNIT

Facilitator (1998 -2004)

JUDICIAL OFFICERS' ASSOCIATION OF SOUTH AFRICA (JOASA)

Member (1998 – 2004)

KWA-ZULU NATAL STAFF ASSOCIATION (PROFESSIONAL)

Treasurer (1988 – 1995)

ADVENTIST WOMENS' MINISTRY

Member (no dates given)

DORCAS MOVEMENT – SEVENTH DAY ADVENTIST CHURCH

Member (no dates given)

SELECTED JUDGMENTS

CIVIL PROCEDURE

EUGENE NEL N.O. V BHEKAYENA WILFRED LUTHULI N.O. AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 11281/2011 (KWAZUL NATAL HIGH COURT, PIETERMARITZBURG)

Case heard, Judgment delivered

Application in terms of rule 35(7) to direct the respondents to comply with applicant's notice in terms of rule 35(3) of the Uniform Rules of Court. The issues in the main action were the status of certain payments made by the liquidated company to certain of the respondents.

Hadebe AJ held:

"The applicant's case and argument is that the abovementioned sums were indeed commissions and/or remuneration earned by the fourth respondent and as such were income in the hands of the fourth respondent. He would have, therefore, declared such income in his income tax returns for the period 2007-2010. Furthermore, if the sums in question were not reflected in fourth respondent's income tax returns for the period in question, then the income tax returns would corroborate the applicant's version that the sums were paid gratuitously or not for value to the Trust and/or as loans to the fourth respondent. The applicant further avers that it may also be that the commissions earned were declared as income of the Trust in its income tax returns." [Paragraph 14]

"It is the applicant's belief that monies are due and payable to Amandwala by the fourth respondent and by the Trust of which the fourth respondent is one of the trustees. In an endeavour to recoup such monies he has approached the respondents, especially the fourth respondent to produce documents which are exclusively available to the respondent, which documents, in this case are, the tax returns of the fourth respondent, and he believes such documents will assist him to "prove a claim" in terms of section 386(1)(b) against the respondents, in particular the fourth respondent." [Paragraph 23]

"I am, in the final analysis, of the view that the application by the applicant herein does not amount to a "fishing expedition" … He has sufficiently laid the basis why such documents become relevant in his cause. He has clearly indicated why the production of the fourth respondent's tax returns for the period of 1 June 2007 to 1 December 2010 will assist him in determining whether the amounts paid to the fourth respondent would have been monies earned by the fourth respondent from the applicant as commission and/or remuneration. In view of provisions of section 26(1) of the Insolvency Act, the determination of the status of these payments becomes crucial for the applicant's case." [Paragraph 27]

The application was granted.

CRIMINAL JUSTICE

MBUSO PATRIC SHUSHA V S, UNREPORTED JUDGMENT, CASE NO. AR541/2016 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 20 February 2017, Judgment delivered 12 May 2017

This was an appeal against conviction on several counts of rape and sexual assault.

Hadebe AJ (Lopes J concurring) held:

"The first point of contention raised by the appellant … is the issue of the competency of the four complainants. The argument is that the children were not properly admonished before they testified. …" [Paragraph 18].

"In as much as it appears that the magistrate did lean towards the religious aspect of the children's consciousness of what is right or wrong, his questioning of these children, however, cannot be said to have been "elementary" as was observed in the judgement of *Raghubar*. With all the complainants, the record indicates that the magistrate went much further in establishing the competency of the children. He questioned them about their ages, their schooling, their teachers, their families etc., before he ventured into admonishing them and again as argued by counsel for respondent, the record indicates that at each and every break the magistrate would remind the children of their undertaking to tell the truth." [Paragraph 25]

"The cross-examination of all the complainants appears to have been merciless and at times bordered on being unfair. It is to be appreciated that on such instances, the magistrate was alive to this fact and timeously intervened." [Paragraph 28]

"The fact of the matter is that the offences took place somewhere in 2012 and the witnesses only testified in 2014, two years after the commission of the offences. … The record shows that all the witnesses were distressed by having to repeat what had happened to them … [S]ight must not be lost of the fact that it is not only the young witnesses who broke down and cried in court …" [Paragraph 29]

"The evidence on the record seems to suggest that both Mrs Mavundla and Dr Mjali understood the limitations of the children because of their age better than the defence attorney did. The responses of these two adult witnesses directly address the concerns raised … The ages of all the victims have been referred to in this judgment. It would be taking it too far to expect the children of those ages to have the precision of a month and a year when testifying about an incident that had occurred over a period of two years as the evidence herein suggests." [Paragraph 34]

"What is important is what the children testified to in details as to what had been done to them. And what they told the court had happened to them is what amounts to the offence of rape. It was not important, in the circumstances for them to know what the word "rape" means. The trier of fact had a duty to analyse and scrutinise their evidence, as he did, and to decide if what the children endured was actually rape." [Paragraph 35]

"... I am not of the view that the sentences imposed by the magistrate in this case reveal any kind of disparity, neither are they shocking nor inappropriate." [Paragraph 42]

"I do not understand how a previous, relevant conviction can be a mitigating factor as argued in appellant's heads ... The appellant in his own words indicates that he was released on parole in 2010, having served only four years of his term of seven years' imprisonment for attempted rape. In 2012 he had reverted to his wayward conduct, molesting the victims in this case. In my view, nothing would have assisted him to escape the imposition of these sentences and that the sentences imposed fell in line with the dictates of the triad as enunciated in *S v Zinn*." [Paragraph43]

The appeal was dismissed.

ADVOCATE ELIZABETH LAW

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 23 May 1968

Bachelor of Arts, University of Natal, Pietermartizburg (1986 - 1998)

LLB, University of Natal, Pietermartizburg (1989 - 1991)

Post Graduate Diploma in Industrial Relations, University of Natal, Durban (1992)

CAREER PATH

Acting Judge:

KwaZulu Natal High Court, Durban (March – April & October – November 2017)

KwaZulu Natal High Court, Pietermaritzburg (April - May 2017)

Accredited commercial mediator (2016 -)

Commissioner, Small Claims Court (2002 – 2013)

Practising advocate since July 1995

SOCIETY OF ADVOCATES

Member Advocate (1995 – current)

Honorary Secretary (Oct 2003 – Jul 2005)

Honorary Treasurer (Current)

SELECTED JUDGMENTS

CIVIL PROCEDURE

SKIN RENEWAL CC V BRIGIT FILMER SPA AND SKIN (PTY) LTD AND 2 OTHERS, UNREPORTED JUDGMENT, CASE NO. AR 465/2016 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 28 April, Judgment delivered 4 July 2017

Appellant had brought two applications against all three respondents, seeking to hold them in contempt of certain court orders. The appeal was against the discharge of the of rules nisi in respect of both applications.

Law AJ (Jappie JP and Gyanda J concurring) held:

"In essence the appellant was asking that an inference be drawn that the third respondent was acting as the agent of the first and/or second respondents and that he had some form of control over or affiliation to the business activities of the first respondent." [Paragraph 27]

"An inference can only be drawn from facts which have been proved or admitted. Given the criminal dimension of contempt proceedings, I am of the view that the rules which apply to inferential reasoning in criminal proceedings are applicable ..." [Paragraph 28]

"... [T]he facts from which the appellant sought to draw an inference that the third respondent was the agent of the first and second respondents and/or that he had some form of control over the first respondent's business activities were the following:

a) The second and third respondents are married to each other and reside together on the property where the premises are situated.
b) The premises occupied by the appellant are situated on a property owned by a family trust of which the third respondent is a trustee.
c) This third respondent deposed to a confirmatory affidavit in the proceedings between the appellant and the first respondent apparently confirming that the property is owned by the trust.
d) The sign which was erected on the wall of the premises (admittedly by the third respondent) refers to a notice to vacate the premises which was given by the first respondent to the appellant." [Paragraph 29]

"In my view, by no stretch of the imagination can any inference be drawn from the above facts that the third respondent was the agent of the first and/or second respondents or that he had any control over the first respondent's business activities." [Paragraph30]

"Mr. Nowitz contended that each instance of the respondent's conduct had to be considered holistically together with each of the other breaches complained of. I do not think that such an approach can lead one to the conclusion that any of the respondents were in contempt. As has been discussed above, in several instances the individual acts complained of did not amount to breaches of the orders and, that being the case, it is impossible for them to amount to a breach collectively. In other instances there were disputes of fact as to whether the respondents had committed the acts complained of and I do not think that the learned Judge in the Court a quo erred or misdirected herself in coming to the conclusion which she did in that regard." [Paragraph43]

The appeal was dismissed with costs.

CRIMINAL JUSTICE

VUSI [REDACTED] V S, UNREPORTED JUDGMENT, CASE NO. AR626/16 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 28 April 2017, Judgment delivered 14 June 2017 [as per date stamp]

The appellant was convicted of rape in the Regional Court. The complainant was a girl under the age of sixteen, and the appellant was found to have raped her more than once. The magistrate found no substantial or compelling circumstances to deviate from the minimum sentence of life imprisonment. The appeal was against the sentence. One of the arguments raised was that the age of the appellant should be taken into account, in that he would be 76 years old when he qualified for parole.

