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

APRIL 2019

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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 previous reports we have described the evolution of the methodology and format of our research reports, as we strive to strike a balance between providing a comprehensive overview of a candidate's judicial track record, on the one hand, and not burdening readers with an unduly long report, on the other. This report continues our efforts to streamline our summaries to make them shorter and more accessible to readers.

5. The challenge of balancing the need to be comprehensive and accessible is particularly acute in this report. 20 out of the 22 candidates appearing before the JSC in the April 2019 interviews are already judges, and are being considered for elevation to higher courts or to judicial leadership positions. The body of work that the combined judicial experience of these candidates has created is vast and impressive. We have always added a disclaimer to these reports, namely that they should be seen as a guide to a candidate's track record, and not as a comprehensive review of every aspect of their jurisprudence. This disclaimer is particularly relevant to the current group of candidates.

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

6. We hope that we have provided a fair overview of each candidate's track record, but emphasise again that we do not attempt to provide all possible relevant information about a candidate.

7. We have continued to group the summaries of judgments and thematic headings, which seem to us to be a sensible way of organising the report so as to make it more accesible. These thematic headings are the following:
   7.1. Private Law;
   7.2. Commercial Law;
   7.3. Civil and Political Rights;
   7.4. Socio-Economic Rights;
   7.5. Administrative Justice;
   7.6. Constitutional and Statutory interpretation;
   7.7. Environmental Law;
   7.8. Labour Law;
   7.9. Civil Procedure;
   7.10. Criminal Justice;
   7.11. Children's' Rights
   7.12. Customary Law; and
   7.13. Administration of Justice.

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

9. We would like to take the opportunity to emphasise again that the purpose of these reports is not to advocate for or against the appointment of any particular candidate. We emphasise this in light of the inclusion of sections on media coverage of candidates, and of the inclusion of academic commentary on judgments, in the current structure of the report.

10. 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.

11. 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.

12. We obviously are not in a position to confirm the veracity or otherwise of media reports, and as with judgments, we aim simply to present the results of what we find through the research we undertake.

13. 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.

14. This point is particularly important to make in respect of this report, where the reader will note that we have identified several academic commentaries on judgments included in the report. Many of these articles are critical of the judgments. We submit that it is important for these criticisms to be used as a basis for discussion, which in turn can helpful to test a candidate's jurisprudential philosophy. The fact that a judgment has bene criticised does not in and of itself mean that the candidate is unsuitable for appointment.

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

SUBMISSIONS REGARDING THE INTERVIEWS

16. 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.

17. Our submission to our October 2018 report raised concerns about vacancies on the Constitutional Court not being advertised. We commend the JSC for the fact that these vacancies have now been advertised, and candidates will be interviewed during this sitting.

18. It is also encouraging that six candidates are to be interviewed for the positions, one more than the minimum number of candidates the JSC would be required to interview in order to send a shortlist to the President for appointment under section 174(4) of the Constitution.[2] We have previously raised concerns about a lack of candidates putting themselves forward for appointment to the Constitutional Court, and we regard the number of candidates being considered in this round as grounds for cautious optimism.

19. The fact that the JSC has one more candidate than the minimum required means that it has scope to explore the strengths of the candidates in order to select the best ones available. This is in contrast with the situation in the 2012, 2015, and the truncated 2016 interviews for the

[2] The subsection requires the JSC to submit a list of names three more than the number of appointments to be made to the President for selection. Thus the minimum number of candidates to enable the current two vacancies to be filled would be five.

Constitutional Court, where the JSC was only interviewing the minimum number of candidates, and therefore was able to do little more than assess whether any of the candidates were unappointable.

20. In this sitting, the JSC will be able to undertake a richer task, that of engaging with the question of what makes a candidate suitable for appointment to the Constitutional Court. This leads to consideration of another of our regular submissions, namely the importance of clearly identified criteria for appointment.

21. In previous Constitutional Court sittings, we have suggested some criteria that may be taken into account in selecting judges for the Constitutional Court, and we take the opportunity to reiterate these here. These criteria are:

    21.1. A commitment to constitutional values and to apply the underlying values of the Constitution (human dignity, freedom and equality), with empathy and compassion, and with due regard to the separation of powers and the vision of social transformation articulated by the Constitution;

    21.2. Independence of mind: judges must have the courage and disposition to act independently and free from partisan political influence and private interests;

    21.3. A disposition to act fairly and impartially and an ability to act without fear, favour or prejudice;

    21.4. High standards of ethics and honesty;

    21.5. Judicial temperament, encompassing qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness;

    21.6. As well as being qualified in respect of the general body of law, Constitutional court judges must also have expertise in constitutional law, and be equipped to give meaning to constitutional values.

22. These are suggestions to contribute to what we hope will be a rigorous engagement by the JSC with the question of the criteria on which candidates will be recommended to the President for appointment. We do not suggest that this list is exhaustive – it would in any event be read together with the Constitutional requirements found in sections 174(1) and (2), namely that a judge be fit and proper, appropriately qualified, and that the need for the judiciary to reflect broadly the racial and gender composition of the country must be considered.

23. We agree with the comment by columnist "Professor Balthazar" that "it will be extremely important that the records, jurisprudential philosophy and experience of all applicants be

examined by the JSC and, as occurs in other countries, be respectfully but thoroughly examined by legal commentators for the benefit of the citizenry whom the Court serves."[3]

24. Although the appointment process differs for the Constitutional Courts compared to the other superior courts, we believe that the need for comprehensive and transparent criteria applies to all courts, and all appointments recommended by the JSC. The importance of this is emphasised in the *Lilongwe Principles and Guidelines on the Selection and Appointment of Judicial Officers*, adopted by the Southern African Chief Justices' Forum in October 2018.[4] Principle (vii) of this document provides that "[o]bjective criteria for the selection of judicial officers should be pre-set by the selection and appointment authority", and the supporting text explains that "[t]he principles of fairness and transparency are reinforced by the publication of criteria for the selection of judicial officers."

ACKNOWLEDGEMENTS

25. This research was conducted by Chris Oxtoby, DGRU senior researcher, and Musa Kika, Anisa Mahmoudi, Nyasha Nyatsambo, Godknows Mudimu, and Liat Davis, DGRU research assistants.

26. We are grateful for the financial support of the Raith Foundation, the Millenium Trust and the Open Society Foundation for making this project possible.

DGRU

8 March 2019

[3] Professor Balthazar, "All courts, including the highest, must be subject to careful public scrutiny", *Daily Maverick* (27 February 2019). https://www.dailymaverick.co.za/opinionista/2019-02-27-all-courts-including-the-highest-must-be-subject-to-careful-public-scrutiny/

[4] The document may be accessed here: https://sacjforum.org/content/lilongwe-principles-and-guidelines-selection-and-appointment-judicial-officers. The DGRU provided assistance and support to the SACJF in the development of this document.

JUDGE ANNALI BASSON

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth : 10 October 1960

BLC, University of Pretoria (1982)

LLB, University of Pretoria (cum laude) (1984)

LLD, UNISA (1990)

CAREER PATH

Acting Justice, Constitutional Court (2018)

Judge, North Gauteng High Court (2016 -)

Judge, Labour Court (2007 – 2015)

Advocate Pretoria Bar (2003 – 2007)

Commissioner, CCMA (2003 – 2007)

Academic, UNISA (1982 – 2007)

Professor, Department of Mercantile Law (2003 – 2007)

SELECTED JUDGMENTS

COMMERCIAL LAW

COMPETITION COMMISSION OF SOUTH AFRICA V HOSKEN CONSOLIDATED INVESTMENTS LIMITED AND ANOTHER (CCT296/17) [2019] ZACC 2 (1 FEBRUARY 2019)

Case heard 16 August 2018, Judgment delivered 1 February 2019.

This was an application for leave to appeal against a judgment of the Competition Appeal Court (CAC). The first respondent (HCI) proposed to increase its shareholding in the second respondent (Tsogo Sun) to more than 50%. It already exerted de facto control. After the Competition Commission refused to do so, the CAC issued a declaratory order that the transaction did not require the approval of the Commission. At issue was whether the granting of the declaratory order was appropriate; and whether the proposed transaction was notifiable.

Basson AJ (Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring) held, as to the question of whether the transaction was notifiable, that it must first meet the definition of a merger. The obligation to notify the Commission of proposed merger was dependent on two jurisdictional facts: whether the transaction met the definition of a merger; and whether it met the financial threshold for an intermediate or large merger [Paragraph 38]. Acquisition of control was central to the definition of a merger, but the Act did not define control [paragraph 43]. It was common case that the earlier merger in 2014 was notifiable [paragraph 49], and that HCI had acquired de jure control after the 2017 merger [paragraph 50]. This led to two questions: did the change in the type of control (to de jure from de facto) make it notifiable? And could the respondents rely on the once - off principle to avoid notification of the subsequent transaction? [Paragraph 51]

Regarding once off control, Basson AJ found that:

> "if the statute required a new notification once the form of existing control changes to *de jure* control, it would have said so. Once a firm has acquired control over another firm in any of the instances contemplated by section 12(2)(b)-(g), the crossing of a further "bright line" does not result in the acquisition of control that it did not have before. This is consonant with the requirement that control must be acquired over the whole or part of the business of another firm. Where the quality of control over the firm which was already controlled changes, it will not constitute a "merger"." [Paragraph 54]

However, the once off principle did not prevent the Commission from investigating potential irregularities [paragraph 58] Basson AJ found that the once off principle applied to the 2017 transaction, since that transaction had formed part of 2014 approval, and was not notifiable [Paragraph 68]. But the Commission retained powers to investigate the assurances given by the parties at time of the 2014 merger. [Paragraph 71]. Regarding the declaratory order, Basson AJ noted that the Commission had modified its position, and accepted that the Tribunal could be approached without there having been a notification, and that it had the power to issue a declaratory order. [Paragraph 74]. This was consistent with the wide powers vested in the Tribunal under the Act, and there were persuasive policy considerations justifying such an approach [Paragraphs 76 – 77].

As to whether the order should have been issued, Basson AJ endorsed the two stage approach set out by the SCA in the *Cordiant* case, which focused on: whether an applicant has an interest in an existing, future or contingent right or obligation, and if so, the court then had a discretion to issue the declaratory order [Paragraph 80] Basson AJ rejected the Commission's argument that there was no live dispute, and that therefore the discretion should not have been exercised to grant the order.[Paragraphs 81 – 82, 85].

The appeal succeeded only in part, as it was held to be within the powers of the Commission to investigate the assurances given in the 2014 merger proceedings. Froneman J wrote a separate concurring judgment, agreeing with the decision but with the "cautionary note" that the decision "should not be read as an invitation to flood the Tribunal with applications for declaratory orders of this kind." [Paragraph 92]

CONSTITUTIONAL AND STATUTORY INTERPRETATION

BALENI AND OTHERS V MINISTER OF MINERAL RESOURCES AND OTHERS, UNREPORTED JUDGMENT, CASE NO: 73768/2016, GAUTENG DIVISION, PRETORIA

Fifth respondent, a mining company (TEM) applied for a mining right in the Xolebeni area of the Eastern Cape. Applicants had lived on this land "according to their customs and traditions for centuries." It was not disputed that applicants held informal rights to the land, as defined in the Interim Protection of Informal Land Rights Act (IPILRA). [Paragraphs 2 – 4]. Applicants were opposed to the proposed mining activities, and sought declaratory relief that the first respondent lacked the lawful authority to grant a mining right without complying with provisions of the IPILRA, and was obliged to obtain the full and informed consent of the applicants and their community before granting any mineral rights to the fifth respondent.

Basson J noted that "customary communities such as the applicants" tend to suffer disproportionately from the impact of mining activities. [Paragraph 19]. Basson J held that declaratory relief would be appropriate, considering the background of contestation and ongoing high levels of tension relating to the mining right. [Paragraph 31]. Basson J identified that a pertinent issue in the case was the level of engagement required before a mining right was granted. The IPILRA required 'consent', whereas the Mineral and Petroleum Resources Development Act (MPRDA) required 'consultation'. [Paragraph 33].

Basson J further noted "[t]he importance of considering the broader social and historical context" within which the legislation operated [paragraph 35], and found that the IPILRA and the MPRDA were both enacted "to redress our history of economic and territorial dispossession", and that both act sought "to restore land and resources to Black people who were the victims of historical discrimination". The acts therefore had to be read together [Paragraph 40].

Basson J held that the granting of mining rights constituted a "deprivation" as contemplated b section 2(1) of the IPILRA [Paragraphs 57 – 58]. This triggered the requirement of consent. Basson J noted that section 2(1) of the IPILRA made the consent requirement subject to the provisions of the Expropriation Act, or any other law which provided for the expropriation of land or rights in land, but found that the MPRDA did not constitute such a law. Basson J cited the Constitutional Court judgment in *Agri SA* as authority for the proposition that "the granting of a statutory mineral right under the MPRDA does not constitute expropriation". [Paragraphs 61 – 63]. Basson J concluded that:

> "Having regard to the overall purpose of the two acts and given the status now accorded to customary law… I can see no reason why the two acts cannot operate alongside oneanother. … [H]aving regard to the special protection granted to traditional communities in terms of IPILRA, I am of the view that communities such as the applicants are … afforded broader protection in terms of the IPILRA than the protection afforded to common law owners (as contemplated under the MPRDA) when mining rights are considered by the Minister. … [T]he MPRDA … does [apply], but so does IPILRA which imposes the additional obligation upon the Minister to seek the consent of the community who hold land in terms of customary law …" [Paragraph 76]

Basson J held further that requiring consent rather than only consultation was consistent with international law [paragraph 78]. An order was granted declaring the first respondent could not grant a mining right unless provisions of the IPILRA had bene complied with, and that the first respondent was obliged to obtain full and informed consent before granting any mining right to the fifth respondent.

LABOUR LAW

NYATHI V SPECIAL INVESTIGATING UNIT 2011 12 BLLR 1211 (LC)

Case heard: 19 July 2011, Judgment delivered 22 July 2011

The applicant created a document, which was circulated by email, which contained a wide range of allegations of racism within the respondent organisation. Applicant refused to undergo a polygraph examination, and was informed that any refusal to comply strictly with the instructions would entitle the SIU to terminate her contract of employment. Applicant sought to interdict the respondent from terminating her employment contract, to declare a decision to extend her suspension to be invalid, and to permit her to resume her duties.