Law AJ (Jappie JP concurring) held:

"Section 73(6)(b)(iv) of the [Correctional Services] Act provides that a person who has been sentenced to life incarceration may not be placed on parole until he or she has served at least 25 years of the sentence. However, section 73(6)(b)(vi) of the Act provides that a person who has been sentenced "to any term of incarceration… may be placed on day parole or parole on reaching the age of 65 years provided that he or she has served as least 15 years of such sentence."" [Paragraph 12]

"… [T]he advanced age of a prisoner is a factor which is considered and provided for in the relevant parole legislation. By virtue of the provisions of section 73(6)(b)(vi) the appellant will be 66 years old when he becomes eligible to be considered for parole by the Minister as contemplated by section 73(5)(a)(ii) of the Act. If the suggested sentence of 20 years were to be substituted for the life sentence imposed by the Court a quo, the appellant would, in terms of section 73(6)(A) of the Act, become eligible to be considered for parole after he has served half that sentence, namely after 10

years. Whilst there is no guarantee in either case that parole will actually be granted, given the circumstances of the case, I do not think that justice would be served if the appellants sentenced were reduced to 20 years." [Paragraph 14]

"There are a number of aggravating factors in this case which were comprehensively dealt with by the Magistrate in her judgment in the Court a quo. There is no need to repeat them here, but it bears noting that in terms of the minimum sentencing legislation, there were two grounds which rendered the appellant liable to the imposition of a life sentence, namely, the complainant was under the age of 16 and the appellant raped her multiple times. The Magistrate did not misdirect herself in coming to the conclusion that a life sentence was the only appropriate sentence." [Paragraph 15]

"Whilst the relatively advanced age of the appellant is a factor to be considered in sentencing … it cannot be said that the sentence imposed by the Court a quo is shockingly inappropriate such that our interference is warranted." [Paragraph 16]

The appeal was dismissed.

BHEKI [REDACTED] V S, UNREPORTED JUDGMENT, CASE NO. AR 216/16 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 8 May 2017, Judgment delivered 16 June 2017

The appellant was convicted of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (rape), and sentenced to 19 years imprisonment. The appeal was against conviction and sentence. The complainant was identified as "mentally disabled" in terms of the Act.

Law AJ (Koen J concurring) held:

"This definition [of mentally disabled] is very specific. Where in a sexual offence case the State wishes to rely on the fact that complainant is a person who is mentally disabled, it is not sufficient for it to prove merely that he or she is mentally disabled, retarded or challenged. The State has to prove that the complainant's mental disability is such that he or she falls into one of the four categories contained in the definition…" [Paragraph 8]

"Notwithstanding the … discrepancy in the defence case, the State was still required to prove all the elements of the offence beyond a reasonable doubt. Insofar as the element of lack of consent is concerned, the State called registered clinical psychologist, Ms. Sinden Mdunjanan, to testify regarding the complainant's mental condition." [Paragraph 19]

"Is it quite clear from the foregoing evidence that Ms. Mdunjanan could not unequivocally say that the complainant [who was 27 years old with a mental age of below 10] was unable to grasp the concept of sex due to her mental disability. She testified that the complainant's inability to understand the concept of sex could have been due to her retarded mental age or it could also have been due to the fact that she had never been educated about sex at home or at school." [Paragraph 22]

"In the absence of any direct evidence on the issue of consent from the complainant herself, the State had to reply on the presumption contained in section 57(2) of the Act. In that regard it was incumbent upon the State to prove beyond a reasonable doubt that the complainant's inability to appreciate the nature and foreseeable consequences of a sexual act was attributable to her mental disability … In that respect the State failed to discharge the onus resting upon it." [Paragraph 23]

"The Magistrate was therefore wrong in finding that the State had proved all the facts and allegations in the charge sheet and, in particular, that it had been proved beyond a reasonable doubt that the complainant, owing to her mental disability, was unable to appreciate the act of sexual intercourse, its nature and its consequences and that she was therefore unable to consent. On that basis, the conviction must be set aside." [Paragraph 24].

"A charge of rape involving a complainant who is mentally disabled has a significant feature which distinguishes it from a charge of rape involving any other adult complainant. That is the presumption contained in section 57(2) of the Act which effectively vitiates a defence of consent." [Paragraph 26]

"In my view, it is not sufficient for the charge sheet in such a case to state merely that the act of sexual penetration took place without the complainant's consent. It should be clearly stated that the complainant is incapable in law of giving his or her consent because he or she is a person who is mentally disable as contemplated by section 1(1) read with section 57(2) of the Act and it should be stated on which of the four grounds listed in the definition reliance is placed. A mere reference in the heading of the charge sheet to the numbers of the various sections of the Act does not suffice." [Paragraph 27]

"Bearing in mind the very specific definition attaching to the words "a person who is mentally disabled" and the legal consequences which flow from the commission of a sexual offence involving such a person, it is crucial that those words be used in the charge sheet. It is not sufficient for a complainant to be described a "mentally retarded" or in any other manner which is not provided for by the Act." [Paragraph 28]

"The constitutional right of an accused to a fair trial includes the right to be informed of the charge with sufficient detail to answer it. The charge sheet lays the foundation for the trail. It should not be drafted in such a manner that the accused has to try to ascertain by inference or assumption what case he or she has to meet by piecing together various sections of the legislation. That is inimical to an accused's rights in terms of section 35(3) of the Constitution." [Paragraph 30]

The appeal against conviction was upheld.

MR. ANAND MAHARAJ

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 24 December 1964

B.IURIS, University of Durban Westville (1989)

LLB, University of Zululand Durban, Umlazi Campus (1999)

CAREER PATH

Acting Judge, KwaZulu Natal Division (January – March 2015; July – August 2015; April – May, May – June 2016; July – August 2016; May – July 2017; October – November 2017).

Acting Regional Court President, Durban (December 2011 – January 2012; December 2012 – January 2013; January – March 2014)

Regional Magistrate (2006 –)

Acting Regional Magistrate, Durban (2000-2006)

Magistrate (1993-2006)

Prosecutor, Department of Justice (1987 – 1993)

Association of Regional Magistrates (ARMSA), KZN

Treasurer (2007 – current)

SELECTED JUDGMENTS

CIVIL PROCEDURE

SHAUN KISTEN N.O. AND OTHERS V ABSA BANK LIMITED AND OTHERS (AR179/15) [2016] ZAKZPHC 72 (23 AUGUST 2016)

Case heard 5 August 2016 [date judgment reserved], Judgment delivered 23 August 2016

This was an appeal against the refusal of an application for rescission of a default judgment which had initially been granted for amounts owed in terms of a mortgage contract.

Maharaj AJ (Koen and Mnguni JJ concurring) dismissed the appeal:

"The Appellants … sought to have the said judgment rescinded on the following grounds: (a) non-compliance with section 129 of the National Credit Act No. 34 of 2005; (NCA); (b) the provisions of section 26 of the Constitution not being dealt with in the summons relating to the right to have access to housing and that no one may be evicted from their home" [Paragraph 7]

"The court a quo found that the Appellants launching the application some four years later, for the rescission of the default judgment was not (a) reasonable in the circumstances; (b) despite the fact that notice was not given in terms of section 129 of the NCA it was not in the interest of justice to grant rescission; (c) that the interests of justice also favours that matters come to finality and the application for rescission ought to fail on this ground as well. (d) the court a quo also found that a "Trust" is not protected under section 26 of the Constitution." [Paragraph 11]

"The Appellants on no less than six occasions paid the First Respondent monies to have the sale of the property stayed. In my view this conduct amounts to pre-emption … The general position is that 'no person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'. In order to show that a person has acquiesced in a judgment, the court must be satisfied upon the evidence that an act has been done which is necessarily inconsistent with his continued intention to have the case reopened on appeal." [Paragraph 15]

"… [I]t is my view that the failure by the First Respondent to include the section 129 notice does not render the summons a nullity or the granting of the default judgment by the Registrar … erroneous on the basis that even if the notice was alluded to in the summons, the Appellants have not pointed to what effect remedy they might have resorted, and which they did not subsequently do, which would have warded off the default judgment." [Paragraph 17]

"It is clear that the grounds of appeal as set out by the Appellants and the reasons advanced for the delay in bringing the application for rescission some four years later, in my view, suggests that the Appellants had acquiesced in the granting of the default judgment." [Paragraph 18]

CRIMINAL JUSTICE

SITHOLE V S, UNREPORTED JUDGMENT, CASE NO. AR61/2017 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 3 November 2017, Judgment delivered 14 November 2017 (as per date stamp).

Appellant was convicted of murder and sentenced to seven years' imprisonment. In an appeal against the conviction, Maharaj AJ (Bezuidenhout J concurring) held:

"The record in this matter does not reflect the question of assessors being canvassed as required by Section 93ter(1) of the Magistrate's Court Act 32 of 1944. Both the State and defence counsel concede that this is so. In light of the decision of the Supreme Court of Appeal in S v Gayiya 2016 (2) SACR 165 (SCA) where the court held that the appointment of assessors in terms of Section 93ter(1) of the Magistrate's Court Act 34 of 1994 is peremptory and – 'It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) shall be assisted by two assessors at the trial, unless the accused requests that the trail proceed without assessors. Failing to do so would result in the court not being properly constituted.' For this reason alone the appeal against the conviction must be upheld." [Page 1]

"In passing it is my view that given the many cases emanating from the regional courts where accused persons are charged for murder and Section 93ter(1) is not applied … this results in the conviction and sentences being set aside, the Legislature should as a matter of urgency consider an amendment to this section as it has the potential to cause an injustice for non-compliance on technical grounds."

"The proposed amendment, in my view, should be considered is the deletion of Section 93ter(1) or to amend the word "*shall*" to "*may*" or that the failure to comply with this section shall not render the court improperly constituted."

"This means that the appeal is only heard after a passage of time and witnesses may not be available to testify should the matter start de novo. In the majority of cases the accused persons have the benefit of legal representation and the appeals are lodged, in some cases, in respect of sentence only." [Page 2]

SIBUTHA V S, UNREPORTED JUDGMENT, CASE NO. AR 122/2017 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 3 November 2017, Judgment delivered 14 November 2017

Appellant had been convicted of rape and sentenced to life imprisonment. This was an appeal against conviction and sentence.

Maharaj AJ (Bezuidenhout J concurring) held:

"I cannot fault the learned regional magistrate in coming to the conclusion of the identity of the appellant as the person who committed this crime and rejecting the version of the appellant." [Page 2]

"I do not believe that sufficient weight was attached to the circumstances of the appellant and as such the ultimate sentence of life imprisonment seems to me to be disproportionate to the crime committed and the ultimate interests of society. In my view this constitute a misdirection." [Page 3]

"The following factors persuade me that substantial and compelling circumstances do in fact exist, which justify the imposition of a lesser sentence. These factors are the following –

a) The first offender status of the appellant indicates that there is a good prospect of rehabilitation;
b) The failure of the State to adduce evidence of the seriousness of the injuries to the complainant and how this has affected her emotional state;
c) The possibility that consumption of alcohol may have reduced the appellant's moral blameworthiness as mentioned by the learned regional magistrate at page 184 of the record line 8 where he says – "I would be surprised if you were drunk. I wouldn't be surprised if you were high."

The apparent loss of objectivity by the learned regional magistrate in the manner appellant was treated as is evident from the following portions of the record namely – i) Page 128 line 6: "Hey, man, answer the question, please", ii) Page 135 line 24: "When you are not answering the questions you are frustrating us because you are wasting our time"; iii) Page 147 line 4: "On the issue of the charge, I may comment that the accused is lucky that he was not charged with housebreaking. It's either that he was lucky or is some form of graft on the part of the State." iv) Page 159 line 19: "Well it is understood why Mr. Mdingo didn't have much to say. If I were him, I wouldn't have much to say." Having found substantial and compelling circumstances as mentioned supra, this Court is at liberty to interfere with the sentenced imposed in the court a quo." [Pages 3-5]

"Rape is undeniable a despicable crime. It is humiliating and degrading and constitute a brutal invasion of the privacy and dignity of the person, more so when the perpetrator is a known person. Children are vulnerable to abuse and are abused by those who think they can get away with it and all too often do." [Page 5]

The appeal against conviction was dismissed, and the appeal against sentence upheld. The sentence of life imprisonment was substituted with a sentence of 25 years' imprisonment.

GAMBU V S, UNREPORTD JUDGMENT, CASE NO. AR 224/2017, 3 NOVEMBER 2017 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Appeal was convicted of the rape of a 9 year old girl, and sentenced to life imprisonment. The appeal was against sentence only.

Maharaj AJ (Bezuidenhout J concurring) held:

"The learned magistrate in my view over-emphasised the seriousness of the crime and the interest of society and failed to accord sufficient weight to the personal circumstances of the appellant. In my view this constitutes a misdirection that warrants interference with the sentence imposed by the court a quo." [Page 2]

"The following factors persuade me that substantial and compelling circumstances are present: a) the accused was relatively young at the time of the commission of the crime; b) he is afflicted with asthma; c) his level of education is low and he can be considered as unsophisticated; d) there is no evidence of serious injury to the complainant or her emotional state…" e) there is a great prospect of rehabilitation for the appellant as he is a not a repeat offender." [Pages2-3]

"Rape is undeniably a despicable crime. It is horrifying and cruel and selfish in which the aggressor treats with contempt the dignity and feelings of the victim. It is humiliating and degrading and is a brutal invasion of the dignity and privacy of the victim. It is an appalling and pervasive abuse of male power."

"Children are vulnerable to abuse and the younger they are the more vulnerable they become. They are usually abused by those who think they can get away with it and all too often do."

"No doubt the rape of children is considered in a serious light and calls for a severe penalty." [Page 3]

The sentence of life imprisonment was set aside, and replaced with a sentence of 20 years' imprisonment.

IN THE MATTER OF: JIMMY YOUNG (MENTAL HEALTH CARE USER) (1801/15) [2015] ZAKZPHC 12 (3 MARCH 2015)

Maharaj AJ (K Pillay J concurring) held:

"The above mentioned matter was sent to the High Court by … the Chairperson of the Unthungulu Mental Health Review Board for consideration and an order by this Court in terms of Section 34(7)(c) of the Mental Health Care Act 17 of 2002." [Paragraph1]

"At the outset I wish to emphasize that this matter is not before me as a review in terms of section 304 or 304A of the Criminal Procedure Act 51 of 1977. The accused was not convicted of an offence in the court a quo, and the order made by the magistrate in terms of section 77(6)(a)(ii) is not a sentence as contemplated in section 302 (1) (a)." [Paragraph 3]

"Detention pursuant to section 77(6)(a) of the Criminal Procedure Act, is an inroad on the liberty of an accused person. Such detention should not be ordered unless the accused has been found unfit to stand trial in accordance with the procedure laid down in section 79 of the Criminal Procedure Act." [Paragraph 18]

"Section 77 and 78 of the Criminal Procedure deal respectively with fitness of an accused person to stand trial and criminal responsibility where one or more of these capacities is said to be lacking on account of mental illness or defect. In either instance, the accused person must be referred for psychiatric assessment which is governed by section 79." [Paragraph 19]

"The Mental Health Review Board may decide that the mental health care user should be discharged or may approve further involuntary care." [Paragraph 22]

"The High Court has a discretion to order a person be detained as an involuntary health care user in terms of section 37 of the Mental Health Act, or that the user should be released conditionally or unconditionally." [Paragraph 23]

"In the absence of a proper enquiry by the court a quo, the referral by the magistrate in terms of section 77(6)(a)(ii) of the Criminal Procedure Act, in my view should be declared a nullity and set aside." [Paragraph 24]

"The provisions of the Mental Health Care Act cannot be dispensed with or superseded by the provisions of section 77(6)(a)(ii) of the Criminal Procedure Act. In my view they work in conjunction with each other serving different purposes …." [Paragraph 25]

"In the premises, I propose that the order of the magistrate referring the accused to Ngwelezane dated 27th November 2014 in terms of section 77(6)(a)(ii) of the Criminal Procedure Act be set aside." [Paragraph 26]

"The application by the Chairperson of the Uthungulu Mental Health Review Board to have the mental health care user … be kept and provided with care and treatment and rehabilitation services until the said user has recovered or is otherwise legally discharged, is hereby granted in terms of section 34(7) (c) of the Mental Health Care Act 17 of 2002." [Paragraph 27]

ADMINISTRATION OF JUSTICE

MAHARAJ V GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA (476/2001) [2012] ZAKZDHC 6 (1 JANUARY 2012)

In this case, magistrate Maharaj sued the respondent for wrongful and malicious prosecution, arising from charges that had been brought against him, and then withdrawn, of fraud, alternatively theft, alternatively corruption and/or obstructing or attempting to defeat the course of justice. In issue was whether the defendant had acted without reasonable or probably cause, and whether the defendant had acted with malice. It was not in dispute that the Plaintiff, while sitting as an additional magistrate, imposed sentences that were suspended subject to the payment of sums of money equivalent to a fine, to specified beneficiaries. One of these beneficiaries was a creche affiliated to the court. These types of sentences were subsequently set aside by the High Court.

Koen J rejected the claim:

"Although the orders were made in favour of the Chamber of Commerce special project, or the chamber described by other designations, the references in all instances was clearly intended to be the Durban Chamber of Commerce and Industry. There is no other and there has been no suggestion that any other chamber than the Durban Chamber of Commerce and Industry was intended. Indeed the receipts reflected the recipient also not as any 'project' but in most instances as 'Chamber of Commerce', or payment being received 'for Chamber of Commerce'. According to the affidavit of Mr Parsons, the Vice-President of Finance and Treasure for the Durban Chamber of Commerce and Industry, the Chamber had not been notified of any such orders from which it was to benefit, nor had any arrangements been entered into with the Chamber allowing for such orders, nor had any funds ever been received by the Chamber. This evidence was in direct conflict with the entry reflected in the bench book on every occasion that the beneficiary had been 'notified'. It also conflicts directly with what is to be gleaned from the charge sheets and bench book namely that payment had been made to the chamber, when the chamber in fact had no knowledge thereof and did not receive same. Certainly, to any reader, these circumstances would point to some potential misrepresentation or possible theft of monies." [Paragraph 12(b)]

"The plaintiff's allegation that he understood that the clerks from the Department of Justice could receive the money for the chamber, without detailing the basis for such belief, had an appearance at best devoid of good faith and at worst indicating possible dishonesty. The explanation of the entry in the bench book that the beneficiary had been notified so as to prevent 'duplication of work by the clerk of court 10 in having to send letters of notification …' is similarly incredulous. If the prescribed procedure required the clerk to send a written notification, then that should be followed. … In my

view the terse explanations proffered by the plaintiff in his first affidavit was such as to leave considerable doubt as to whether his mere say so that he understood that there was such an arrangement in place with the Chamber of Commerce, could be said to be reasonably possibly true, or to be remotely such as to disturb the only inference from the facts making up the *actus reus*, that the plaintiff had intended this result. Particularly, the reader of the docket would have had to weigh up the mere say so by the plaintiff that he understood that this was the arrangement with Mr Parsons, against the direct evidence of Mr Parsons contained in his affidavit that no funds had been received, no such an arrangement had been entered into, and no notification had ever been received by the chamber." [Paragraph 12(h)]

"... [T]he plaintiff might have been fortunate to have the charges against him withdrawn because if during any trial against Mr Smit, the plaintiff's evidence as to what Mr Smit on his version allegedly told him was disbelieved, his complicity would continue to exist and hence also his status as potential accomplice. The State might in those circumstances have been remiss, on that information, not to continue against both Mr Smit and the plaintiff, leaving any conflict between them to be resolved and decided in one forum." [Paragraph 12(j)]

BOOK PUBLICATION

Maharaj, Anand, "Confident Criminal Litigation", LexisNexis, 2010.