Basson J identified two legal issues to be determined: 1), whether the respondent was entitled to extend the suspension beyond the 90 day period provided for in the Disciplinary Policy; and 2), whether respondent was entitled to terminate the employment contract on the basis that the refusal to undergo a polygraph test constituted a repudiation of the contract by the applicant. Basson J held that it could not be said that the Disciplinary Policy was "merely a guideline that can be ignored", as it was common cause that it formed part of the contractual terms and conditions. The clause was framed in peremptory terms, and unequivocally stated that a suspension would lapse after 90 days. This was to protect an employee from a protracted suspension. In this case, no disciplinary proceedings had been instituted against the applicant. The suspension was thus held to be unlawful [Paragraphs 18-27].

Basson J then dealt with an argument that respondent could invoke a clause in the contract which provided for an unlimited suspension, and held that "it could not have been the intention of the drafters of the contract to provide for two conflicting suspensions clauses." Once the respondent had chosen a process to follow, by suspending the applicant, they were bound by that choice, and could not abandon it half way to proceed with another suspension process provided for in the contract.

The decision to extend the suspension was set aside, and the respondent was ordered to allow the applicant to resume her duties. Basson J then turned to consider whether the respondent could lawfully terminate the contract:

> "… [T]he Court accepts that the respondent has sound reasons for including such an obligation, to submit to, *inter alia*, a polygraph, in light of the core business and functions of the SIU … The Court also accepts that, although some of the measures such as having to submit to a polygraph examination … may seem to be intrusive, these measures are reasonable in the context of an organisation such as the respondent (provided, of course, that these measures are applied fairly and only when reasonably necessary to do so)." [Paragraphs 31-33]

Basson J held that it was a material term of the contract to submit to a polygraph test, and that be refusing to do so, the applicant had repudiated a material term, entitling the respondent to terminate the contract. [Paragraphs 35-39] The applicant had not made out a case for the interdict sought, but still retained remedies under the Labour Relations Act to challenge any termination of her contract. [Paragraphs 41-43].

AVIATION UNION OF SOUTH AFRICA AND OTHERS V SOUTH AFRICAN AIRWAYS (PTY) LTD AND OTHERS (J2206/07) [2007] ZALC 66; [2008] 1 BLLR 20 (LC); (2008) 29 ILJ 331 (LC) (1 OCTOBER 2007)

Case heard: 27 September 2007, Judgment delivered 1 October 2007

This was an urgent application to compel respondents to comply with provisions of section 197 of the Labour Relations Act (LRA). SAA had been employing the second and further applicants to perform certain work, but decided to outsource that work or to contract it to LGM SA. Before outsourcing, SAA concluded an agreement with the trade unions whose members would be affected, to the effect that the outsourcing would constitute a transfer of business as a going concern in terms of section 197 of the LRA, and that the contracts of employment of the employees involved would be transferred to LGM SA in accordance with section 197, and this would not affect their continuity of employment. The dispute was about the fate of the workers in light of the termination of the Outsourcing Agreement. Applicant demanded that, since SAA had called for tenders from bidders interested in having the affected services outsourced to them, it should specify that the successful bidder would have the contracts of employment transferred to it in terms of section 197. SAA refused.

Basson J held the purpose of section 197 was "the preservation of the contract of service in the event of a transfer as a going concern which in turn would result in the preservation of the employee's work security." Section 197 required a balance between the business interests of the employer on the one hand and the interest of workers in job security. Not every act of a business transfer or outsourcing would as a matter of course constitute a transfer of a business as contemplated by section 197. Basson J found that three criteria had to be met to establish a transfer as contemplated by section 197: (1) the transaction had to constitute a "transfer" as contemplated by section 197; (2) a "business" must be transferred, which could include a part thereof; (3) the "business" had to be transferred as a going concern. [Paragraphs 22-23]

Basson J held that:

> "[P]reference should be given to a more liberate [sic] interpretation rather than a conservative or narrow interpretation of section 197 and that the interpretation … should lean in favour of protecting the rights of employees affected by the often harsh effects of a transfer as a going concern." [Paragraphs 26 - 28]

However, the legislature had only contemplated a 'first generation transfer', i.e. a transfer from the old employer to the new employer, and nothing else. [Paragraphs 30-31] Thus section 197 only contemplated first generation outsourcing. Basson J held that, in light of the clear wording of the section, it would not be appropriate "to interpret section 197(1)(b) to also apply to a transfer "from" one employer to another as opposed to a transfer by the "old" employer to the "new" employer." [Paragraphs 32-33]

The application was dismissed. An appeal to the Labour Appeal Court was partially upheld, the Court holding that section 197 was capable of application when, at the end of the contract between SAA and LGM SA, the services were transferred to SAA or contracted out by SAA to another party **(*Aviation Union of South Africa obo Barnes and Others v South African Airways (Pty) Ltd and Others (JA 51/07) [2009] ZALAC 12*)**. The SCA overturned the Labour Appeal Court and confirmed the LC decision (***SAA v Aviation Union of SA* (123/10) [2011] ZASCA 1 (11 January 2011)**). Finally, the Constitutional Court overturned the decisions of the Labour Court and the SCA: *Aviation Union of SA and others v SA Airways and others* (2011) 32 ILJ 2861 (CC).

CHILDRENS' RIGHTS

AB AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT 2016 (2) SA 27 (GP)

Case heard 12 August 2015, Judgment delivered 12 August 2015.

AB wished to enter into a surrogacy agreement whereby a surrogate mother would bear her a child conceived from donated male and female gametes. However, this was precluded by section 294 of the Children's Act, which required that the conception be effected by the use of a gamete of at least one of the commissioning parents. This was referred to as the 'genetic link requirement'. Due to her individual circumstances, this requirement meant that it was impossible for AB to conclude a surrogacy agreement or become a parent, save by adoption. Applicants challenged the constitutionality of this provision on the grounds that it violated their rights to rights to equality, dignity, reproductive healthcare, autonomy and privacy.

Basson J held that a difference of opinion between the parties on the meaning of 'surrogacy' lay at the heart of the dispute: applicants understood it to mean the provision of an opportunity to persons who could not give birth themselves to become parents, regardless of whether or not the child was genetically related to the parents or not. Respondent interpreted it to mean an opportunity for person who could not give birth themselves to have a genetically related child. [Paragraph 31]. Basson J identified the legislative purpose as being to regulate surrogacy, and ensure sufficient protection of the rights and interests of all parties involved in surrogacy arrangements, in order for commissioning parents under surrogacy agreements to acquire parental rights without having to follow an adoption process. [Paragraph 41]. Basson J further found that a family could not be defined by genetic lineage [Paragraph 46].

After surveying the regulation of surrogacy in foreign legal systems [paragraphs 47 – 55], Basson J analysed the applicable constitutional framework. Basson J accepted the argument that "infertility objectively has the potential to impair human dignity" [paragraph 74], and found that the genetic link requirement constituted discrimination in terms of section 9 of the Constitution (the right to equality):

> "The genetic link requirement has the effect of completely excluding members of the subclass [of people biologically unable to contribute their own gametes to conception, or who are not involved in a sexual relationship with a person who is able to make such contribution] from accessing surrogate motherhood as a reproductive avenue. Furthermore, excluding members of the subclass from accessing surrogate motherhood undoubtedly encroaches upon their human dignity, not only in that it prohibits a member of the subclass from exercising his or her right to autonomy, but also in light of the fact that the exclusion reinforces the profoundly negative psychological effects that infertility often has on a person." [Paragraph 76]

Basson J rejected an argument that removing the genetic link requirement would compromise the rights of a child provided in section 28(2) of the Constitution [Paragraphs 83 - 86], and held further that the genetic link requirement infringed on the rights to human dignity [paragraphs 88 – 93], privacy [paragraphs 94 – 96], and access to healthcare services [paragraphs 97 – 99]. Basson J thus found section 294 to be inconsistent with the constitution, and held that the genetic link requirement was severable [paragraph 105]. Respondent was ordered to pay the applicants' costs on an attorney and client scale, as respondent was found to have "flagrantly disregarded her constitutional duty in respect of ensuring that all relevant evidence was timeously placed before the court." [Paragraph 113].

A majority of the Constitutional Court reversed the decision in **AB AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT 2017 (3) SA 570 (CC)**. The majority (Nkabinde J; Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Jafta J, Mhlantla J and Zondo J concurring) found that there was a rational connection between the differentiation and a legitimate government purpose, and that as the differentiation was not unfair, there was no violation of the right to equality. The costs order of the High court was confirmed. The minority (Khampepe J; Cameron J, Froneman J and Madlanga J concurring) found the section did limit decisions regarding rights to reproduction, and violated the right to equality, and that the limitation was no justifiable.

SELECTED ARTICLES

'SEXUAL HARASSMENT IN THE WORKPLACE: AN OVERVIEW OF DEVELOPMENTS', (2007) Stellenbosch Law Review 3, 425.

The article dealt with three main topics: the continuing search for a workable legal definition of harassment, the location of protection against harassment within protection against unfair discrimination, and the availability of remedies to the victim. The author argues that from the perspective of legal certainty, the approach of defining sexual harassment with reference to the type of conduct involved or the effect on the victim was problematic:

> "First, such a definition may exclude behaviour that at face value seems to be non-sexual, but which is intended or implemented in a sexually oppressive manner. Secondly, even if the conduct is sexual in nature, the reality remains that the law recognises, in principle, the acceptability of interaction between the sexes, even at work (ie sexual conduct is not necessarily sexual harassment)." (Page 426)

The article then considers the threshold for conduct to be regarded as sexual harassment. (Pages 429 - 430) The author argues that it is important to determine "from whose perspective the conduct or the alleged hostile working environment must be judged." (Page 431 – 432), abd advocates for a "reasonable victim" test:

> "'In terms of this test, the feelings and perceptions of the victim are taken into consideration as well as the surrounding circumstances. … One of the main points of criticism is that it unduly places the conduct of the victim under the spotlight. Care should always be taken that the focus of an enquiry into harassment is not placed on the victim's personal history rather than on the conduct of the harasser. It is nonetheless suggested that this test is the more acceptable because it tries to find a balance between the perceptions and feelings of the victim (typically as a woman) whilst, at the same time, it takes into account the surrounding circumstances" (Page 433 - 434)

The article surveys the history of South Africa's approach to defining sexual harassment, and considers the link between harassment and discrimination. The author argues that practices of a sexual nature which undermine or inhibit a woman's job performance, or which force her to resign, constitute sex discrimination, as they encroach on her right to equality in the workplace and her right to dignity. (Page 439) The author argues that, despite wide acceptance of a link between harassment and discrimination, problems remain due to fundamental differences between the two "as legal phenomena." (Pages 440 - 441)

> "In short, discrimination law does not work with degrees of conduct, while harassment law does. … [T]here are a variety of remedies available to the victim of sexual harassment, one of which is a claim of unfair discrimination. At the same time, experience has shown that instances of harassment are either dealt with as a disciplinary matter or culminate in constructive dismissal claims in the wake of a resignation by the victim. … [T]his may lead to a definition or understanding of harassment removed from reality and the important role discipline and protection against unfair (constructive) dismissal play in combating harassment in the workplace." (Pages 442 – 443)

The article then discusses remedies and the relationship between sexual harassment and constructive dismissal, before concluding:

> "Perhaps the most important feature of these developments is that the underlying approach that harassment is discrimination is now firmly established, also in South Africa. Acceptance of this paradigm has influenced our understanding and, for practical purposes, the legal definition of sexual harassment. … [I]t is significant that at last some reliance has been placed on the Employment Equity Act by victims of workplace sexual harassment. But … this has been done against the background of the fact that the victim's job security still was compromised by the harassment." (Pages 450 – 451).

DEPUTY JUDGE PRESIDENT PATRICIA GOLIATH

BIOGRAPHICAL INFORMAITON AND QUALIFICATIONS

Date of birth : 15 October 1964

BA Law, University of the Western Cape (1986)

LLB, UWC (1988)

LLM, University of Cape Town (1999)

Certificate in Labour Law, UCT (2000)

Diploma in Insolvency Law, University of Pretoria (2002)

CAREER PATH

Acting Justice, Constitutional Court (January – December 2018)

Deputy Judge President, Western Cape High Court (July 2016 -)

Judge, Western Cape High Court (2006 -)

Acting Judge, Eastern Cape High Court (July – October 2005)

Acting Judge, Northern Cape High Court (April – June 2004 ; April – June 2005)

Attorney, Goliath's Attorneys (1991 – 2005)

Admitted as conveyancer and Notary Public (2000)

Professional Assistant, Gary Jansen Attorneys (1991)

Candidate Attorney, E Moosa & Associates (1988 – 1990)

NADEL

Member (1988 – 2000)

Member, management committee (1998 – 1999)

Member, Black Lawyers' Association (2001 – 2005)

International Association of Women Judges (South African Chapter)

Executive member (2008 – 2012)

Member (2006 -)

SELECTED JUDGMENTS

PRIVATE LAW

STEYN v HASSE AND ANOTHER 2015 (4) SA 405 (WCC)

Case heard 9 May 2014, Judgment delivered 15 August 2014

First respondent was involved in a romantic relationship with the appellant, who lived at the first respondent's house rent-free. When the relationship soured, he issued appellant with an eviction notice. The appellant resisted on the ground that she was living in the house at first respondent's invitation, as his partner. She alleged that he had promised to provide her with a secure home for 10 years. A magistrates' court found there to have been no reciprocal rights and duties of support, and held that the withdrawal of consent meant that appellant's occupation was unlawful and granted an eviction order.

On appeal to the High Court, Goliath J (Schippers J concurring) found that the parties had not established or maintained a joint household, and the appellant had never contributed towards first respondent's expenses. [Paragraph 20]. Goliath J held that the revocation of a power of attorney granted to the appellant, the request for her to vacate the property and cancellation of acces to a bank account "are all indicative of a relationship having irrevocably broken down." [Paragraph 22].

> "Considering the overall nature of the relationship, as well as the fact that the appellant had no intimate knowledge of first respondent's personal affairs, it is evident that there was clearly no express or tacit universal partnership. I am therefore in agreement … that there is no legal basis to find that there existed reciprocal rights and duties of support between the appellant and the first respondent." [Paragraph 23]

Goliath J held that as, on the appellant's own version, there appeared to have been no meaningful discussions surrounding their cohabitation, there was no clear basis on which long-term or alternative accommodation would have been raised and agreed to by the parties. [Paragraph 31] Goliath J found it "highly improbable" that first respondent, who had no duty to support the appellant, would have given her an undertaking of a secure home for ten years, or offered to purchase property for her at the end of the relationship [Paragraph 34].