MEDIA COVERAGE

Cop gets 10 years for shooting teen during Durban protest, *DFA*, 16 January 2018, available at https://www.dfa.co.za/south-african-news/cop-gets-10-years-for-shooting-teen-during-durban-protest/

"A policeman and father of two, who was convicted of shooting dead a teenager during a 2013 protest in Durban's Cato Crest, was sentenced to 10-years' imprisonment in the Durban Magistrate's Court on Monday."

"The Durban Magistrate's Court was filled with Abahlali supporters as Magistrate Anand Maharaj handed down the long-awaited sentence. Maharaj said the shooting was understandable but not justifiable."

" 'Throughout the trial initially one got the impression that it was self-defence, but we find out there were shots in the air and shots in the ground, but you can't say he acted in self-defence and shot someone in the back', said Maharaj'

"The finding I have to make is that he fired into the crowd. That is the most likely probability. He came up with different versions of shooting into the air and then into the ground but nobody wants to explain to me how was this child shot in the back."

Drunk Driver Kills Three Friends and Gets 20 Years in Jail, *Women on Wheels*, 19 September 2017, available at https://www.womenonwheels.co.za/news/drunk-driver-kills-three-friends-and-gets-20-years-in-jail/

"Magistrate Anand Maharaj, the Durban Regional Court magistrate responsible for the strict ruling, believes that 'the time has now arrived for courts to consider the imposition of exemplary and austere sentences to those who show wilful and wanton disregard for the rules of the road'. He referred to such drivers as becoming like "lethal weapons" on the road and spoke of a need for sentences that will 'changed the mind-set' of such drivers."

"He also ordered the cancellation of Moodley's driver's licence, telling him that 'the court needs to not only punish you for what you have done, but deter other like-minded people."

Magistrate Tries to Save Suspect in Cell, *News24*, 11 March 2013, available at https://www.news24.com/SouthAfrica/News/Magistrate-tries-to-save-suspect-in-cell-20130311

"When Anand Maharaj heard that murder accused Alex Soobben, 61, was in trouble in the holding cells below his court room, he did not hesitate and immediately went to help him…"

"Maharaj knelt on the dirty cell floor to perform first aid and CPR< trying to revive the dying man. It was all in vain, however, and Soobben died of cardiac arrest."

Jolene Marriah, Maharaj writes book on Bench, *Sunday Tribune*, 23 January 2011, available at https://www.pressreader.com/south-africa/sunday-tribune/20110123/282840777504817

"Durban magistrate Anand Maharaj can now add author to his achievements. He is known for his no-nonsense approach in his courtroom to criminals, and is applying for a position on the Judicial Service Commission"

"He dedicated a chapter of the 464-page paperback, The Effects of Media Reporting, to media sensationalism and responsible reporting. 'Trial by newspaper remains a real danger to both the fair trial and the impartial disposal of an issue in the judicial process, especially where information is published in the media, but is not part of the court proceedings,' Maharaj told the Herald."

"Once the media is allowed to publish information and comment on pending cases there will always remain at least a suspicion in the mind of the public, and any party to the case, that the court, in coming to its conclusion has been influenced by outside factors."

Fiona Gounden, 60 meters 65 years, *Saturday Star*, 22 November 2009, available at https://www.security.co.za/news/14545

"Two men who robbed and hijacked the 26-year-old were sentenced to a total of 65 years in jail."

" 'One can only imagine the fear, anxiety and helplessness that Seevnarain went through before being hurled off the bridge and nearly to her death', said Maharaj before delivering his verdict."

"Maharaj said Kavisha was "an attractive, vibrant young woman" who was now incapacitated and in the intensive care unit at St. Augustine's Hospital. He branded the crime one of an 'extreme nature'. 'She pleaded for her life yet the suspects kicked her and booted her, resulting in her falling off the bridge. They took advantage of a single woman and deprived her of her freedom. This was a crime of an extreme nature', he said."

"Only a parent can know the pain and suffering his daughter has gone through. The crime situation in South Africa has become so severe that the sad reality is not if, but when you will become a victim. In this case the court has to make an example…"

MR. BONGANI MNGADI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 20 March 1958

Dip Juris (cum laude), University of Zululand (1981)

Dip Legum, University of Zululand (1984)

B. Proc, University of Zululand (1986)

LLB, University of Zululand (1988)

Dip. Tax Practice, Rand Afrikaans University (1996)

Master of Business Administration, University of Potchefstroom (2001)

CAREER PATH

Acting Judge

KwaZulu Natal High Court, Pietermaritzburg (August – September 2010; March – April, August – September & November – December 2017)

North Gauteng High Court, Pretoria (April – May 2017)

KwaZulu Natal High Court, Durban (November – December 2016)

South Gauteng High Court, Johannesburg (May – June 2015)

Practising Attorney, Mngadi and Partners (2017 – to date)

High Court Unit Manager, Legal Aid South Africa (2009 – April 2017)

Justice Centre Executive, Legal Aid South Africa (2005 – 2009)

Commissioner, Small Claims Court, Empangeni (1995 – 2005)

Practising Attorney, Mngadi and Partners, (1991 – 2005)

Professional Assistant, Mhkize and Mhkize Attorneys (1990 – 1991)

Articled Clerk, J.H Bekker Attorneys (1988 – 1990)

Magistrate 1, KwaZulu Government (September – December 1985)

Prosecutor, KwaZulu Government (1981 – 1985)

NATAL LAW SOCIETY

Member (1998 – current)

NADEL – DURBAN

Member (1998 -2001)

BLACK LAWYERS ASSOCIATION – EMPANGENI

Member (2001 – 2005)

NADEL – EMPANGENI

Member (2005 – 2009)

BLACK LAWYERS ASSOCIATION - DURBAN

Member (2009 – to date)

AFRICAN NATIONAL CONGRESS

Member (1976 – to date)

MHUBHENI – aMaNgadi Peace and Development Committee.

Member (1997 – to date)

MABASO TRIBE CHIEF'S ADVISOR

(no dates given)

SELECTED JUDGMENTS

COMMERCIAL LAW

BODY CORPORATE OF RYDAL MOUNT V GERALD MICHAEL CROSS, UNREPORTED JUDGMENT, CASE NO. AR/630/16 (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 4 September 2017, Judgment delivered 22 September 2017

Appeal against the dismissal of a claim for outstanding levies and allied charges, and the granting of a counter-claim for rendering and debatement of a levies account.

Mngadi AJ (Sishi J concurring) held:

"The respondent's gripe is not the body corporate's resolutions determining levies to be paid in a particular financial year. It is the calculation of the levies due by ... He accepts that it is the percentage quota fixed in the schedule to the sectional title plan but argues that it is wrong. It is

unreasonable and unfair. It results in him paying levies which are higher than those of unit owners with equal or even bigger units than his. It is not based solely on square floor area of his unit. …" [Paragraph 7]

"… [A] mixed scheme is not two schemes. It is one scheme, the determination of the participation quotas of the units in the scheme follow a different method from that of a residential scheme or non-residential scheme. In the case of a mixed scheme the developer must indicate the total quotas allotted to the residential sections and this quota must then be divided amongst those sections in accordance with the floor-area method. Secondly, once a participation quota has been fixed for units in a scheme a unit owner who is of the view that the participation quota applicable to his unit is not proper must follow a proper course to seek to amended the prescribed participation quota. Thirdly, the CPA is not applicable, participation quota prescribed in the schedule to the sectional plan of a scheme filed with and accepted by the Registrar of Deeds are not transactions or agreements to which s48(2) of the CPA would apply. The respondent, as well as the learned magistrate, is there not correct in contending that the participation quota of the respondent's unit must be based on the floor area only. That will not take into consideration that it is a mixed scheme. It appears that the learned magistrate over looked that it was one mixed scheme composed of residential units and non-residential units. It was not two schemes." [Paragraph 11]

"The changing of a participation quota of a unit has an impact to all units in the scheme. It can only be done through a formal process on notice to all owners of the units and the Registrar of Deeds. The learned magistrate in dismissing the claim and granting the counter-claim on the basis that an incorrect participation quota was used, granted a consequential order without granting the primary remedy. The participation quota of the relevant unit in the registered sectional plan remained extant and parallel to it would be the participation quota the learned magistrate declared is the correct participation quota. It results in absurdity and an untenable situation. There was no prayer for a relief to set aside the participation quoted in the registered sectional plan and there was no prayer to amend the sectional plan with the participation quota the respondent claimed it was the correct one. These remedies were not sought because the correct process for such relief has not been followed, the interested parties had not been cited, the court a quo had no jurisdiction to grant such relief and the case had not be made out to grant such relief …" [Paragraph16]

The appeal was upheld.

SOCIO – ECONOMIC RIGHTS

FORSYTE PROPS 5 (PTY) LTF V GEBASHE AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 8378/16P (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 25 July 2017, Judgment delivered 28 July 2017

Applicant sought confirmation of a rule nisi to interdict respondents from building structures on and trespassing on its property. Respondents opposed the application on the grounds that the applicant

had failed to proceed in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).

Mngadi AJ held:

"... The rationale of the [PIE] Act is to address to some extent the institutionalized disposition of the black people of their land aimed at impoverishing them as a race as an act of oppression. The disposition may have been technically lawful but it was by an illegitimate regime pursuing a policy of apartheid which was a crime against humanity. PIE seeks to acknowledge and recognise unlawful occupation by affording a degree of protection to unlawful occupiers. Unlawful occupiers may only be deprived of occupation if it is shown to be fair and just to do so. It affords unlawful occupiers strong procedural and substantive protection. PIE interferes with the rights of land owners by prescribing a stifled process in dealing with unlawful occupiers. However, legislation meant to address the imbalances of the past should be interpreted purposefully and be embraced by all...." [Paragraph 21]

"The applicant's version is not that the respondents did not have metal sheet or temporary structures in the property by 8 august 2016. The applicant's case is that no respondent occupied such a structure as his home on the date in question. The surrounding circumstances are that each respondent claimed a site in the property on the basis that his ancestors live in the property and were unlawfully removed, that their ancestors graves were in the property, that some respondents had livestock in the property, that squatters' shack were spreading invading the property exposing the ancestral graves to be desecrated, that the property was unfenced and unguarded, that the structures had recently been erected and some structures had building material in them and there was building activity taking place. In my view, these factors show that the metal sheet/timber structures were not abandoned but occupied. ... The extent of the occupation cannot be determined. In view of the fact that the respondents were the persons primarily responsible for the structures in 'their' sites as well as the building activity that was going on, I accept that they were occupying the metal sheet/timber structures on the sites. Section 1 of PIE defines an unlawful occupier as a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land. The respondents squarely fall within this definition but section 26(3) of the Constitution requires more..." [Paragraph58]

"The next question is whether the respondents occupied the metal sheet/timber structures as their homes. The nature of a structure on its own does not necessarily indicate whether it is a home or not. The respondents although not necessarily well of, it was clear from their evidence that they would not occupy a one roomed metal sheet/timber structure with a degree of permanence as a home. ..." [Paragraph 59]

"The applicant, on the totality of the evidence, has shown on the preponderance of probabilities that the respondents by 8 August 2016 had not occupied the applicant's property as their homes. Consequently, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act... are not applicable. It is established that the applicant is the owner of the property in question. The respondents are interfering with the property without the consent of the applicant. The applicant has no other alternative remedy to stop the interference with its property. The balance of convenience favours the granting of an interdict to the applicant. [Paragraph60]

"The respondents had erected structures in the property and had their building material in the property. It is necessary that they be given an opportunity to attend to the removal of their structures and their building material. A period of thirty days from the date of the confirmation of the rule will give them sufficient time." [Paragraph 61]

"The respondents opposed the application. The applicant has succeeded with the application. The claims of the respondents that they have close connection with the land in question in that it is their ancestral land with the graves of their ancestors. Their ancestors were unlawfully removed from the area in terms of the apartheid policy, and that despite the community lodging a land claim in 1998, the claim remains not finalized after a period of more than 20 years. Their eagerness to reoccupy the land and resistance to the removal is understandable but not justifiable in law. Cost of suit must follow the result." [Paragraph 62]

The rule nisi was confirmed, with costs.

CIVIL PROCEDURE

PILLAY N.O. AND ANOTHER V REDDY AND OTHERS (10717/15)

Case heard 16 November 2016, Judgment delivered 14 December 2016

Application to set aside an order made to set aside the voluntary liquidation of Chatsworth Investment (Proprietary) Limited.

"The applicants have not succeeded in the appeal process to persuade the relevant courts that the decision of the court on 5 February 2016 is wrong. They now approach this court for a similar relief. This court is in the same level as the court which gave judgment on 5 February 2015. It has no power to review or set aside on appeal the decision of the court which gave judgment on 5 February 2015." [Paragraph 14]

"The position of the judiciary is entrenched in the Constitution. A judgment or order of a court binds all persons to whom and organs of state to which it applies. It remains operative until set aside on appeal or review. It can only be reviewed or set aside on appeal by a court with competent authority to review or set aside the decision of the court that delivered the judgment. The hierarchy of courts is fundamental to certainty and the principle of precedent is core to the functioning of the judiciary." [Paragraph 16]

"This court has no jurisdiction to review or set aside the decision of the court which gave judgment on 5 February 2015…" [Paragraph 17]

Application dismissed with costs.

CRIMINAL JUSTICE

GODDARD V S, UNREPORTED JUDGMENT, CASE NO. 1493/19P (KWAZULU NATAL HIGH COURT, PIETERMARITZBURG)

Case heard 14 March 2017, Judgment delivered 27 March 2017

The accused appealed against a second denial of bail, a previous application having been refused by the Magistrates' Court and, on appeal, the High Court confirmed that refusal of bail. The accused had been charged with an initial four counts of sexual offences against minor children.

Mngadi AJ held:

"The appeal court, with respect to the learned judge, overlooked that the submissions by the public prosecutor were not supported by evidence; i.e. these allegations were not based on evidence adduced before the court, and hence they fall not to be taken into consideration. The appeal court dismissed the appeal against the refusal of the first bail application on the basis that the state had a strong case against the appellant based upon the submissions made by the public prosecutor, which submissions were, in my view, not based on any evidence. ..." [Paragraph 9]

"The public prosecutor in his address stated that the questions around the residence of the appellant have been cleared. The state is now accepting that the appellant was not a flight risk. Further, he stated that initially one of the grounds on which bail was opposed was that if released on bail the appellant's life would be in danger, but now the state was also abandoning that ground. He insisted that the communication by the appellant was an indication that, if released on bail, he will interfere with the outstanding investigation and with the witnesses. In my view, there was no evidence of an attempt to destroy evidence or to interfere with state witnesses produced. The allegations were not clarified and there were not supported by the evidence presented to establish interference. ..." [Paragraph 12]

"The learned magistrate refused the second bail application on the same reasons that it was necessary that the appellant remain in custody so that more victims will be prepared to come forward and disclose. The reasons were found by the appeal court, and I agree with that finding, to constitute a misdirection. ... The potential complainants, if any, had had more than six months to come forward while the appellant was in custody. Such a ground cannot, in my view be relied upon to refuse bail to the appellant." [Paragraph 13]

"The appeal court dismissed the appeal against refusal of bail on the ground that there was a strong case against the appellant which in view of the applicable sentence renders him a flight risk. ... [I]n my view, there was no basis for such a conclusion. However, the crimes relating to the rape of minor children are very serious. ... The issue is whether it has been shown that there is a strong case against the appellant. ... The only evidence implicating the appellant appears to be an allegation against the appellant made by each child. There is no evidence of the first report. The allegations brought against the appellant are made subsequent to counselling sessions. There is no DNA evidence. These allegations are based on the evidence of single child witnesses. It is required that such evidence, to found a conviction, must be approached with extreme caution." [Paragraph14]

"Where an accused, as it is the case with the appellant, is charged with an offence referred to in schedule 6 of the CPA, he carries the burden of satisfying the court on a balance of probabilities that exceptional circumstances exist which, in the interest of justice, permit his release on bail. … It has been held that the concept of exceptional circumstances is indefinable. Its proof appears formidable but promote flexibility which is subject to judicial control on a case by case basis. … The section should not … be interpreted to mean that the procedure is punitive in that the accused who has demonstrated, with reference to usual circumstances governing bail applications, that he will stand trial and will not cause hard to the administration of justice or society, should nonetheless be detained…" [Paragraph 16]

"… [T]he provision should not be read as authorising random incarceration of persons who are suspected of having committed schedule 6 offences, who are presumed innocent until proven guilty in a court of law. The likelihood of acquittal weight heavily toward discharging the onus…" [Paragraph 17]

"Incarceration prior to a conviction with all its irreversible indignities and consequences may not be resorted to easily in a constitutional democracy with an enshrined Bill of Rights. It must be for good reason. In particular, it must be to ensure the integrity of the administration of justice including effective prosecution of crime and punishment of offenders. However, an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment…" [Paragraph 18]

The appeal was upheld, and bail granted.