Goliath J held that the eviction had been properly granted [Paragraphs 35, 40]. Goliath J held that, in the circumstances, it was in the interests of justice and fairness that no order be made as to costs. [Paragraph 43]. The appeal was dismissed.

GILES NO AND ANOTHER v HENRIQUES AND OTHERS 2008 (4) SA 558 (C)

Case heard 22 February 2007, Judgment delivered 19 September 2007

A husband and wife (Mr and Mrs Cammisa) had inadvertently signed each other's wills, which had been mistakenly swapped during the signing process. The couple had read their respective wills and were both satisfied with the contents of the wills and their implications. Applicants submitted that rectification was an appropriate remedy. Respondents took the view that the wills were invalid and therefore not capable of rectification.

Goliath J discussed non-compliance with will signing and execution formalities, including an examination of international trends, noting that there had been "a shift towards a less rigid approach" regarding exact compliance with statutory formalities regarding the signing and execution of wills. [Paragraph 25]. Different forms of remedial legislative provisions have been enacted to enable courts to grant relief in cases of non-compliance with formal requirements. [Paragraph 27]. Goliath J held that:

> "It is generally accepted that a will that fails to comply with statutory formalities may constitute just as reliable an expression of intention as a will executed in strict compliance." [Paragraph 29]

Acceptance of a will by the Master of a will does not in itself give it validity. [Paragraph 38] Goliath J noted that section 2(3) of the Wills Act gives the High Court the power to condone failure to comply with the formalities required to execute a valid will. [Paragraph 39]. Goliath J considered case law relating to the interpretation of section 2(3), but noted that the remedial provisions of the section were not open to the applicants in this matter, as the will had not been drafted by the deceased, and thus fell outside the scope of section 2(3). "Contrary to certain foreign courts, South African courts do not have a general discretion to condone non-compliance with the prescribed formalities." [Paragraph 40].

Regarding rectification, Goliath J held that the wills had been prepared on the instructions of both deceased, who had attended the execution ceremony. The same attesting witnesses had signed both wills. Apart from the wrong wills being signed, all other prescribed formalities had been complied with. The erroneous signing had clearly been a mistake. [Paragraph 46]. In the circumstances, the requirements for rectification had been shown, and it had clearly been established that "the discrepancy between the expression and intention was due to a bona fide mistake". [Paragraph 47]

The application succeeded, with the court ordering specific deletions and substitutions in relevant clauses in both wills. On appeal, the decision was upheld by the Supreme Court of Appeal save for the setting aside of the costs aspect of the court a quo's order: ***Henriques v Giles NO* 2010 (6) SA 51 (SCA).**

MJ De Waal, "The Law of Succession (Including Administration of Estates) and Trusts", *Annual Survey of South African Law,* 2007 describe the judgment as controversial, arguing that it goes far beyond anything that had to that point been accepted under rectification in South African law. The author argues that "under the guise of rectification that court, by means of its elaborate order, effectively rewrote the two wills for the testators." The author empathises with the judge for the dilemma she faced in this

matter, however he indicates that it may have been better for a finding of intestacy "with a claim against the firm of attorneys for the disappointed beneficiaries."

MC Schoeman-Malan, Juta's Quarterly Review, Succession 2007 (4), states that although the approach adopted by the court on rectification led to a satisfactory result, "it is unfortunate that the possibility of condoning was not explored."

CIVIL AND POLITICAL RIGHTS

RAHUBE V RAHUBE AND OTHERS (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC) (30 OCTOBER 2018)

Case heard 17 May 2018, Judgment delivered 30 October 2018.

This case concerned the constitutionality of section 2(1) of the Upgrading of Land Tenure Rights Act. The High Court had found the section to be unconstitutional [see further the summary on page 29], on the basis that people who were not holders of certificates or deeds of grant were prevented from acquiring ownership of properties in which they had a substantial interest. This exclusion was inherently gendered because, in terms of the Proclamation, women could not be the head of a family, and thus, could not have a certificate or deed of grant registered in their name.

In confirmation proceedings before the Constitutional Court, Goliath AJ (Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring) held that the impugned proclamation had discriminatory effects on African women, as it was:

> "crafted in gendered terms in that no provision is made for a husband, brother or non-dependent man to be a member of a family, and describes the family only in relation to the head of the family. The Proclamation does not define "head of the family" however, all references to the "head" are made using masculine pronouns." [Paragraphs 29 – 30]

Goliath AJ held that it was clear from a plan reading of the relevant sections of the Proclamation that it envisaged "a situation where only men could be the head of the family, with women relatives and unmarried sons falling under their control." [Paragraph 32]. Goliath AJ found that it was not possible to read the section in a manner consistent with the Constitution, as this would involve reading the Proclamation to have gender-neutral provisions. Goliath AJ found that this was not reasonably possible and would require an unduly strained interpretation,

> "because it is simply not plausible that the Proclamation was applied in a gender-neutral way during apartheid. To read it as gender-neutral now would not cure the discrimination that occurred previously and, since the Upgrading Act is based on the position as it was during apartheid, would not render the Act constitutionally compliant." [Paragraph 34]

The section was held to be constitutionally invalid due to its inconsistency with section 9(1) of the Constitution, the right to equality. [Paragraphs 36 – 44]. Goliath AJ held that, as it was possible that property ownership since the enactment of the Act may have ended up vesting in African women, it was necessary to limit the retrospectivity of the declaration of invalidity [paragraphs 63 – 64]. The list of

exceptions provided by the High Court were extended [paragraph 68], and the suspension of the declaration of invalidity for 18 months was confirmed [Paragraph 70].

CONSTITUTIONAL INTERPRETATION

TLOUAMMA AND OTHERS v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS 2016 (1) SA 534 (WCC)

Case heard 7 October 2015, Judgment delivered 7 October 2015

Three opposition parties challenged certain provisions of the National Assembly (NA) rules, and the Speaker's application thereof, dealing with the tabling of a motion of no confidence. The complaints stemmed from the tabling of a motion of no confidence in the President of the Republic, and the subsequent failure of the Speaker to schedule the debate and vote on such motion before the end of the parliamentary session. An order was sought declaring such failure inconsistent with s 102(2) of the Constitution and NA rule 102A, to the extent that such motion was not accorded "due priority" over other motions. Further, that the new NA rule 102A was inconsistent with s 102(2) of the Constitution to the extent that it did not provide for a political party to enforce the right to exercise the power to have a motion of no confidence in the President scheduled for a debate and voted upon within a reasonable time, or at all. As such it failed to adequately address the defects in chapter 12 of the NA rules identified by the Constitutional Court in Mazibuko v Sisulu. Applicants also sought an order to ensure that the motion of no confidence be voted upon by secret ballot, and a declarator that the Speaker was not a fit and proper person to hold the office.

Goliath J (Henney J and Mantame J concurring) discussed the role and importance of the office of the speaker, [Paragraphs 75 – 76, 78] noting that the South African legal system had developed a "strong set of traditions concerning the speaker of Parliament", including that the Speaker "must maintain the neutrality of the office, must act with fairness, without favouritism and with impartiality." [Paragraph 79].

Goliath J found that the Constitution did not prescribe the procedure or any substantive requirements for a motion of no confidence in the President. Goliath J held that "it is the National Assembly which must determine and control the 'arrangements, proceedings and procedures' for a motion of no confidence in the President and further that it may do so in its 'rules and orders concerning its business'." [Paragraph 84] Goliath J found that the requirement in National Assembly Rule 102A(2) that the Speaker consult with the Chief Whip and Leader of Government Business was reasonable and rational.

> "There is no substance to the allegation that the NA rule 102A(2) is vulnerable to manipulation and procrastination. There is no evidence that the consultation procedure is designed to unreasonably delay, postpone or frustrate the tabling and scheduling of a motion of no confidence." [Paragraph 93]

Goliath J held that the decision making process for tabling and scheduling a no-confidence vote was "no longer at the discretion of the majority or minority since the provisions of NA rule 102A(5) are peremptory", and that the applicants' argument "that the scheduling of a motion of no confidence is effectively left in the hands of the ruling party is therefore unfounded." [Paragraph 95].

Goliath J found that the Constitutional Court had specifically refrained from prescribing a specific time frame for a motion of no confidence to be dealt with.

"If this court were to prescribe a specific period within which to schedule a debate on a motion of no confidence it would be unduly prescriptive to the Speaker and the National Assembly as to how and when to schedule its own business. It is not competent for this court to dictate specific time periods to the National Assembly … In doing so the court would be overstepping the boundaries of separation of powers".

Goliath J found that NA rule 102A was consistent with the Constitutional Court judgment in *Mazibuko*, regarding the time within which a motion of no confidence had to be scheduled. [Paragraph 99]. Goliath J considered the merits of the Speaker's decision on the scheduling of the debate, and held that:

> "The Speaker as administrative head is best placed to fulfil the obligation to schedule the motion, which clearly involves polycentric decision-making. The court recognises her expertise in fulfilling her function in the House. In exercising its designated judicial control over the actions of other branches of government the court should always be mindful to show due deference to the autonomy of Parliament and presiding officers in respect of the deliberations of Houses of Parliament. In my view the Speaker is entitled to a high degree of deference by the courts." [Paragraph 114]

Goliath J found that there was no implied or express constitutional requirement for voting by secret ballot in respect of a motion of no confidence in the President [paragraph 121], and that the court was "not mandated to prescribe to the National Assembly on how to conduct its voting procedures", and that granting the relief sought on voting by secret ballot "would offend against the provisions of s 57 of the Constitution as well as the doctrine of separation of powers, in that it would in effect amount to the court formulating rules for the National Assembly." [Paragraph 123].

Finally, Goliath J held that the question of the Speaker's fitness and propriety was not justiciable [paragraph 135], and that the Constitution expressly provided that the National Assembly was the competent authority to remove the speaker. It was "impermissible for any other person or institution" to assume that function [Paragraph 152].

> "It is therefore inappropriate for the Speaker to be removed by the courts". [Paragraph 154]

The application was dismissed. As the case raised matters of constitutional import and "'indeed adds texture to what it means to be living in a constitutional democracy", each party was to pay its own costs.

In **United Democratic Movement v Speaker, National Assembly and Others 2017 (5) SA 300 (CC)**, the Constitutional Court was faced with an argument by the speaker that neither the Constitution nor the rules of the National assembly allowed her to authorise a vote by secret ballot in another motion of no confidence against the President. The Court held that this view was mistaken, and that "[t]he only real constraint that stood in her way was the *Tlouamma* decision. [Paragraph 89]. The Court held that the Speaker did have the power to authorise a vote by secret ballot in appropriate circumstances, and that "[t]o the extent that *Tlouamma* might have been understood to have held that a secret-ballot procedure is not at all constitutionally permissible, that understanding is incorrect." [Paragraph 91].

CIVIL PROCEDURE

ARNOLD BOTHA V MAGISTRATE M PANGARKER AND CHRISTINA MAGDALENA SUSANNA BOTHA CASE NO.: 6499/2012 (WCC) (29 JANUARY 2013)

Applicant sought an order reviewing and setting aside divorce proceedings that had taken place before the respondent magistrate, together with the judgment issued by first respondent, save for the decree of divorce itself. The magistrate had refused to grant a postponement, requested due to the unavailability of counsel. It was argued that the magistrate continued with proceedings, finalised the divorce and issued an order in applicant's absence, thereby violating the applicant's right to be heard and his right to legal representation, and that the court denied the applicant the right to a fair trial. The applicant had been represented by various legal representatives at different points in the proceedings.

Goliath J (Cloete AJ concurring[5]) emphasised the importance of legal representation, and held that "[p]rejudice to a litigant flowing from a refusal of a postponement is sometimes virtually presumed where the effect of the refusal of an application is to deprive him of legal representation." [Paragraph 14]. The court held that

> "It was grossly irregular for first respondent to simply decide to proceed with the matter without considering the issue of a postponement. The court was fully aware that the applicant's previous legal representative withdrew and that he needed to be given an opportunity to obtain another legal representative at short notice. The court is of the view that it was unreasonable of the learned magistrate to deny the applicant's new legal representative an opportunity to facilitate a postponement of the matter." [Paragraph 27]

The court held that, as a result of the magistrate not accommodating the applicant's new legal representative, the applicant was not afforded the right to a fair trial, as he had bene deprived of the opportunity to be represented by a legal practitioner, or one of his choice. The proceedings of 8 - 9 March 2012 were set aside [Paragraph 29].

The matter was referred back to the Regional Court for trial de novo before a different regional magistrate. However, the High Court's decision was reversed on appeal in ***Pangarker v Botha* 2015 (1) SA 503 (SCA)**, with the SCA court finding [at paragraph 30] that "[t]he judgment of the high court in finding that the failure to postpone the trial constituted a gross irregularity is disturbing as it is not supported by the facts"; and that "the high court failed to appreciate the principles applicable in respect of postponements and recusal applications." [Paragraph 31]. The SCA found that there was "no doubt that Mr Botha engineered an application for a postponement under the guise of a recusal application", and that it was "incomprehensible how it could be said that the magistrate had committed a gross irregularity under these circumstances." [Paragraph 33].

[5] Note – it is not clear whether the judgment is jointly written by Goliath J and Cloete AJ; or by Goliath J only, with Cloete AJ concurring.

CRIMINAL JUSTICE

JACOBS AND OTHERS V S [2019] ZACC 4 (14 FEBRUARY 2019)

Case heard 1 March 2018, Judgment delivered 14 February 2019.

Applicants had been convicted of murder in the High Court, on the basis of having acted in common purpose. An appeal to the full bench was dismissed. In the Constitutional Court, applicants argued that the full bench had incorrectly applied the common purpose principle, and that this incorrect application amounted to an unconstitutional development of the principle.

Goliath AJ (Cachalia AJ, Froneman J, Khampepe J and Madlanga J concurring) held that leave to appeal should not be granted, as the appeal concerned factual findings, which did not raise a constitutional issue. Goliath AJ held that

> "[T]he core factual dispute for determination was whether the fatal blow was inflicted at stage one or stage two; it being common cause that the evidence did not establish that the applicants participated in the attack at stage one. … The determination as to whether the fatal blow was inflicted during stage one or two is clearly a factual enquiry which does not raise a constitutional issue that this Court should consider." [Paragraphs 37 – 38]

Goliath AJ found that applicants had "camouflaged their application as a constitutional matter" by asserting that the common purpose doctrine had been incorrectly applied and unconstitutionally developed by the lower courts. However, this matter was neither grounded on the interpretation of the common purpose doctrine, nor its development. It was purely factual and did not raise any important constitutional issues. [Paragraph 44].

Goliath AJ considered the court's earlier decision in *Makhubela*, and identified the main issue in that case as whether the common purpose doctrine had been correctly applied, and held that the basis on which the Court had granted leave to appeal was founded on the fact that the applicants' co-accused had all been granted leave to appeal and subsequently been released from prison. [Paragraph 45]. Goliath AJ held that the current case dealt with the issue whether the Court had jurisdiction to hear matters which are purely factual. Goliath AJ held that the *Makhubela* decision had been "founded on the basis that the interests of justice warranted that all the accused who were convicted as a result of the same trial, be afforded the same treatment." [Paragraph 46]. Goliath AJ held that "[w]ere this Court to interpret that statement in the broad manner suggested by the applicants, every criminal appeal would implicate constitutional rights and engage the jurisdiction of this Court. That must be wrong." [Paragraph 47].

Goliath AJ held that the application for leave to appeal should be dismissed. Theron J (Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ concurring) held that leave to appeal should be granted. Theron J held that the application of the doctrine of common purpose was a constitutional issue, and thus the Court had jurisdiction [paragraph 56]. Theron J differed from the assessment of the judgment of the high court set out by Goliath AJ [paragraphs 64 – 65; 68] and held that the applicants should not have been convicted of murder on the basis of common purpose. Zondo DCJ (Dlodlo AJ, Jafta J, Petse AJ and Theron J concurring) wrote a separate judgment, finding that the application of the common purpose doctrine did raise a constitutional issue, and that the court therefore did have jurisdiction, and thus concurred in the judgment of Theron J

Froneman J (Cachalia AJ and Madlanga J concurring) wrote a separate judgment concurring in the judgment of Goliath AJ, and expressly disagreeing with the criticisms of Goliath AJ's analysis of the findings of the High Court. Froneman J held that:

> "The disagreement illustrates the fundamental difficulty of the case, namely that in the end it revolves around facts, not legal or constitutional issues. The full record of the evidence is not before us. In its absence I find it difficult to understand how the first judgment's analysis of the facts can be attacked on the basis that it does not accord with the record." [Paragraphs 91 – 92]

There was thus no majority decision of the court, and the decision of the full bench of the High Court stood (judgments para 1 – 3)

JUDGE JODY KOLLAPEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born 19 May 1957, Pretoria.

B. Proc – University of the Witwatersrand (1978)

LL.B – University of the Witwatersrand (1981)

CAREER PATH

Judge, Land Claims Court (October – December 2018)

Acting Justice, Constitutional Court (July – December 2017)

Chairperson, South African Law Reform Commission (2016 to date)

Judge of the High Court (North Gauteng) (2011 to date)

Acting Judge, North Gauteng High Court (2010 – 2011)

Chairperson, South African Human Rights Commission (2002 – 2009)

Deputy Chairperson, South African Human Rights Commission (2001 – 2002)

Commissioner, South African Human Rights Commission (1996 – 2001)

Lawyers for Human Rights (1992 – 1996)

N Kollapen (Attorney) (1982 – 1983; 1988 – 1992)

Moosa Omar and Kollapen (Partner) (1984 – 1987)

Trustee, Legal Resources Centre (2000 to date)

Pretoria Child and Welfare Society (2001 to date)

Laudium Care Services for the Aged (2000 to date)

SELECTED JUDGMENTS

PRIVATE LAW

SA NATIONAL DEFENCE UNION V MINISTER OF DEFENCE & OTHERS (2012) 33 ILJ 1061 (GNP); 2012 (4) SA 382 (GNP)

Case heard: 29 August and 2 September 2011; Judgment delivered 9 February 2012.

Upheld a claim for defamation by plaintiff trade union regarding an article published in the official magazine of the Department of Defence.

> "Our law has developed to such a stage where considerations of legal and public policy must mean that a trade union should have the right to sue for defamation and in my view this would be consistent with the spirit of the judgment of the Constitutional Court in *SA National Defence Union v Minister of Defence & another*, where the court found that the total ban on trade unions in the defence force went beyond what was reasonable and justifiable.
>
> If such an action would be available to a trade union in the widest sense … there can be no reason why a trade union that operates within the context of the defence force should on account of any policy or legal considerations be excluded from being the recipient of such a right and on this aspect one must conclude that, having regard to the incremental development in our law of defamation as well as regard to the constitutional values which underpin our constitutional order, there can be no reason why a trade union and in particular a trade union such as the plaintiff which operates within the defence force should not have the right to sue for defamation under appropriate circumstances." [Paragraph 19]

CIVIL AND POLITICAL RIGHTS

RAHUBE V RAHUBE AND OTHERS 2018 (1) SA 638 (GP)

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

In proceedings where applicant sought to claim ownership of property based on the Restitution of Land Rights Act, applicant also argued that section 2(1) of the Upgrading Act was unconstitutional and invalid to the extent that it deprived the occupants of property, who were not holders of a certificate of occupation or a deed of grant, from claiming ownership of the property. The exclusion from holding a certificate of occupation or a deed of grant was argued to be based on gender discrimination. [Paragraph 20].

Kollapen J held that the Upgrading Act "may have been a well-intentioned legislative intervention", aimed as it was at providing full ownership rights to those whose tenure rights fell short of ownership. [Paragraph 48]. However, the Act effectively vested all ownership rights in the property in the first respondent, while divesting the applicant and potentially others similarly situated, of any entitlement to the property, without affording the applicant or others affected an opportunity to be heard and present a claim for entitlements to the property. [Paragraph 55]. Kollapen J found that

the Act's automatic conversion mechanism, particularly the lack of notice of the conversion and the absence of a procedure to raise issues with the conversion, violated the *audi alteram partem* principle, and was "not reconcilable with the purport and spirit of our Constitution and democracy based on human dignity and equality, not to mention the right to adequate housing." [Paragraphs 59 – 60].

> "In particular, I find s 2(1) is unconstitutional in that it violates s 9 (right to equality) and s 34 (right to access to courts). … The violation of the applicant's right to equality flows from the Upgrading Act's automatic conversion of the land tenure rights which has a disproportionate and discriminatory impact on the applicant due to her gender." [Paragraphs 62 - 63]

Kollapen J then considered the scope of the declaration of invalidity necessary, and found that this "may need to be restricted in terms of the time frame of application and the categories of individuals to which it applies." This court had to provide an adequate remedy not just to the applicant but also to other similarly situated individuals whose constitutional rights had been infringed. [Paragraph 68]. Kollapen J found that compelling circumstances existed to justify an order of retrospectivity [paragraph 73], and that the declaration of invalidity should apply from the date that the Interim Constitution came into effect [paragraph 77]. Kollapen J further held that he was:

> "mindful that an open-ended order of retrospectivity may well have serious and far-reaching consequences for persons who in good faith … relied on and acted upon the ownership rights they would have acquired upon automatic conversion by the Upgrading Act." [Paragraph 78]

Retrospectivity was limited to instances where the property had bene sold to a third party, or inherited by a third part y in terms of the law of succession, where the estate was finalised, or where a party to the transfer was on legal notice that the underlying property was the subject of a dispute. [Paragraphs 80 – 81]. The declaration of invalidity was suspended for 18 months.

The declaration of invalidity was confirmed by the Constitutional Court in **RAHUBE v RAHUBE AND OTHERS 2019 (2) SA 54 (CC)** , with variations to the order [see summary on page 21].

AFRIFORUM AND ANOTHER V CHAIRPERSON OF THE COUNCIL OF THE UNIVERSITY OF PRETORIA AND OTHERS [2017] 1 ALL SA 832 (GP).

Case heard 1 December 2016; Judgment delivered 15 December 2016.

This was an application to review and set aside decisions of the university senate and council to change university language policy, to provide for English as the main language of learning and teaching. Kollapen J (Baqwa and Mabuse JJ concurring) held that Section 29(2) of the Constitution provided that everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. However, the exercise of the right to receive education in the language of one's choice cannot negate considerations of race and equity.

> "[I]t could hardly be said that UP failed to be responsive to the constitutional rights of Afrikaans students seeking instruction in the language of Afrikaans. Being responsive can hardly equate to having to positively respond to the request made. What it requires is … to consider the request and determine whether the request is one that is reasonably practicable as contemplated in Section 29(2). I have demonstrated that this exercise, as required, was undertaken with a high level of engagement, thoroughness and transparency and the ultimate conclusion that it would not be reasonably practicable was reached after a proper consideration of all the necessary and relevant factors in a context-sensitive understanding within which the claim was located." [Paragraph 47]

SOCIO-ECONOMIC RIGHTS

SECTION 27 AND OTHERS v MINISTER OF EDUCATION AND ANOTHER 2013 (2) SA 40 (GNP)

Case heard 17 May 2012; Judgment delivered 18 June 2012.

Held that that the failure of the respondents to provide textbooks to schools in Limpopo constituted a violation of the right to basic education; and ordered respondents to provide textbooks to certain grades as a matter of urgency; and ordered respondents to develop a "catch-up plan" for affected learners.

> "… [T]he provision of learner support material in the form of such textbooks as may be prescribed is an essential component of the right to basic education, inextricably linked to the fulfilment of that right. In fact it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks. On that basis it accordingly has to follow — given the respondents' own goals and indicators in their Annual Performance Plan, and their target of 100% in respect of delivery of workbooks and textbooks for the entire school year — that the failure to provide textbooks by about midway through the academic year would prima facie constitute a violation of the right to basic education." [Paragraph 25]

The judgment was followed by the SCA in **MINISTER OF BASIC EDUCATION AND OTHERS v BASIC EDUCATION FOR ALL AND OTHERS 2016 (4) SA 63 (SCA)**, where the court said (at paragraph 46): "I agree with Kollapen J … that the failure to provide textbooks to learners in schools in Limpopo in the circumstances … is a violation of the rights to a basic education, equality, dignity, SASA and s 195 of the Constitution."

The judgment was also approved by the Eastern Cape High Court in **TRIPARTITE STEERING COMMITTEE AND ANOTHER v MINISTER OF BASIC EDUCATION AND OTHERS 2015 (5) SA 107 (ECG)**, where the court said (at paragraph 18): "In my view Kollapen J is correct. The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn and transport to and from school at state expense in appropriate cases."

CIVIL PROCEDURE

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

Case heard 24 April 2018, Judgment delivered 24 April 2018

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

The majority of the Constitutional Court (Madlanga J, with Zondo DCJ, Cameron J, Froneman J, Kathree-Setiloane AJ, Mhlantla J and Theron J concurring) held that there were no reasons to exclude deliberations, as a class of information, from the rule 53 record. The JSC's concerns about confidentiality were overstated, and did not entitle it to refuse to disclose the recordigns of the deliberations. The appeal was upheld, and the JSC was ordered to deliver the full record of the proceedings.

Jata J dissented, holding that the word 'record' in rule 53 did not incorporate the JSCs deliberations.

Kollapen AJ (Zondi AJ concurring) wrote a separate dissenting judgment. Kollapen J observed that "[i]n the wide sense," the case "may have relevance for the judiciary — its independence, integrity, efficacy and, in particular, the calibre of those who constitute it." [Paragraph 155].

"Openness is also double-sided. It is imperative that what is constitutionally necessary is seen and heard. However, in order to ventilate what must be seen and heard and to preserve certain core constitutional values, there also has to be an environment in which open and uncensored debate flourishes. In some instances, confidentiality is necessary to ensure such an environment exists, so that what must be shown and said is brought into the light, to factor into constitutionally necessary debates." [Paragraph 160].

Kollapen AJ found that the JSC's deliberations were relevant to the decision under review, and should therefore be included in the record, unless there was a legal justification for their exclusion. [Paragraph 168]. Kollapen AJ analysed similar proceedings, and found that

> "even in a jurisdiction such as ours, that places a high premium on openness and transparency, policy and the law recognise that, in given situations, even deliberations that meet the threshold of relevance may well be justifiably excluded from a record, either in terms of PAIA or in terms of rule 53(1)*(b)* for a variety of reasons, including the dignity and privacy interests of individuals, the integrity of the administration of justice, and the independence of the judiciary." [Paragraph 184]

Kollapen AJ found that maintaining the confidentiality of JSC deliberations was "not only constitutionally sustainable but also necessary to protect multiple constitutional values housed in the Bill of Rights", considering the interests of the candidates, members of the JSC, and the JSC as an institution. [Paragraphs 191 - 204].

S S v V V S (CCT247/16) [2018] ZACC 5; 2018 (6) BCLR 671 (CC) (1 March 2018)

Case heard 29 August, 8 November 2017' Judgment delivered 1 March 2018

This was an appeal against an order by the High Court authorising the issue of a warrant of execution against the applicant's immovable property. The warrant was in respect of maintenance obligations due by the applicant to the respondent in respect of the minor child born of the erstwhile marriage between the parties. During the hearing of the appeal, it emerged that while the applicant disputed the quantification of additional maintenance amounts, he was in substantial arrears with his basic maintenance obligations. [Paragraph 16].

Kollapen AJ (Zondo ACJ, Cameron J, Froneman J, Jafta J, Kathree Setiloane AJ, Madlanga J, Mhlantla J and Zondi AJ concurring) held that, whilst these proceedings were not contempt proceedings, the concession of non-payment could not pass without consequence.

> "The judicial authority vested in all courts, obliges courts to ensure that there is compliance with court orders to safeguard and enhance their integrity, efficiency, and effective functioning." [Paragraph 18]

Kollapen AJ held that although applicant did not face the consequences of a finding of civil or criminal contempt, his conduct, if left unaddressed, "would undermine judicial integrity", and that considerations analogous to formal contempt proceedings arose. [Paragraph 21]. The matter was postponed, with applicant ordered to pay respondent's costs as well as maintenance payments [paragraph 27]. When the matter proceeded, the first question to be considered was whether the applicant had complied with the order. It was conceded that applicant had failed honour the term of the order relating to payment of maintenance obligations. [Paragraph 32].