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 – October 2011; March – April & September 2012; March 2015; January – March & July – August 2017)

Partner, Shepstone and Wylie Attorneys (1998 – Present)

Associate Partner, Shepstone and Wylie (1997 – 1998)

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)

KWAZULU NATAL LAW SOCIETY

Member (1994 - Present)

CAPE LAW SOCIETY

Member (1995 – Present)

KWATHEMA YOUTH CONGRESS

Member (1985 – 1990)

SOUTH AFRICAN NATIONAL STUDENTS CONGRESS (SANSCO)

Education Commissar (1984 – 1988)

Member (1989 – 1990)

ML SULTAN FOUNDATION

Chairperson of Board of Trustees (2000 – present)

AKHA BLACK ECONOMIC EMPOWERMENT TRUST

Chairperson of Board of Trustees (2005 – present)

RICHFIELD GRADUATE INSTITUTE OF TECHNOLOGY

Member of Legal Portfolio Committee (2017 – present)

SOUTH AFRICAN NATIONAL TUBERCULOSIS ASSOCIATION

Member of Legal Portfolio Committee

PLAYING FOR PEACE SOUTH AFRICA

Board Member

MBONAMBI MUNICIPALITY AUDIT COMMITTEE

Chairperson

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 claims 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 there-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.

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)

The appellant was convicted of the rape of Automatic leave to appeal to the conviction and sentence of the applicant for the rape of a seven-year-old. This was an automatic appeal against conviction and sentence. 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." [Paragraph26]

"… [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." [Paragraph8]

"… 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.

PUBLICATIONS

'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 GLENN THATCHER SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 7 January 1958

Bachelor of Arts, University of Natal (now University of KwaZulu Natal) (1978)

Bachelor of Laws, University of Natal (now University of KwaZulu Natal) (1980)

LLM, University of Cambridge (1982)

CAREER PATH

Prosecutor, Department of Justice (Dec 1980 – Jul 1981)

Practising Advocate (Jan 1985 to date)

Commissioner, Small Claims Court (1987 – 1997)

Assessor, High Court (On occasion in 1990's)

Arbitrator, Arbitration Foundation of South Africa (2000 – to date from time to time)

Acting Judge, KwaZulu Natal High Court, Durban (27 Jul 2012 – 31 Aug 2012; 2 -27 Sep 2013; 2-29 Mar 2015; 29 Feb – 1 Apr 2016; 13 Nov 2017 – 15 Dec 2017)

SOCIETY OF ADVOCATES OF KWAZULU NATAL

Member (Jan 1985 – to date)

Honorary Secretary (1987 – 1990 & Aug 2016 – to date)

Complaints Sub-Committee (2006 – Aug 2010 & 2014 to Aug 2016)

Member of Bar Council (Aug 2010 – Jul 2012)

MARITIME LAW ASSOCIATION

Member (1990 – to date)

BEREA CONGREGATIONAL CHURCH, DURBAN

Member (2002 – to date)

Management Committee (Jan 2015 – to date)

TAX BOARD

Chairperson (2008 – 2013)

SELECTED JUDGMENTS

PRIVATE LAW

FIRSTRAND BANK LIMITED T / A FNB INSURANCE BROKERS V PRITHIPAL AND ANOTHER [2015] JOL 32993 (KZD)

Case heard 6 March 2015, Judgment delivered 18 March 2015

The applicant sought to enforce a restraint of trade agreement against the first respondent, who, upon leaving the applicant's employ, assumed employment with the second respondent.

Thatcher AJ dealt first with an amount paid to the first respondent, allegedly to induce him to sign the contract, and held:

"It would have been a relatively simple matter for the applicant to state that the amount of R200 000 was paid to the first respondent for the latter's goodwill. However it did not do so. It is clear from both the founding affidavit and the answering affidavit that the amount was paid to the first respondent to induce him to conclude a contract to work for FNBIB for five years." [Paragraph19]

"It is thus not correct to describe the payment of R200 000 as the purchase price of the first respondent's goodwill. Therefore the analogy of the restraint binding a seller of his business, including his sale of his goodwill, from canvassing customers of the business at the time of the sale, is not correct and is not evidence that the first respondent's customers became the applicant's." [Paragraph 20]

"The applicant placed no evidence before the court to rebut this evidence of the first respondent by, for instance, putting up evidence of the manner in which the fist respondent and those who do the same work as the first respondent carry on business. … The applicant provided no evidence of the contact it had made with these customers since the first respondent's departure in order to ascertain the reason for their moving their business from the applicant. At the very least I would have thought that the applicant would have provided evidence of its attempt to contact these customers, and if those attempts had not met with any success, to inform the court of this. That the applicant appears not to have made any attempt to contact any of these customers is supported by the allegation by the first respondent that no attempt has been made by the applicant to establish any form of relationship with those clients since his departure. … The first respondent in fact alleges that he did not canvass them to leave and that they had in fact signed statements indicating that they were not solicited, canvassed or induced or persuaded

in any way to appoint the second respondent as their brokers, and he put up examples of two such letters. …" [Paragraph 23]

"Accordingly the first respondent in my view has discharged the onus which rests upon him to prove that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of the applicant, over and above that which previously existed. Thus I find that the applicant has no interest that deserves protection after the first respondent left the applicant's employ." [Paragraph 24]

"If I am incorrect in this regard, I must consider whether that protectable interest is threatened by the first respondent, and if that is the case, whether that interest of the applicant weighs qualitatively and quantitatively against the first respondent not to be economically inactive and unproductive. I have set out earlier in this judgment the applicant's work experience. It is common cause that the first respondent is capable of carrying out the functions for which the applicant employed him. He has a wife of 63 years' old who has never been employed and together they have a combined retirement some R2 100 000. A living annuity purchased with this would give him a monthly income of some R10 500 per month upon which he could barely survive. Accordingly it is imperative for him, and his wife, that he continue in employment for as long as he is able." [Paragraph 25]

"In contrast, the applicant is one of the four largest banks in South Africa. The consequence to the first respondent of being unemployed is, vis à vis him and his wife, far more serious than the impact would be on the applicant if the first respondent is able to work." [Paragraph 26]

"Thus the interest of the applicant does not outweigh the first respondent's interest in not being economically active." [Paragraph 27]

"In the particular circumstances of this case, and I refer specifically to the personal circumstances of the respondent I have set out above, public policy requires that the restraint should not be enforced." [Paragraph 31]

The application was dismissed with costs, including the costs of senior counsel.

ETHEKWINI MUNICIPALITY V GUMBI AND OTHERS (6652/2014) [2015] ZAKZDHC 24

Case heard 6 March 2015, Judgment delivered 17 March 2015

The applicant was the owner of a tract of land known as Umlazi Infill part 4 Phase 1, where people had settled and built informal dwellings. The municipality decided to develop the land, and sought an order to eject the respondents. The question the court had to decide was whether in the circumstances it was just and equitable in terms of section 6 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE) that an order be granted for the eviction of the respondents.

Thatcher AJ held:

"… [T]he circumstances identified in section 6 are not the only circumstances to which the court may refer in deciding what is just and equitable. The court must give consideration to all circumstances that might be relevant including for instance those mentioned in section 4, namely the elderly, children, disabled persons and households headed by women. The application of the Act depends upon the facts

of each case, and each case may require a different approach. … [T]he courts must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values so as to produce a just and equitable result. Provided it acts reasonably, the applicant, like the State, must be afforded some leeway in the design and structure of housing." [Paragraph 8]

"It is unclear … precisely when the sites were demarcated by the applicant. The agreement was concluded in May 2009 and presumably planning for the demarcation commenced approximately at or soon after that date. The applicant contends that the respondents have known since approximately August 2012 that there was a prospect of them having to move." [Paragraph10]

"It is common cause that a house has been constructed on No.1661 W, Extension 2, Umlazi, and according to the respondents is occupied by the first and second respondents. Given that this application was launched on 9 June 2014, it can be assumed that the first and second respondents have enjoyed occupation of their new home from a date prior to the launching of this application and in all probability at a time when the third respondent could validly be considered a dependant of her parents." [Paragraph 11]

"It appears … that the Mchunu family, to whom the applicant has allocated the property, are the children of Mr Mchunu who has apparently passed away. The children of Mchunu are described in the replying affidavit as orphans. According to the applicant, they meet its criteria entitling them to have a low cost house built by the applicant on the property and to have it registered in their names." [Paragraph 12]

"The applicant is endeavouring to upgrade the living environment of the occupants of Umlazi Infill Part 4 Phase One. The first and second respondents have benefited from the applicant's endeavour in that they have been allocated a site and had constructed for them a house in which they are now living. It is probable that at the time the allocation was made and their house constructed, the third respondent, if she was not a minor, certainly had no dependant, and was, not unreasonably, regarded by the applicant as being a dependant of the first and second respondents." [Paragraph 16]

"Even if that assumption is incorrect, there is nothing on the papers to indicate that the third respondent does not have alternative accommodation. She has not disclosed any facts supportive of the notion that she is not able to live in the house where the first and second respondents are living. While she may not regard this as ideal, her desire to have a house of her own must at this stage yield to the opportunity the Mchunu family have of benefiting in the same way in which the first and second respondents have benefited, namely by having a house constructed for them of which they can receive title and in which they can live. There is nothing in the papers to suggest that the Mchunu family has access to alternative accommodation." [Paragraph 17]

"… The respondents have not incurred any legal costs in opposing the application and I do not propose to make any order for costs against the respondents … To avoid any uncertainty, I think it appropriate that an order issue that all of the respondents and any person occupying through them be ordered to vacate the property. The first and second respondents will suffer no prejudice if I make such an order. " [Paragraph 19]

"Insofar as the date by which the property has to be vacated is concerned, it is reasonable to afford the respondents a period of twenty (20) days of the service of this order upon them to vacate the property." [Paragraph 20]

An eviction order was granted.