> "Those interests [of justice] will not be best served and will be undermined if the applicant is allowed to proceed and deal with the merits of the appeal in the absence of him remedying his conduct by complying with the August Order. It will dilute the potency of the judicial authority and it will send a chilling message to litigants that orders of court may well be ignored with no consequence. At the same time, it will signal to those who are the beneficiaries of such orders that their interests may be secondary and that the value and certainty that a court order brings counts for little. For all these reasons, and in particular that the subject matter of this litigation involves the best interests of the child, the interests of justice strongly militate against the applicant's pursuing his application." [Paragraph 35].

The application for leave to appeal was dismissed. Applicant was ordered to pay respondent's costs on a scale of attorney and client. [Paragraphs 37 – 41].

GF v SH AND OTHERS 2011 (3) SA 25 (GNP)

Case heard and judgment delivered 9 December 2010.

Set aside a writ of execution, on the basis that the maintenance obligations had been varied by agreement, and that to insist on compliance with the court order in the face of a mediated agreement would offend against fairness and equity. The warrant was set aside as it did not take the

adjusted maintenance amounts into account. Applicant was found in contempt of court for failing to pay maintenance during certain periods, and was sentenced to imprisonment, suspend on condition that arrear maintenance was paid.

> "These in real and substantive terms represent the efforts and the conclusions reached by the parties with regard to how they would engage each other in respect of their reciprocal obligations towards the minor children, and therefore such agreements would fall to be considered as constituting a valid basis for the departure from the *Shifren* principle. In particular, to the extent that the letter … of 13 August 2008 evidences a new (albeit) temporary financial arrangement, which by all accounts the parties gave effect to and complied with in broad substantial terms, it would constitute a gross inequality if it were open to the first respondent, having been party to both concluding such an agreement and giving effect thereto, to purport to ignore its existence simply on account of the fact that it was not reduced to writing and signed by the parties." [Paragraph 28]

The judgment was overturned in part by the SCA in **SH v GF AND OTHERS 2013 (6) SA 621 (SCA)**. The SCA held that there had been no variation of the maintenance order, but dismissed the appeal against the sanction for contempt of court. The SCA held [paragraphs 15 – 16]:

> "[T]he court a quo erred in concluding that the maintenance order was in fact varied. … In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution. … Despite the disavowal by the learned judge, the policy considerations that he relied upon are precisely those that were weighed up in *Shifren*."

CRIMINAL JUSTICE

S V MALUKA 2015 (2) SACR 273 (GP)

Case heard 28 May 2014, Judgment delivered 31 October 2014.

Whether an order made by a magistrate under s 78(6)(a)(ii)(aa) of the Criminal Procedure Act, read with s 37 of the Mental Care Act (committing a person as an involuntary mental health care user) should be reviewed by the High Court (Thobane and Dosio AJJ concurring).

> "… [T]he potential for serious prejudice, which has been demonstrated in both theory and practice in the cases cited, does indeed make it desirable for some form of automatic review mechanism to be considered. This is a matter for the legislature to consider, and the court should carefully guard against the usurping of the legislative function. It is a matter best left to the executive and the legislature in terms of their policy-making and legislative functions. I intend to refer the matter to the ministers of justice and correctional services, as well as to the speaker of the legislature, for further attention." [Paragraph 40]

SELECTED PUBLICATIONS

"Not only the business of the state, but also a business of all: State reporting in South Africa and popular participation", *Journal of Law, Democracy and Development*, Volume 15 (2011).

This article discusses issues arising from South Africa's state reporting regarding international human rights law.

"While reporting is primarily a state obligation, what is contained in the report is not exclusively the business of state. It is the business of everybody else in the country inasmuch as they have an interest and stake in it. Similar reasoning applies in the case of entities like the United Nations (UN) and African Union (AU). Although they are inter-governmental organisations, their work is the concern of all humanity, and therefore everybody has an interest in what happens within these structures and in the reports that are submitted to them. In other words, given the existence of a gap between international standard - setting and compliance therewith, it is vital that citizens participate in the processes around state reporting, both at country and intergovernmental levels." [Page 516]

"We have a constitution that is committed to public participation at virtually every level of governance: the level of policy making, the level of law making and the level of service delivery. The notion of public participation is the golden thread running through the Constitution; by implication, that notion applies as well to the processes by which government discharges its international human rights obligations." [Page 518]

"Prisoners' Rights Under the Constitution Act No. 200 of 1993", *Centre for the Study of Violence and Reconciliation* Seminar No. 5, 1994 (http://www.csvr.org.za/wits/papers/papkolpn.htm)

"In recent times we have seen high levels of unrest in our prisons and while not condoning some of the actions taken, some of the underlying causes of such unrest appear to be legitimate. It might very well be argued that prisoners who all have a common interest should have the freedom to associate and any law which makes inroads on such freedoms would be unconstitutional. If one was able to successfully argue the freedom of association, the notion of prisoner organisations operating within prisons could become a reality, and if this is so, on what basis could one possibly argue against the right of such prisoners who belong to such associations, to assemble, demonstrate and present petitions. These questions pose interesting challenges not only to the administration of prisons but to the notion that we in society have regarding prisons and prisoners' rights. If prisoners were allowed to associate, to assemble and to present petitions, could it still be argued that such conduct was objectionable, or would someone seeking to outlaw such conduct have difficulty in presenting an argument to the effect that a limitation of such rights complied with the criteria set out in Section 33 of the Constitution. It would certainly appear that the Constitution, far from providing definite answers, brings up interesting questions."

MEDIA COVERAGE AND ADDITIONAL INFORMATION

Media report of keynote address at 2014 Public Interest Law Gathering (http://www.publicinterestlawgathering.com/media-report-on-keynote-by-judge-jody-kollapen/)

"… [H]e said, if the question was have we done enough to transform our society, the answer would have to be decisively no.

Kollapen cautioned against the judicialisation of politics, saying there was a critical role for public interest lawyers, but also a need for the awareness of the limits of that role. He said that despite their best intentions, public interest lawyers should be strategic about the kinds of cases they took up."

Quoted discussing higher education's role in human rights and transformation, at UNISA (http://www.unisa.ac.za/news/index.php/2014/09/higher-educations-role-in-transformation/)

"A university in advancing, defending and embracing academic freedom and institutional autonomy cannot do so without accepting the responsibility of changing society. Universities need to decolonise and deracialise higher education and some of the more practical ways (they) can do that is to be aware of their service providers, their human rights and transformation track record, how they work …"

Complainant in the Equality Court case of **Kollapen v Du Preez (EC 001/03) [2005] ZAEQC 1 (29 March 2005)**, which was settled with the respondent acknowledging that hairdressing salons under his control had unfairly discriminated on the basis of race by turning people away.

Described as "a very moderate person [who] treats all practitioners with the uttermost respect. His colleagues on the bench only have the utmost respect for him, both as a person and a jurist."

- Zelda Venter, "Colleagues hail Kollapen as top class", *Pretoria News* 6 April 2017.

A social media comment was made by former clerk of the Constitutional Court Elisha Kunene:

"I was clerking at @ConCourtSA when Judge Kollapen was an acting Justice. The clerks often joked about him always having exactly one well-considered, two-pronged question at hearings. He never competed for visibility. But his substantive contributions were reliably excellent."

- https://twitter.com/Eli_Kunene/status/1095389944791609350

JUDGE FAYEEZA KATHREE - SETILOANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 19 August 1965

BA, University of Natal (1988)

LLB, University of Natal (1991)

LLM, Georgetown University Law School, Washington DC (1993)

CAREER PATH

Acting Judge, Competition Appeal Court (January 2018 – December 2018)

Acting Judge of Appeal, Labour Appeal Court (June 2014 – December 2014, December 2016 – May 207, July 2018 – December 2018)

Acting Justice, Constitutional Court (July 2017 – December 2017)

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

Judge, High Court, Gauteng Local and Provincial Divisions (Pretoria and Johannesburg) (2010 – present)

Acting Judge, South Gauteng High Court (February – October 2010)

Director, Werksmans Advisory Services (Pty) Ltd (2006 - 2010)

Practising Advocate, Johannesburg Bar (1997 – 2006)

Advocate, Constitutional Litigation Unity, Legal Resources Centre (1996 – 1997)

Law Researcher to Justice Mokgoro, Constitutional Court (1995 – 1995)

Lecturer, University of the Western Cape (1994 – 1995)

Senior Research Fellow, Gender Project, Community Law Centre, UWC (1994 – 1995)

Election Administrator, Independent Electoral Commission, Northern Cape Provincial Office (1994)

Lecturer, University of Maryland School of Law, Baltimore, USA (1993 – 1993)

Fellow, Legal Resources Centre, Durban (1991 – 1992)

Board Member, Centre for the Study of Violence and Reconciliation (2009 – present)

Board Member, Institute of Directors Southern Africa (2015 – present)

Alternate Director to Board of Directors, ProBono.org (2008 – 2009)

Board Member, AGENDA Feminist Media Project and Journal (2005 – 2007)

Deputy Chairperson, Broadcasting, Monitoring and Complaints Committee of ICASA (2005 – 2006)

SELECTED JUDGMENTS

COMMERCIAL LAW

S.O.S SUPPORT PUBLIC BROADCASTING COALITION AND OTHERS V SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LIMITED AND OTHERS 2019 (1) SA 370 (CC) (28 SEPTEMBER 2018)

Case heard 23 November 2017, Judgment delivered 28 September 2018

This case concerned the interpretation the Competition Appeal Court gave to its own order, concerning the powers of the Competition Commission. The underlying issue related to the Commission's powers regarding a controversial agreement between the SABC and MultiChoice. The application arose in the context of a pending, court-sanctioned investigation by the Commission into whether their agreement constituted a notifiable merger, and the main issue in the case related to the ambit of the powers of the Commission to investigate whether the agreement constituted a notifiable merger. The SABC and Multichoice argued that the Commission was limited to a "desktop study" of the documents provided, and was excluded from exercising any powers of investigation. The Applicants and the Commission argued that the Commission was permitted to make use of a range of standard investigative powers as set out in the Competition Act, and that those powers were necessary to ensure the Commission was suitably equipped to undertake its court-mandated task of investigating whether the said agreement amounted to a notifiable merger.

Kathree – Setiloane AJ (Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ concurring) first considered the issue of whether the powers under part B, chapter 5 of the Competition Act were available to the Commission to determine whether the agreement constituted a notifiable merger. It was held that:

> "What would it mean to merger regulation if the Competition Act is construed as not permitting the Commission to investigate transactions that may constitute notifiable mergers, or are suspected of being so but are implemented without notification? In a compulsory 'self-notification' statutory regime, where parties to a transaction fail or refuse to notify the Commission of a merger, the Commission would be powerless to investigate whether it is notifiable or not. This would effectively leave the Commission at the mercy of parties to a transaction. If those parties notify the Commission of a merger, then it has the full range of investigative powers. But if they refuse to notify the Commission, even intentionally, the Commission is powerless to investigate." [Paragraph 44]

Kathree – Setiloane AJ held that the need to summons relevant information and documents from persons believed to be in possession or control thereof, as well as the need to summons persons with knowledge of relevant facts, was crucial to the powers of the Commission to investigate mergers and transactions that may give rise to a merger.

> "Any contrary interpretation would defeat the purpose of merger regulation under the Competition Act which is to maintain competitive market structure by ensuring 'that transactions which are likely to substantially . . . lessen competition should be carefully examined by the competition authorities'". [Paragraph 49].

Kathree – Setiloane AJ held that the Commission's investigative powers were legislatively mandated by the Competition Act, and unless the court order specifically prohibits the Commission's use of its coercive and non-coercive statutory powers in carrying out its mandate, the Commission's powers remained intact.

AFRICAN BANKING CORPORATION OF BOTSWANA LTD V KARIBA FURNITURE MANUFACTURERS (PTY) LTD AND OTHERS [2013] 4 ALL SA 432 (GNP)

Case heard 3 - 4 June 2013, Judgment delivered 29 August 2013

Applicant sought relief relating to business rescue proceedings of the first respondent. At issue was the meaning and constitutionality of the "binding offer" provision in section 153(1)(b)(ii) in the new Companies Act. The term was not defined in the Act, and was argued by the Bank to mean that that an offer is binding on the offeror only and that the offeree is free to accept or reject it. The respondent contended that the offer is binding on both the offeror and the offeree. [Paragraph 22].

Kathree – Setiloane J held that a "binding offer" in the Act not an 'option" or 'agreement' in the contractual sense of the term, but was a set of statutory rights and obligations, from which neither party may resile. This was so predominantly to ensure compliance with the procedure to revive a business rescue and enforce a revised business rescue plan. [Paragraph 29] Therefore, the proper interpretation of the section was that a 'binding offer' is binding on both the offeror and offeree once made. [Paragraph 36].

The bank contended that such an interpretation was a violation of their constitutional rights to property, access to court and equality. Regarding property rights, the bank argued that a right to claim payment from a debtor and the right to vote in a statutory meeting convened for voting on a business rescue plan constituted "property" within the meaning of the Constitution. Kathree – Setiloane J accepted that these rights constituted property within the meaning of section 25(1) of the Constitution, but found that there was no disproportion between the means adopted in the Act and the end which it sought to achieve. Furthermore, the section served a "compelling and legitimate governmental purpose", and the deprivation of the voting interest in the company accompanied by compensation, was not arbitrary. The challenge in terms of s 25 of the Constitution thus failed.

Insofar as the right to access to court is concerned, Kathree – Setiloane J held that whilst it was "arguable" that the right was limited, such limitation was justifiable in terms of s36 of the Constitution. [Paragraph 49]. Regarding the equality argument, it was held that no one person was accorded preference over another in the Act.

> "Accordingly, s 153(1)*(b)*(ii) of the Act is not unconstitutional as it does not differentiate between people, and categories of people, in violation of s 9(1) of the Constitution." [Paragraph 55].

The decision was overturned in the SCA in **AFRICAN BANKING CORPORATION OF BOTSWANA LTD v KARIBA FURNITURE MANUFACTURERS (PTY) LTD AND OTHERS 2015 (5) SA 192 (SCA).** The SCA found that the term "binding offer" was predominantly similar in nature to the common law offer, though it may not be withdrawn by the offeror until the offeree responds. Thus, in this case a binding offer was never made, and consequent resolutions made were null and void.

CIVIL AND POLITICAL RIGHTS

MOTSWANA AND OTHERS V AFRICAN NATIONAL CONGRESS AND OTHERS (35398/18) [2019] ZAGPJHC 4 (6 FEBRUARY 2019)

Case heard 30 January 2019, Judgment delivered 6 February 2019

This was an application to declare the decision of the National Executive Committee of the African National Congress, taken on 31 August 2018 to disband or dissolve the North West Province Executive Committee, to be unlawful. The application was based on procedural fairness and substantive irrationality, in that the branches and regions were not notified of the impending decision, nor were they consulted or give proper reasons for the decision to dissolve the PEC. Further, in relation to the substantive legality argument, applicants argued that the NEC had failed to comply with the requirements set out in the ANC Constitution, and failed to demonstrate the

necessity of dissolving the PEC. Central to the relief sought was whether the decision to disband the PEC violated the applicant's rights in terms of s19 of the Constitution.

Kathree – Setiloane J rejected an argument that the relief sought was moot, holding that resolution of the issue was "of paramount importance to the larger public as well as to the general ANC membership, and that determination of the question would provide certainty for the future. [Paragraph 20].

Regarding the issue of procedural fairness, Kathree – Setiloane J held that the ANC Constitution itself stipulates that the powers of the NEC to dissolve or disband a PEC are constrained by the requirement of necessity and also by the requirements of procedural fairness. [Paragraphs 38]. Thus the Branches in the four Regions were entitled, as a matter of law, to be notified and consulted prior to any decision by the NEC to dissolve the PEC [Paragraph 40]. Kathree – Setiloane J held that the purported consultative meetings were not meetings with the NEC, but rather with the NWC, which had no power to dissolve the PEC. The purpose of the meeting was said to be an assessment of the state of the organisation for its readiness for the general elections.

> "This means that Branch members who attended the purported consultative meetings had absolutely no clue that the PEC would be dissolved. Under any interpretation, these meetings do not equate to consultative meetings with the Branches on the question of whether the PEC should be dissolved." [Paragraph 43].

It was held that the consultative meetings did not meet the standard of procedural fairness, as they had not been properly convened. [Paragraph 45].

The decision of the NEC to dissolve the PEC was set aside. It was ordered that the disbanded PEC be reinstated. [Paragraph 56].

NOVA PROPERTY GROUP HOLDING LTD AND OTHERS V COBETT AND ANOTHER 2016 (4) SA 317 (SCA)

Case heard 1 March 2016, Judgment delivered 12 May 2016

This case concerned interpretation of s26(2) of the Companies Act, which regulates access to securities registers. First respondent was a financial journalist, who had been commissioned by second respondent, a financial-media company, to investigate the shareholding structures of the appellant companies to establish their links to a controversial property-syndication scheme. The Companies contend that the right conferred in the Companies Act was qualified, and based on the motive of the seeker. Respondents contend that it was an unqualified right, and that if motive was a factor, it could significantly impact investigative journalism and the public's right to know.

Kathree – Setiloane AJA (Maya AP, Majiedt and Mbha JJA and Plasket AJA concurring) held that there was no requirement that section 26(2) be exercised in accordance with PAIA, and corrected the 'unfortunate' obiter statement in a previous SCA judgment, *La Lucia Sands*. [Paragraph 25].

> "PAIA is a general statute. It regulates access to innumerable types of information held by a wide range of bodies, with various different types of interests at stake. Parliament, therefore, had to lay down general rules to balance the competing interests at stake by means of threshold requirements, grounds of refusal and public-interest overrides. By contrast, s 26(2) confers a specific right in respect of one type of information only — securities registers and directors registers." [Paragraph 21]

Kathree – Setiloane AJA held that Section 26(2) conferred an unqualified right on members of the public and the media to obtain access to share registers. Thus, the motive for seeking the register is irrelevant. [Paragraph 28]. It was held that "[a]n unqualified right of access to a company's securities register is … essential for effective journalism and an informed citizenry." [Paragraph 38]. The appellant was unhappy with the potential for further negative reporting, but this could not providing a basis for limiting the exercise of rights under section 26(2) to access the securities register. "The media cannot be precluded from accessing information because the subject of the likely reportage considers that the reportage will be unfavourable and unfair." Kathree – Setiloane AJA held that such an approach would be inconsistent with well established legal principles; first that access to accurate information was critical for the right of freedom of expression; and that courts will rarely grant prior restraints on expression. [Paragraphs 43 – 45].

The appeal was dismissed. The Constitutional Court refused leave to appeal.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

MCBRIDE V MINISTER OF POLICE AND ANOTHER [2016] 1 ALL SA 811 (GP)

Case heard 27 August 2015, Judgment delivered 4 December 2015

This case concerns the independence of the Independent Police Investigative Directorate (IPID) and whether the authorising legislation afforded it the independence required by the s206(6) of Constitution. Applicant, the Executive Director of IPID, was suspended by the first respondent for alleged misconduct, and sought an order declaring relevant sections of the IPID Act and Regulations, the Public Service Act and the 'SMS handbook' to be unconstitutional.

Kathree-Setiloane J found that the independence of IPID was expressly guaranteed under section 206(6) of the Constitution, and "the effect of the constitutional entrenchment of the independence of IPID is that the operational and structural independence of IPID must be at least as strongly protected as that of the DPCI - if not stronger", since, unlike IPID, there was no express

entrenchment of the independence of the DPCI in the Constitution. [Paragraph 15, 17]. Kathree – Setiloane J held that the Constitutional Court's recognition, in the *Glenister II* judgment, of the necessity of an independent corruption – fighting unit for the protection of rights in the Bill of Rights and to meet South Africa's international obligations applied with equal force to IPID [Paragraph 19].

Kathree – Setiloane J held that it was "necessary to ensure that both the Directorate and its Executive Director are clothed with adequate independence to avoid 'political interference' from the Police Minister" [Paragraph 27], and turned to determine whether IPID was adequately independent

> "[T]he "overriding consideration" is whether the autonomy-protecting features in the IPID Act enable the members of the investigative unit to carry out their duties vigorously, and without any inhibitions or fear of reprisals. Further, the appearance or perception of independence plays an important role in evaluating whether independence in fact exists." [Paragraph 29].

Kathree – Setiloane J analysed the impugned provisions [paragraph 38 ff] and found that it was "imperative" that the suspension and removal from office of the Executive Director be subject to parliamentary oversight through a veto power.

> "The Minister's power to unilaterally suspend or remove the Executive Director poses substantial risks to the independence of IPID and its ability to investigate corruption and other abuses of power within the police service. An Executive Director who constantly fears for his or her job will be less inclined to carry out these responsibilities where this threatens to embarrass or expose the Minister or other high-ranking politicians." [Paragraph 55].

Thus, insofar as the impugned provisions purported to authorise the Minister to unilaterally suspend, discipline and remove from office the Executive Director, and did not provide for any parliamentary oversight, it was held that those provisions were unconstitutional and invalid. The resultant decision to remove the Executive Director was unlawful and invalid. [Paragraphs 59 – 60]. A temporary reading in was ordered.

The declaration of invalidity was confirmed by the Constitutional Court in **McBride v Minister of Police and Another (CCT255/15) [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC) (6 September 2016)**. The Court held:

> "The High Court gave adequate consideration to what a just and equitable remedy should be as required by section 172 of the Constitution. Its conclusion was well-reasoned and fully supported by the facts of the case. Accordingly, I confirm the orders of the High Court." [Paragraph 56].

LABOUR LAW

PHARMACO DISTRIBUTION (PTY) LTD V WEIDEMAN [2017] ZALCJHB 258 (4 JULY 2017)

Case heard 23 February, Judgment delivered 4 July 2017

This was an appeal against a decision of the Labour Court, which had found the dismissal of the respondent by the applicant to be automatically unfair, the respondent having been singled out to undergo a psychiatric assessment, as she suffered from bipolar disorder. The Labour Court also found the dismissal to be an act of unfair discrimination under the Employment Equity Act.

In the Labour Appeal Court, Kathree – Setiloane AJA (Davis and Jappie AJJA concurring) found that the Employment Equity Act prohibited medical testing, except in limited, defined circumstances. [Paragraph 22]. The evidence showed that the appellant had not required members of its sales staff to undergo medical tests prior to taking up employment, and that the nature of the job was not intrinsically stressful [Paragraph 24]. Kathree – Setiloane AJA found that the Labour Court had been correct to declare the contract provision requiring medical testing to be of no force and effect. [Paragraph 26].

Kathree – Setiloane AJA further held that:

> "It is manifestly clear from the record of evidence that the appellant had discriminated against the respondent because of her bipolar disorder. Crucially, on the appellant's version, its primary concern was the respondent's bipolar disorder and the perceived dangers associated with it. On this account, no matter her exceptional performance reviews, and no matter the legitimacy of her grievance, the mere fact that she suffered from bipolar disorder was a matter of such grave concern to the appellant, that she had to be subjected to a psychiatric assessment. So grave did the appellant consider her condition to be, that her refusal to undergo a psychiatric assessment resulted in her dismissal. There was, as a result, a direct causal connection between the respondent's bipolar disorder and her dismissal. Simply put, but for her medical condition, the appellant would not have dismissed her." [Paragraph 32]

Regardless of whether the appellant may have acted from a benign motive, respondent would not have been instructed to undergo a psychiatric assessment had it not been for her bipolar condition, and she would then not have been dismissed for refusing to do so. This was held to amount to unfair discrimination in terms of both the Labour Relations Act and the Employment Equity Act. The decision of the Labour Court on the merits was thus upheld. [Paragraph 34].

A cross-appeal relating to the award of compensation and damages was upheld, increasing the compensation from R220 000 to R285 000 for the automatically unfair dismissal [paragraphs 37 – 44]. However, the award for general damages was set aside, as the court found that awarding non-patrimonial damages and compensation for the same wrongful act would not be equitable, as it would be seen as penalising the employer twice. [Paragraphs 45 – 49].

CRIMINAL JUSTICE

S V LIESCHING AND OTHERS 2019 (1) SACR 178 (CC)

Case heard 24 August 2017, Judgment delivered 29 August 2018

This case dealt with the question of whether a post – trial recantation by a material witness in the subsequent trial of a co – accused may constitute an exceptional circumstance in terms of section 17(2)(f) of the Superior Courts Act, which allowed the President of the SCA to refer a decision refusing leave to appeal to the court for reconsideration or variation.

For the majority, Theron J (Zondo DCJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring) held that the nature and justiciability of such an appeal required more detailed argument and thought. Assuming the Court had jurisdiction, Theron J held that the President of the SCA had not yet exercised her discretion, and that in any event exceptional circumstances were not present.

Kathree – Setiloane AJ dissented. The judgment considered the meaning of 'exceptional circumstance':

> "Construed strictly, I consider the words 'rare', 'extraordinary', 'unique', 'novel', 'atypical', 'unprecedented', and 'markedly unusual' to more fittingly exemplify the meaning of the phrase contemplated by s 17(2)*(f)* of the Superior Courts Act. What we must remain mindful of, though, is that what is exceptional must be determined on the merits of each case. It is a factual inquiry." [Paragraph 51].

Kathree – Setiloane AJ found that the President of the SCA had erred in not providing reasons for dismissing the section 17(2)*(f)* application. [Paragraph 63], and that there was a reasonable prospect that the SCA would find that the recantation was true. [Paragraph 91]

> "I am of the view that there is a reasonable prospect of the SCA finding, on reconsideration, that it is probable that the new evidence will result in a materially different outcome of the applicants' trial in the High Court — as the new evidence has a direct bearing on the truthfulness of both Mr Abrahams and Mr Arries' testimonies, which were instrumental in sustaining the applicants' convictions." [Paragraph 99].

> "In the circumstances, I find that the President committed a misdirection in law and fact by dismissing the condonation application (as there was none before her) and the applicants' s 17(2)*(f)* application on the basis that no exceptional circumstances were present. This justifies interference with the order made." [Paragraph 104].

SELECTED ARTICLES AND SPEECHES

"*Rich Man, Poor Man: it shouldn't really matter, costs awards in constitutional litigation*", *Without Prejudice*, July 2009.

This article discusses the case of *The Trustees for the Time Being of Biowatch Trust v The Registrar, Genetic Resources and Others*, a Constitutional Court case involving the proper judicial approach to determining costs awards in constitutional litigation. The article notes that Sachs J points out that the primary consideration in constitutional litigation is whether a costs order would hinder or promote the advancement of constitutional justice, not the status of the parties. The *Affordable Medicines* case is cited, which states the irrelevance of the financial ability of a party when making a decision on costs and that unsuccessful litigants cannot be spared costs simply due to a perceived inability to pay. Insofar as costs between private parties and the state is concerned, the Constitutional Court established a principle that if the government loses it should pay the costs of the other side, and if it wins, each party is to bear its own costs. The exception, however, is that a frivolous or vexatious, or an otherwise manifestly inappropriate application, does not immunise the applicant against costs. "The issues must be genuine and substantive and truly raise constitutional considerations relevant to the adjudication." Where private parties are concerned, the approach is that each party is to bear its own costs. Where more than one private party is involved, however, Biowatch determined that the state should bear the costs of the litigants who have been successful against it and that cost orders should not ordinarily be made against private litigants who become involved. Thus, the court in Biowatch ordered that the government pay the costs incurred by Biowatch in the high court and in the Constitutional Court.

"*Public Interest Law: Its Continuing Role in South Africa*", *Advocate*, December 2002.

This article deals with the role of Public Interest Law in South Africa and its ever-increasing necessity. It outlines the significance of lawyers who take on cases which would otherwise go unheard, and demonstrates the useful influence is has on decision makers. It provides examples of Public Interest cases and defines "Public Interest Law", while illustrating how the role of the public interest lawyers is "complimentary to economic growth development and the resultant alleviation of poverty". It also explains the role and effectiveness of impact litigation often used to define constitutional rights, while also describing its limitations.

"Have our Efforts Paid Off? A critique of the New Constitution from a Feminist Perspective", published in *Agenda, Journal on Women and Gender*, Issue 29, 1996.

This piece was written before the Final Constitution came into force, and critiqued the working draft of the new Constitution. It discusses women's rights in general, highlighting the perceived gaps in working draft in relation to women's rights and suggests ways in which to greater secure and entrench the rights of women. It does so by, inter alia, making reference to CEDAW (both its

successes and failures) and the role of the Human Rights Commission in monitoring the fulfilment of this right.