COMMERCIAL LAW

STANDARD BANK OF SOUTH AFRICA LIMITED V HARILALL (6565/2014) [2015] ZAKZDHC 33

Case heard 2 March 2015, Judgment delivered 9 April 2015

Plaintiff concluded an instalment sale agreement with the defendant, Marlene Harilall, in terms of which the defendant was to repay the principal debt and interest in 60 monthly instalments. In 2011, the magistrates' court granted a debt restructuring order in favour of the defendant and her husband, to whom she was married in community of property. The plaintiff brought an action in terms of section 86 (10) of the National Credit Act, terminating the debt review process, despite the existence of the debt restructuring order. The court had to decide whether the plaintiff was entitled to claim back the car from the respondent under the NCA, considering the payment history of the defendant.

Thatcher AJ held:

"On the face of it, the defendant was not in breach of the debt restructuring order when this action was instituted." [Paragraph 12]

"As I understand it, for the defence of impossibility to succeed, it must be objective impossibility, not subjective impossibility. … It is not open to a party to plead impossibility of performance because in a commercial situation, through changed financial circumstances the payment has become difficult, expensive or unaffordable." [Paragraph 16]

"… She failed to place any evidence before the court that the institution of the action … rendered it impossible for her to maintain the payments in terms of the debt restructuring order. The defendant had succeeded in persuading a magistrate's court that she was over indebted. It is probable therefore that the financial circumstances of the defendant were constrained and that any unforeseen, additional, expenses with which she was subsequently saddled would place her under further financial strain … it was incumbent upon her to place evidence before the court as to what her personal financial circumstances were … that rendered it impossible for her to comply with the debt restructuring order. She did not place any evidence before the court on this aspect. She has therefore not discharged the burden which rests upon her to establish impossibility." [Paragraph 17]

"The plaintiff, did not, by electing to accept the instalments after the non-payment of the four instalments in 2012, elect to keep the debt restructuring order in place. In August 2012, a short period after the defendant had defaulted on the debt restructuring order, the plaintiff instituted an action in which it sought cancellation of the instalment sale agreement. This conduct of the plaintiff, far from constituting an election to treat the debt restructuring order as binding, is precisely the opposite. Thus the acceptance by the plaintiff of instalments in terms of the debt restructuring order after they resumed in June 2012 cannot in my view be regarded as the plaintiff electing to abide by the debt restructuring order." [Paragraph 20]

"The plaintiff's institution of the action in August 2012 under case number 8272/2012 gives the lie to this [claim that plaintiff consented to the defendant withholding payments]. In that action the plaintiff

specifically relies upon the defendant's default in paying the instalments for January to May 2012 inclusive." [Paragraph 21]

"I accordingly find that the plaintiff is entitled to an order cancelling the contract and an order that the defendant restore possession of the vehicle to the defendant." [Paragraph 22]

"It must be borne in mind that the plaintiff is one of the four largest banks in South Africa. The defendant, on the other hand, is an individual who does not have at her disposal the financial resources that the plaintiff can call upon. Indeed, having opposed the application for debt review, the plaintiff and its then attorneys must have been acutely aware of the defendant's parlous financial situation. ..." [Paragraph 28]

"Ordinarily, the unsuccessful party is ordered to pay the successful party's costs. A successful party however may under certain circumstances be ordered to pay the costs of the proceedings, but this is a very unusual order, seldom given." [Paragraph 30]

"... This conduct of the plaintiff arising from the instalment sale agreement constitutes serious oppression of the defendant. In the circumstances, and in the exercise of my discretion, I am of the view that it is appropriate that the plaintiff pay the defendant's costs of this action." [Paragraph 34]

CIVIL PROCEDURE

W v C (13778/2013) [2015] ZAKZDHC 25

Case heard 10 March 2015, Judgment delivered 18 March 2015

The plaintiff and the defendant had been married to each other, and had two children. They divorced in 1996, and an order was made that the plaintiff pay maintenance to the defendant for the minor children. The plaintiff claimed that he had mistakenly increased maintenance payments, and that the defendant was thereby unjustly enriched. The defendant raised an exception, arguing that the plaintiff failed to plead the essential elements of an enrichment action, and that the maintenance paid did not enrich the defendant, but was for the children. The court had to deal with whether the pleadings by the plaintiff showed a cause of action or whether they were vague and embarrassing.

Thatcher AJ held:

"In terms of Rule 18(4), every pleading must contain a clear and concise statement of the material facts upon which the pleader relies for his claim "with sufficient particularity to enable the opposite party to reply thereto." The pleading should be so phrased that the other party may reasonably and fairly be required to plead thereto ... A pleading contains sufficient particularity if it identifies and defines the issues in such a way that it enables the opposite party to know what they are." [Paragraph 10]

"It is true that there is no precise allegation that the plaintiff paid the defendant R49 571,21 in excess of what he was obliged to pay and that he was correspondingly impoverished and she correspondingly enriched in that amount. However it is alleged that the plaintiff made payment in terms of the divorce order which surely must mean that he paid and that the payments were made to the defendant. There is sufficient definition of the issues enabling the defendant to know what they are." [Paragraph 12]

"It is also true that one cannot discern exactly how the amount of R49 571,28 is calculated, but it is clear … that that amount is calculated using the Weighted Consumer Price Index over the relevant period. It is open to the defendant in a request for further particulars for the purposes of preparation for trial to seek particularity on how the amount … is calculated." [Paragraph 13]

"In any event, the claim is not one for damages. … Here Rule 18(4) only has to be complied with and in my view it has been." [Paragraph 14]

"… [I]t is true that both parents have an obligation to contribute towards the expenses of the child. However it is open to the defendant … to plead as much, and in her plea to disclose the amount of maintenance she has received from the plaintiff for the child and to disclose whether the payments alleged by the plaintiff to have been made in error were in fact used to maintain the child so that she, the defendant, has not been unduly enriched." [Paragraph 15]

"In the alternative the plaintiff pleads that if her application in the maintenance court fails, he in any event has a claim against her for one half of the expenses incurred by the plaintiff on behalf of I[...] from 1 January 2012 to date, namely R272 529,50. Whether this is a claim properly described as a claim for unjust enrichment or whether it is a claim by the plaintiff against the defendant arising from their joint responsibility for maintaining I[...] is unclear. However the pleading identifies the issues in such a way that the defendant is in a position to know that they are. Obviously this claim cannot be adjudicated before the maintenance court proceedings are determined. … In the meantime, the defendant is able to discern what the issues are and can plead to them" [Paragraph 17]

The exception was dismissed with costs.

ADVOCATE IAN TOPPING SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 3 September 1954

BA LLB, University of KwaZulu Natal (1982)

LLB, University of KwaZulu Natal, (1984)

CAREER PATH

Candidate Attorney, Goodrickes Attorneys (1984)

Candidate Attorney, Adams and Adams Attorneys (1985)

Professional Assistant, Adams and Adams Attorneys (1986 – 1989)

Prosecutor, Department of Justice (1989 -1991)

Pupillage (Feb – June 1992)

Advocate, KwaZulu Natal Bar (1992 – to date)

Acting Judge, KwaZul Natal Local Division, Durban & KwaZulu Division, Pietermartizburg (25 May 2015 – 26 Jun 2015; 21 Jul 2015 – 24 Jul 2015; 3 & 4 Aug 2015; 21 Sep – 23 Sep 2015; 18 Apr 2016 – 22 May 2016; 27 Jun – 28 Jun 2016; 22 Aug 2016 – 25 Sep 2016)

KWAZULU NATAL LAW SOCIETY

Member (1984 -1989)

MARITIME LAWYERS ASSOCIATION

Member (1986 – 1989)

SOCIETY OF ADVOCATES OF KWAZULU NATAL

Member (1992 – to date)

STELLA SPORTS CLUB (GLENWOOD)

President (1985 – 1996)

Lifetime member (1985 – to date)

DURBAN HIGH SCHOOL GOVERNING BODY

Member and Chairperson of the Disciplinary Committee (2003 – 2011

SELECTED JUDGMENTS

PRIVATE LAW

NETCARE ST AUGUSTINE'S HOSPITAL (PTY) V EEG & SLEEP LABORATORY, UNREPORTED JUDGMENT, CASE NO.9088/2013 (KWAZULU-NATAL LOCAL DIVISION)

Case heard 29 May 2015, Judgment delivered 1 July 2015

This was an application for eviction. Topping JA held:

"The dispute between the parties …revolves around a proper interpretation of what is meant by "no sooner than six calendar months before the expiry of the initial period of lease, nor later than six calendar months before expiry of period of lease. The parties are in agreement that should the Respondent have wished to exercise the option to renew the sublease, it would have had to have done so within the time period stipulated within the provisions … as properly interpreted." [Paragraph 10]

"In order to test the Applicant's submission regarding the proper interpretation … one has to ignore, albeit for the moment, that there is a difference between the "initial period of lease" and the period of lease". One has to assume that they are the same thing … and then endeavour to determine a specific point or period in time when the sub-lessee is obliged to give notice, having regard to the fact that it

must be done no "sooner than" nor "later than" six calendar months before the expiry of that specified date. The operative phrase being "six calendar months before"." [Paragraph 12]