***Convention on the Elimination of all Forms of Discrimination against Women and Implications for South Africa*, published in the *South African Journal of Human Rights*, 1995, (2) Part 3, 421.**

This article discusses the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). It describes the objectives of particular clauses set out in the Convention, presents the author's own observations about them and details the possible shortfalls that may exist. The article briefly describes the functions of the CEDAW committee and illustrates the problem that reservations can create, particularly because it could result in countries not properly applying the Convention. The final section of the article provides an explanation of the implications the Convention has on South Africa, while suggesting that the Convention could have more influence than it has currently to further progress the status of women as equal.

MEDIA COVERAGE

'*Inequality for Women in the workplace still prevalent, says Judge Fayeeza Kathree-Setiloane'*, published on the University of the Western Cape's news page, 17 September 2018, available at https://www.uwc.ac.za/News/Pages/Inequality-for-Women-in-the-workplace-still-prevalent,-says-Judge-Fayeeza-Kathree-Setiloane.aspx

The article reports on an event where UWC and the Dullah Omar Institute hosted Judge Kathree-Setiloane for a conversation with postgraduate student on women's rights, the Sustainable Development Goals and the building of an inclusive society in South Africa. Quoted as saying that women in South Africa face a great deal of sexual harassment in the workplace and most often women are unaware of workplace policies and procedures that assist them in raising the problem. She also states that it is only once gender-based violence, poverty and structural discrimination are addressed will women see true empowerment and that is it up to the citizens to take responsibility towards its achievement.

'*Appoint young judges, JSC told*', published in Times Live, 11 October 2010, available at https://www.timeslive.co.za/news/south-africa/2010-10-11-appoint-young-judges-jsc-told/

During JSC interviews in October 2010, quoted as saying that younger judges should be appointed to the bench in order to ensure transformation. Typically jurists tend to proceed to the bench in their sixties, though the recent pool of black women lawyers who wish or qualify as judges are as young as 35. "We come in so young because we do it in the interest of transformation and of the people of the country."

JUSTICE STEVAN MAJIEDT

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 18 December 1960

BA (Law), University of the Western Cape (1981)

LLB, University of the Western Cape (1983)

CAREER PATH

Justice of Appeal, Supreme Court of Appeal (December 2010 -)

Acting Justice, Constitutional Court (January - May 2014)

Judge, High Court, Kimberley (2000 – 2010)

Chief Provincial State Law Adviser, Northern Cape Government (1997 – 2000)

Advocate, Cape Bar, Cape Town (1984 – 1996)

Member, South African Judicial Education Institute (2014 -)

Member of the Council and Executive Committee, SA Judicial Education Institute (2014 -)

Chairperson, Rules Board for Courts of Law (2015 – 2017)

Chancellor, Sol Plaatje University, Kimberley (August 2015 -)

Member, National Association of Democratic Lawyers (January 1986 – 31 March 2000)

Member, Cape Bar (June 1984 – December 1995)

SELECTED JUDGMENTS

PRIVATE LAW

MALAN V CITY OF CAPE TOWN 2014 (6) SA 315 (CC)

Case heard 20 February 2014; Decided on 18 September 2014.

This case concerned the validity of the City of Cape Town's decision to cancel a lease agreement, as well as an appeal against the High Court's eviction order. Majiedt AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron, Jafta, Khampepe and Van der Westhuizen JJ concurring) concluded that the City had lawfully and validly cancelled the lease because of Ms Malan's arrear rental and alleged illegal activities conducted on the property.

> "Tenants in public housing … may not be evicted merely on notice. There must be something more: either further breaches of the lease agreement, or the necessity to secure vacant premises for other pressing public reasons…. It is sufficient to say that, absent good cause, the Constitution forbids a government agency from using a contractual power of termination against a tenant in need of public housing." [Paragraph 64].
>
> "As Ms Malan will be adequately accommodated as proposed, there is no good reason why the property should not be made available to a deserving, needy family. We were informed by Counsel for the City that there are many thousands of people waiting to be accommodated. The City must also bear in mind the rights and needs of these people." [Paragraph 85].

Dambuza AJ (Froneman J and Madlanga J concurring) dissented, and would have upheld the appeal on the basis that the city failed to give Malan a proper opportunity to rectify her breach of the first of the illegal activities clauses, and that this rendered the city's cancellation of the agreement invalid. [Paragraphs 49 – 50]. Zondo J in a separate dissent would also have upheld the appeal on the basis that while the city's position was that breach of the first illegal activities clause justified cancellation of the lease, it had not been shown that Malan allowed illegal activities to take place. The city ought to have notified Malan of her breach of the clause, have discussed it with her, and given her an opportunity to rectify it before cancelling the agreement.

COOL IDEAS 1186 CC V HUBBARD AND ANOTHER 2014 (4) SA 474 (CC).

Case heard 5 February 2014, Judgment delivered 5 June 2014.

The case was about a building contract for the construction of a residential dwelling unit. The issue was around a property developer not being a registered home builder in terms of the Housing Protection Act. An arbitration award was made in the builder's favour. The Court had to consider the proper meaning of section 10(1)(b) of the Housing Protection Act. It observed that the fundamental tenet of statutory interpretation was that the words in a statute had to be given their ordinary grammatical meaning, unless to do so would result in an absurdity. It was held that this was subject to three important interrelated riders to this general principle: Statutory provisions should always be interpreted purposively; they should be properly contextualised; and all statutes had to be construed consistently with the Constitution.

The Court refused to make the arbitration award an order of court but Majiedt AJ (Moseneke ACJ, Skweyiya ADCJ, Khampepe and Madlanga JJ concurring) nonetheless stated:

> "That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that constitutional values require courts to "be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently". Courts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute. … So it will often be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. But it will not always be so. The force of the prohibition must be weighed against the important goals of private arbitration that this court has recognised." [Paragraph 56].

Jafta J (Zondo J concurring) wrote a separate concurring judgment. Froneman J (Cameron, Van der Westhuizen JJ and Dambuza AJ concurring) dissented, arguing that the Act had to be interpreted in a manner less damaging to the right to property, and for that reasons would have granted leave and allowed the appeal.

The judgment was criticised by Justice Malcolm Wallis in '**The Common Law's Cool Ideas for Dealing with Ms Hubbard',** ***South African Law Journal,*** **Vol. 132, Issue 4 (2015), pp. 940-970.** Justice Wallis argued that Majiedt AJ should have resolved the case by the straightforward application of common law principles. Instead, the article argued, Majiedt AJ created uncertainty and "cast doubt upon two long established rules that are part of the bedrock of the rule of law." The first was that a court would not order someone to do something that is forbidden by law. The second was that an arbitrator is in the same position as a court and likewise may not, by an award, order that something unlawful be done. Justice Wallis argued that there was a claim for unjustified enrichment, but that the majority held that such a remedy was precluded due to the continuing validity of the contract:, and that this " premise was incorrect, the authority relied upon inapplicable, and the result mistaken". Regarding the majority's approach to statutory interpretation, Justice Wallis expressed the hope that the decision did not signal "any return to literalism in statutory interpretation." [Page 953].

LESTER V NDLAMBE MUNICIPALITY AND ANOTHER [2014] 1 ALL SA 402 (SCA).

Case heard 15 May 2013; judgment delivered 22 August 2013.

This case concerned the demolition of a luxury home. The Municipality had applied in the High Court for an order in terms of Section 21 of the National Building Regulations and Building Standards Act that the first respondent Lester be compelled to demolish his entire home on the basis that the building was erected unlawfully, without any approved building plans as required by s 4(1) of the Act. Appellant was ordered to demolish the offending building, and brought an appeal. The question before the appeal court was whether s 26(3) of the Constitution affords a court a discretion in demolition cases.

Majiedt JA (Mthiyane DP, Cachalia JA, Theron JA and Zondi AJA concurring) held that:

> "[S]ection 26(3) of the Constitution must not only be read in its historical context, i.e. as a bulwark against the forced removals, summary evictions and arbitrary demolitions of the shameful past dispensation, but also together with section 26(1) and (2) [...] The protection afforded in section 26(3) must therefore always, without exception, be read against the backdrop of the right to have access to adequate housing, enshrined in section 26(1). Thus where a person, facing a demolition order, does not adduce any evidence that he or she would not, in the event of his or her dwelling being demolished by order of a court, be able to afford alternative housing, section 26(1) is of no avail to him or her. [...] This Court pointed out in Standard Bank of South Africa Ltd v Saunderson ... that what constitutes 'adequate housing' is always a factual enquiry and that executing a writ of execution in respect of a luxury home ... has no bearing on the right of access to adequate housing. ... The cardinal question is whether demolition of Lester's property would infringe upon his right to access to adequate housing. The answer, on the papers before us, must be an emphatic 'no'. ... " [Paragraph 17]

The appeal was dismissed with costs. The majority judgment in **BSB International Link CC v Readam South Africa (Pty) Limited and another [2016] 2 All SA 633 (SCA)** raised doubts as to whether the interpretation accorded to section 21 of the Act was correct.

MOKALA BELEGGINGS AND ANOTHER v MINISTER OF RURAL DEVELOPMENT AND LAND REFORM AND OTHERS 2012 (4) SA 22 (SCA)

Case heard 27 February 2012, Judgment delivered 23 March 2012

The question before the court was whether when the purchaser of land, in this case the State, deliberately delays the transfer of property and payment of the purchase price, the seller was entitled to *mora* interest on the purchase price to compensate it for damages suffered in consequence the of delay. The appellants had sold property that was subject to a land claim to the state for its eventual restitution. It was common cause that the state had instructed its conveyancers to delay transfer and payment because it was short of funds.

Majiedt JA (Mpati P, Navsa JA, Snyders JA and Wallis JA concurring) held that the relevant clause could not be interpreted as fixing a date for transfer, since that event was dependent on various factors extraneous to the transferring attorneys. Accordingly, the clause could not and did not establish *mora ex re*. As to *mora ex persona*, since the appellants were able to establish on the evidence that the letters of demand had been properly sent and received by the state, it had been placed in *mora ex persona*. Since the appellants were dependent on the payment of the purchase price to re-establish their farming business or other enterprises from which to derive income, they had clearly suffered loss as a result of the state's delay, for which they were entitled to be compensated. [Paragraphs 7; 14 – 15].

Majiedt JA admonished the State for its conduct:

> "Lastly, there is a disturbing aspect which must be addressed. In the founding affidavit on behalf of the appellants, the deponent relayed advice that she had received, that the department was on record as stating that it only pays out moneys due in respect of agreements entered into (in respect of land claims), when ordered to do so by a court of law. This damning accusation was left unanswered by the department. It is troubling that a state department can adopt such an

> attitude, which is to be strongly deprecated. It may well be that the department is under severe strain to meet the financial (and, it seems, the administrative) demands imposed by the land reform process. The restitution of land … is not only a constitutional imperative but a highly emotive issue as well. Considerable circumspection, diligence and sensitivity are required on the part of all concerned, including departmental officials. Agreements to purchase land for restoration to dispossessed communities should be honoured in accordance with the terms agreed upon, lest the already demanding challenges of the process be further exacerbated. [Paragraph 16].

Robert Sharrock criticized the judgment in **"The General Principles of the Law of Contract" in *Annual Survey of South African Law* 2012,** arguing that Majiedt JA should have explained his reliance on the clause in the contract as the relevant clause for establishing mora ex re. He argued that Majiedt JA did not do this, which created confusion.

MINISTER OF SAFETY AND SECURITY V VENTER AND OTHERS 2011 (2) SACR 67 (SCA)

Case heard 23 February 2011, Judgment delivered 29 March 2011

The High Court awarded the respondents damages arising from the negligent failure by members of the South African Police Service to advise and assist them in asserting their rights under the Domestic Violence Act. Respondents contended that, had they been aware of and understood their rights under the Act, in particular their right to apply for a protection order, they would have taken the appropriate steps to protect themselves. Appellant argued that the respondents did not establish that they would have taken steps to protect themselves even if the police had assisted them, and therefore failed to prove that such negligence caused their damages.

Majiedt JA (Mpati P and Cachalia JA concurring) held:

> "The extensive protection available under the Act would be meaningless if those responsible for enforcing it, namely SAPS members, fail to render the assistance required of them under the Act and the Instructions. The legislature clearly identified the need for a bold new strategy to meet the rampant threat of ever increasing incidences of domestic violence. Its efforts would come to naught if the police, as first point of contact in giving effect to these rights and remedies, remain distant and aloof to them, as the facts of this case appear to suggest.". [Paragraph 27]

Majiedt JA held that the High Court's finding, that the evidence established that the police's failure to have advised the respondents of their remedies under the Act was the critical cause for why they had not pursued this course, could not be faulted and it followed that the respondents had established factual causation. Concerning legal causation, the appellant had not advanced any grounds to suggest that there were any policy considerations that stood in the way of a finding against them. [Paragraphs 29 – 30]. Majiedt JA found that the respondents had however been negligent in failing to obtain an interdict, and that this had contributed to the harm suffered. After considering the respective degrees of negligence, Majiedt JA held that it was "plain that the negligence of the appellant is far greater than that of the respondents", as SAPS had failed to adhere to clear guidelines, and "[o]ver and above this they have a

constitutional duty to protect citizens." Majiedt JA assessed the respondents' degree of culpability at 25%. [Paragraphs 33 – 34].

This judgment was criticized by Johan Scott in **"Delictual Liability of the Police Flowing from Non-Compliance with the Domestic Violence Act: Minister of Safety and Security v. Venter 2011 2 SACR 67 (SCA)" in the *Journal of Contemporary Roman-Dutch Law*, Vol. 75, pp. 288-304, 2012**. Scott argued that although the question whether omissions flowing from a breach of a duty imposed by law is normally regarded as falling under the heading of wrongfulness as one of the recognised elements" of delict, the court in this instance hardly touched upon wrongfulness, opting instead to determine the question of liability by focusing on principles of the element of causation (factual and legal) to the facts at hand. Although this in itself raised the "perplexing question" of whether it is at all possible to apply the well-established condition sine qua non or "but for" test for factual causation to determine whether an omission caused a specific infringement of an individual interest, the court "seemed oblivious to this fact" and proceeded to apply this test without taking note of the necessary logical adjustments to the thought processes involved in determining whether negative conduct (an omission) caused a specific result.