"... In the present instance, there is nothing to indicate that the parties intended that an "inexact moment" ought to be calculated in determining the period of notice. It would follow therefore that no account ought to be taken of "broken units" and that the "whole or the first and fast [sic] days ought to be taken into account when calculating the interest period. That being the case, a day corresponding to "six calendar months before" the 1st of April 2013 can be calculated. I accordingly do not agree with the Respondent's ... submission that, upon ... the Applicant's contention of the proper interpretation of clause 7.2, an actual date could not be ascertained." [Paragraph 13]

"It makes business sense that the parties would have intended that advance notice of the Respondent's intention to exercise the option needed to be given so as to forewarn the parties and to place them in a position to be able to engage in meaningful negotiations so as to agree upon the rental for the option period within the 30 day period before the lease would come to an end ..." [Paragraph 19]

Topping AJ then considered the intention to exercise the option to renew:

"... [I]t has to unequivocally convey to the recipient, using ordinary reason and knowledge, that it was intended to be such an exercise of the option. It has to leave no room for doubt and the recipient is not required to apply any special knowledge or ingenuity in ascertaining the meaning of what is conveyed in the notice." [Paragraph 28]

"When the intention to exercise the option is conveyed in a written document, the actual but uncommunicated intention of the person addressing such writing is irrelevant. It is only the intention as expressed in that written communication itself that must be considered." [Paragraph 29]

"I therefore come to the conclusion that the Respondent is in unlawful occupation of the leased premises and that the Applicant is accordingly entitled to the relief sought in this application." [Paragraph 32]

The eviction order was granted.

CIVIL PROCEDURE

ETHEKWINI MUNICIPALITY V BHARDWAJ (3135/2015) [2015] ZAKZDHC 80

Case heard 25 June 2015, Judgment delivered 11 September 2015

Applicant sought an order declaring the respondent to be in contempt of an order granted in the main application, where the applicant sought an order interdicting and restraining the respondent from undertaking any building construction work upon his immovable property. The relief was sought on the grounds that the respondent had failed to comply with certain town planning and statutory building provisions.

Topping AJ held:

"It is common cause that according to the Applicant's South Town Planning Scheme, "all erven", except where otherwise stated, are subject to a 7,5m building line. It is also common cause in these proceedings that the Respondent has failed to obtain the Applicant's "special consent" … for a relaxation of the building line. The effect of such failure in the present instance is that no building may be constructed within a 7,5m distance of the Respondent's south-western boundary. I shall refer to this area as the "prohibited area"." [Paragraph 7]

"Once the Applicant has proved the grant of the order, the service thereof on the Respondent or that it has come to the Respondents notice, the Respondent's non-compliance with the provisions of that order and wilfulness and mala fides on the Respondent's part, an evidentiary burden then rests upon the Respondent to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and mala fides. Should the Respondent fail to advance such evidence, contempt will have been established beyond reasonable doubt." [Paragraph 13]

"The grant of the order … and that he had notice thereof is admitted by the Respondent. What needs to be analysed therefore is whether the Applicant has proved, on the papers before me, that the Respondent has not complied with the order by continuing with building works subsequent to the grant thereof and that he acted wilfully and mala fide in doing so." [Paragraph 14]

"…The Respondent has been prohibited from undertaking any construction work which is contrary to the approved plan. No prohibition is imposed in the order regarding any construction work taking place over the building line." [Paragraph 17]

"Should such comparison reveal that the Applicant has established on the papers that construction work has been undertaken on the property that was not "foreshadowed by the plan", one then has to take the enquiry further and determine whether the Applicant has established that such construction work took place after the grant of the order on the 26th of February 2015." [Paragraph 16]

"… [From] the pictorial evidence put up by the Applicant in its founding affidavit, and the admissions made by the Respondent in response thereto, it is clearly evident that the Respondent has proceeded with the construction of a building on the prohibited area from a state where it consisted of the outer boundary wall, still in a state of construction as at the 5th of March 2015, to a state where a structure, inclusive of a roof, a concrete floor and doors, had been completed by the 17th of March 2015. I am therefore satisfied that the structure that presently stands on the prohibited area, save for the rear retaining wall, the concrete pillars running along its centreline and a portion of the outer boundary wall, were constructed after the grant of the order on the 26th of February 2015. I am therefore satisfied that the Applicant has proved that such structure was constructed by the Respondent in contravention of the provisions of that order." [Paragraph 20]

"… It is also admitted by the Respondent that he addressed an email to the Applicant on the 4th of February 2015 wherein he acknowledged receipt of the summons as aforesaid, contended that he had an

approved plan, with reference to the plan forming the subject of this application, admitted that he had deviated therefrom, contended that he had submitted a "deviation plan" to the Applicant, but that such "did not pass"" [Paragraph 21]

"…It must also not be forgotten that the Respondent was represented by his attorney of record during all relevant times to these proceedings. I am therefore of the view that his assertion that he was labouring under a misapprehension that he was entitled to proceed with the building works after the 5th of March 2015 is "clearly unworthy of credence" and ought to be rejected." [Paragraph 23]

"…The Applicant was duty-bound to approach this court in the main application to seek an interdict to prevent the Respondent from continuing with the illegal construction of the structure on the prohibited area of the property. The unauthorised and illegal conduct of the Respondent cannot be condoned by this court. I am of the view that a lenient approach in the present instance would also lead to an open invitation to members of the public to follow the course adopted by the Respondent and to continue with the construction of buildings and structures in circumstances where the authority therefor has not been obtained from the relevant municipality …" [Paragraph26]

"The approach adopted by the Applicant, in seeking the alternative relief, would not only serve the purpose of vindicating this court's honour consequent upon the disregard of the order … but will also serve the purpose of encouraging the Respondent to comply with the provisions thereof and provide him with an opportunity of "righting his wrongs" prior to any punishment being imposed upon him. I am therefore of the view that such relief is appropriate in the present circumstances." [Paragraph 27]

"…I am of the view that a period of 14 days affords the Respondent insufficient time to undertake such demolition and that a period of 30 days would be appropriate in the circumstances. I must also state that the order of demolition granted herein is confined solely to those portions of the structure that are not foreshadowed by the approved plan that were constructed after the issue of the order on the 26th of February 2015…" [Paragraph 28]

CRIMINAL LAW

MJWARA V S, UNREPORTED JUDGMENT (RC 206/14)

Case heard 19 September 2016, Judgment delivered (no date)

Appeal against the decision of the regional court convicting appellant of housebreaking with intent to commit robbery, robbery with aggravating circumstances, possession of a prohibited firearm and possession of ammunition.

Topping AJ (Olsen J concurring) held:

"It is common cause that no warrant had been applied for, either for the arrest of the appellant as a consequence of his failure to comply with the bail conditions or, more importantly to the matter at hand, for the search of the appellant's residence." [Paragraph 6]

"Constable Ngobese endeavoured to justify his search of the appellant's premises by contending that he did not apply for a search warrant as *'it was a situation of emergency'*. If one has reference to his

evidence however, he stated that the appellant had returned to his residence in the Impendle area, which was the breach of his bail conditions. The appellant had returned home therefore and there was never any suggestion that he was going to leave it on the night in question or imminently thereafter. There is simply no reason, in such circumstances, why the procedures prescribed in section 66 of the criminal procedure act could not have been followed and a warrant obtained for the appellant's arrest." [Paragraph 8]

"…I am therefore of the view that the good constable could not, on reasonable grounds, have believed that the obtaining of a warrant to search the appellant's premises in such circumstances would have defeated the object [of the search]…" [Paragraph 9]

"…One simply cannot conclude, on the evidence led by the respondent in the court a quo, that the appellant consented to their search of his residence on the night in question." [Paragraph 11]

"I am therefore of the view that the respondent has failed to establish that a set of circumstances prevailed on the 21st of February 2014 as would entitle the members of the South African police services to enter and search the appellant's premises pursuant to the provisions of section 22 of the criminal procedure act. A warrant ought to have been obtained prior to the members of the South African police services undertaking any search of the appellant's premises on the night in question." [Paragraph 12]

"The appellant's counsel submitted that where evidence has been obtained by the state in deliberate and conscious violation of the constitutional rights of the accused that, save in certain excusable circumstances, such evidence is inadmissible and should be excluded…The learned magistrate accordingly misdirected himself in accepting such evidence as being admissible. Such being the case, I am of the view that the appeal on the conviction of the appellant on counts three and four ought to succeed." [Paragraph 13]

"The evidence of the appellant was that he was simply not there and did not commit the offences that he was accused off. He denies being Mr Zuma's accomplice in the commission of the offences as contended for by him." [Paragraph20]

"…On his evidence alone, one would be hesitant in accepting his identification of the appellant as being reliable in such circumstances…" [Paragraph 21]

"This is also not a case where it can be said that the appellant was a lying witness. He gave evidence, simply denying his involvement in the commission of the offences. He was not materially challenged nor did he contradict himself under cross-examination. There is nothing to gainsay the fact, on the evidence presented by the respondent, that his version might not be reasonably possibly true…This being the case, the respondent has not established the appellant's guilt on counts one and two beyond a reasonable doubt and the learned magistrate was wrong in his conclusion that it had done so. I am of the view that the appeal on the conviction of the appellant on counts one and two ought also to succeed." [Paragraph 25]

The appeal was upheld.