ADMINISTRATIVE JUSTICE

KIMBERLEY GIRLS' HIGH SCHOOL AND ANOTHER V THE HEAD OF DEPARTMENT OF EDUCATION, NORTHERN CAPE PROVINCE AND OTHERS [2005] 1 ALL SA 360 (NC).

Case heard 2 May 2003; Judgment delivered 30 May 2003.

In this matter, the applicants sought to have the first respondent's decision to decline the recommendation made by the second applicant for the appointment of an English higher grade, first language teacher. The first respondent had declined the recommendation on the basis that the governing body had failed to give preference to candidates disadvantaged by injustices of the past, as required by the Employment of Educators Act, and that the recommendations had failed to have regard to the democratic values and principles referred to in the Act.

Majiedt JA (Kgomo JP concurring) held that:

> "The notion that a head of department may not … independently and objectively ascertain whether a recommendation does indeed on the facts and prevailing circumstances accord with the democratic values and principles, is untenable in my view. In the present case the Head of Department was fully justified in my view to decline the recommendation and to remit the matter to the governing body. …" [Paragraph 21].
>
> "… [W]hen the opportunity arises to correct the imbalances of the past by filling a post left vacant by a resignation, a concerted effort should be made (and, importantly, should clearly be seen to be made) to comply with the obligations imposed on a school governing body by section 6(3)(b)(v) of the Employment Act. This has clearly not happened in this matter." [Paragraph 26.3].

The court found, accordingly, that there were therefore no grounds, either as advanced by the applicants or any other grounds, to review the HOD's decision to decline the governing body's recommendation for

the appointment to the vacant post: the HOD had been fully justified in declining the recommendation and remitting the matter to the governing body. The application was accordingly dismissed with costs.

The decision was reversed on appeal in **Kimberly Junior School and another v Head, Northern Cape Education Department and others 2010 (1) SA 217 (SCA**). The SCA held that that a proper analysis of the facts directed the spotlight to an issue which was entirely different from the one identified by the court a quo. The real enquiry was not whether the HoD properly exercised his discretion under section 6(3)*(f)*, but whether he had any discretion to make an appointment under section 6(3)*(f)* at all. The court held that in the absence of the jurisdictional fact of a recommendation by the governing body, the HoD had no authority to make an appointment.

CRIMINAL JUSTICE

NATIONAL COMMISSIONER OF THE SAPS V SOUTHERN AFRICA LITIGATION CENTRE 2015 (1) SA 315 (CC)

Case heard 19 May 2014, Judgment delivered 30 October 2014

This was the first Constitutional Court judgment on South Africa's international law obligations under the Rome Statute. The matter concerned the extent to which the South African Police Service (SAPS) had a duty to investigate allegations of torture committed by the Zimbabwean police against opposition activists in the build-up to the country's 2007 elections. The court had to determine whether, in the light of South Africa's international and domestic law obligations, the SAPS had a duty to investigate crimes against humanity committed beyond South Africa's borders and if so, under what circumstances this duty was triggered.

Majiedt AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Van der Westhuizen J and Zondo J concurring) held:

> "The exercise of enforcement jurisdiction is confined to the territory of the state seeking to invoke it. The principle of non-intervention safeguards the principle of territoriality. Domestic criminal jurisdiction based on universality therefore applies to prescriptive jurisdiction but can also apply to adjudicative jurisdiction, subject to the constraints of territoriality. Accordingly, investigations and the exercise of adjudicative jurisdiction confined to the territory of the investigating state are not at odds with the principles of universal jurisdiction." [Paragraph 29].

As to the principle of complementarity under the Rome Statute, the Court ruled that the need for states parties to comply with their international obligation to investigate international crimes was most pressing in instances where those crimes are committed by citizens of and within the territory of countries that are not parties to the Rome Statute, because to do otherwise would permit impunity. If an investigation was not instituted by non-signatory countries in which the crimes have been committed, the perpetrators could only be brought to justice through the application of universal jurisdiction, namely the investigation and prosecution of these alleged crimes by states parties under the Rome Statute. [Paragraph 32].

Because of the international nature of the crime of torture, South Africa, in terms of sections 231(4), 232 and 233 of the Constitution and various international, regional and sub-regional instruments, was required, where appropriate, to exercise universal jurisdiction in relation to these crimes as they offend against the human conscience and international and domestic law obligations. The Court found that:

> "[T]he exercise of universal jurisdiction, for purposes of the investigation of an international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law". [Paragraphs 40 & 47].

An investigation within South African territory, the Court held, does not offend against the principle of non-intervention, and that torture formed part of the category of crimes in which all states have an interest in terms of customary international law.

The judgment was commended by **Max du Plessis in *Institute for Security Studies Policy Brief 81* November 2015,** where the author stated that "the decision establishes a progressive framework for prosecuting international crimes, provides a powerful tool against impunity, and confirms that states can and must play a complementary role in pursuing the aims of international criminal justice in respect of non-state parties."

MEDIA COVERAGE

In 2006, Judge Majiedt, Judge Lacock, and Judge President Kgomo were involved in a dispute over alleged racism, nepotism and discrimination. The incident originated from a dispute over who would act as judge president while Kgomo JP was acting at the SCA. Kgomo JP lodged a complaint with the JSC in 2006 demanding that Judges Majiedt and Lacock be fired for misconduct after they allegedly insulted him. Judges Majiedt and Lacock laid a counter-complaint. In a statement the JSC said that the conduct of Majiedt and Lacock "using insulting and inappropriate language constituted unacceptable and unworthy conduct." For further information, see the following articles: http://www.bdlive.co.za/articles/2008/10/15/history-casts-shadow-over-appeal-courthopefuls and http://constitutionallyspeaking.co.za/another-racial-spat-in-the-judiciary/.

See also: "Former City Judge a candidate for ConCourt" 20 February 2019 at https://www.pressreader.com/ and https://www.dfa.co.za/news/former-city-judge-a-candidate-for-concourt-19397701:

"In 2006 the two judges were involved in an ugly racial spat after Kgomo overlooked Majiedt, the most senior judge in the division at the time, when proposing an acting replacement to the Justice Minister before going on leave.

"Following his decision, Kgomo then lodged a misconduct complaint against Majiedt with the Judicial Service Commission. This was apparently sparked by Majiedt allegedly sending Kgomo a text message accusing him of being a 'sly, devious, conniving person but also a coward', motivated by 'sheer racism and malice towards him (Judge Majiedt)'.

"Majiedt then filed a counter-complaint of discrimination, nepotism and racism against Kgomo. The matter was reportedly settled by the commission without any of the judges involved being found guilty of an impeachable offence."

JUSTICE ZUKISA TSHIQI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 11 January 1961

BProc, Witwatersrand University (1989)

Postgraduate Diploma in Labour Law, University of Johannesburg (2001)

CAREER PATH

Acting Justice, Constitutional Court (January - May 2015)

Justice, Supreme Court of Appeal (November 2009 -)

Acting Justice, Supreme Court of Appeal (April – November 2009)

Acting Judge, Competition Appeal Court (2007 – 2009)

Judge, South Gauteng High Court (2005 – 2009)

Managing Partner, Tshiqi - Zebediela Inc. (1994 – 2005)

Acting Judge, High Court and the Labour Appeal Court (2003 – 2004)

Commissioner, Small Claims Court, Kempton Park (2002 – 2005)

Litigation Officer, Black Lawyers Association (1992 – 1994)

Professional Assistant, Matlala Attorneys (1991 – 1992)

Articles of Clerkship, Neluheni Attorneys (1989 – 1991)

Legal Co-ordinator, South African Council of Churches (1986 – 1989)

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

Member, ADR Advisory Committee, South African Law Reform Commission: (2017 -)

Deputy Chairperson, Steering Committee of the UNDP African Judges Forum on HIV, TB and Human Rights (2016 -)

Trainer (ad hoc), SA Judicial Education Institute (2015 -)

Trial Advocacy Trainer, Black Lawyers Association education Centre (1992 -)

Trainer, South African Judicial Education Institute (2013 -)

SELECTED JUDGMENTS

PRIVATE LAW

HOLOMISA V HOLOMISA (564/2016) [2017] ZASCA 64

Case heard 16 May 2017, Judgment delivered 29 May 2017

The issue in this appeal was whether a civil marriage between the appellant and the respondent, solemnized on 16 December 1995, was in or out of community of property. This case raised the oddity that women married out of community of property under the Transkei Marriage Act did not enjoy the protection, on divorce, of section 7(3) of the Divorce Act. The parties were in agreement that the marriage relationship had broken down irretrievably with no prospects of the restoration of a normal marriage relationship between them. In the Regional Court the parties settled all issues relating to parental responsibilities towards their minor children, but could not reach agreement on their matrimonial property regime.

Tshiqi JA (Cachalia, Saldulker and Dambuza JJA and Mbatha AJA concurring) held the marriage to have been out of community of property. The civil marriage had been solemnized in December 1995 in the erstwhile Transkei: the Marriage Extension Act did not alter the matrimonial property regime of parties who married without an ante-nuptial contract after 27 April 1994. Therefore the marriage was out of community of property.

The respondent then challenged the constitutionality of sub-section 7(3) of the Divorce Act on the basis that it excluded a spouse married out of community of property who had not entered into an ante-nuptial contract or an express declaration in terms of section 39(2) of the now repealed section 39 of the Transkei Marriage Act 21 of 1978, from its ambit. Tshiqi JA held that the constitutional argument must also fail: It was raised for the first time in this appeal and it was not traversed at all in the pleadings. A court will not allow a new point to be raised for the first time on appeal unless it was covered by the pleadings. Second, section 39(2)*(a)* and *(b)* of the Transkei Act provided that parties who did not wish to marry out of community of property could make a declaration to that effect, jointly before a magistrate or a marriage officer at any time before the solemnisation of the marriage or could conclude an ante-nuptial contract.

> "The respondent did not make the election and there is no evidence to suggest that she wished to do so but was unable to. The court cannot make a new contract for the parties and is thus

> obliged to enforce the terms of their marriage contract. For those reasons the appeal must succeed." [Paragraph 8].

The judgment was reversed on appeal in **Holomisa v Holomisa and Another (CCT146/17) [2018] ZACC 40.** By the time the matter was argued before the Constitutional Court all the parties accepted that there was no exclusion of the default regime and that the marriage between the applicant and the first respondent was indeed one out of community of property. However, the Court granted direct access for the issue of constitutional validity to be heard, and ruled that sub-section 7(3) of the Divorce Act was constitutionally invalid to the extent that it excluded a spouse married out of community of property who had not entered into an ante-nuptial contract or an express declaration in terms of the now repealed section 39 of the Transkei Marriage Act, from its ambit.

COUGHLAN N.O. V ROAD ACCIDENT FUND 2015 ZACC 10

Case heard 12 February 2015, Judgment delivered 20 April 2015

The issue in this case was whether foster child grants were deductible from compensation paid by the Road Accident Fund for loss of support. The applicant (a curator ad litem) contended that the foster child grants were not deductible, whilst the RAF argued that they were, for failure to do so would amount to double compensation. The High Court had held that the grants were not deductible, but had been overturned by the SCA.

Tshiqi AJ (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Madlanga J, Molemela AJ, and Nkabinde J concurring) held that:

> "The system of foster care is [...] one of the means through which the state fulfils its obligations to a child who is in need of care, but it is not the only option. The state also has the option to place the children in youth care centres. If the contention by the RAF is that the award of damages is deductible from the foster child grants, then it begs the question whether the cost of the service the state incurs for placing children in youth centres is also deductible. As the answer is in the negative, it means that there is differential treatment between children in foster care and those placed in youth care centres. That differentiation would be irrational. There is thus no basis for differentiation between children in foster care and youth care centres." [Paragraph 37]

Tshiqi AJ found that compensation by the RAF was calculated on the basis of monetary income and was aimed at placing a child in the position they would have been in if the parent had not died. The loss of provision for material needs can be adequately compensated in money, which has the effect of placing a child in the same position as he or she would have been, but for the delict. However, parental care cannot be compensated for by the payment of money nor can it be readily met by institutional care. It is the foster parent who is entitled to receive the grant.

> "Payment for loss of support on the other hand is payable to the child in order to compensate the child for the patrimonial loss suffered by the loss of the monetary contribution that the deceased parent would have made towards the support of the child. It forms part of the patrimony of the child. It amounts to an income replacement resulting from the death of the parent as a result of a motor vehicle accident. There is no conceivable basis on which to deduct payments made to foster parents (that the child has no claim to) from the child's award for compensation for loss of support." [Paragraph 46]

Tshiqi AJ then dealt with the question of whether there is a distinction between child support grants and foster child grants and found that on the other hand, child support grants are payable only to parents below a certain level of income. Other than that, there is no other distinguishing feature between those two kinds of grants. Their nature and purpose was to provide for children in need of care, and in both instances the grant is payable to the foster parent or the primary care giver who then utilises it as a contribution for the purpose of caring for the child. In both instances the grants were not predicated on the death of the parent. The purpose of the RAF is to give the greatest possible protection to claimants. A deduction of either foster child or child support grants would undermine that purpose. A reading of the RAF Act suggests that those grants should not be deductible. Tshiki AJ concluded that child support grants are on the same footing with foster child grants and should not be taken into account when an award of damages for loss of support is made. The appeal succeeded with costs.

ANDRIES VAN DER SCHYFF EN SEUNS (PTY) LTD T/A COMPLETE CONSTRUCTIO N V WEBSTRADE INV NO 45 (PTY) LTD AND OTHERS (1277/06, 1277/06) [2006] ZAGPHC 43

Case heard 1 February 2006, Judgment delivered 4 May 2006

Applicant, a construction company, urgently sought to be restored to its possession immovable property that it was constructing for the first respondent. The application was based on the mandament van spolie. The court had to decide whether the applicant was in undisturbed possession of the property and whether the second and third respondents unlawfully deprived the Applicant of such possession, and whether the respondents were unlawful occupiers as defined in Section 1 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE).

Tshiqi J held that the "manifest objective" of PIE is to overcome the abuse permitted by the Prevention of Illegal Squatting Act and to ensure that the eviction of unlawful occupiers takes place in a manner consistent with the Constitution. In essence, what the Constitutional Court has held is that PIE is directed at ensuring that justice and equity prevail in relation to all concerned in the eviction process. Justice and equity did not require that the Respondents be protected from their unlawful conduct. Respondents were not in dire need of accommodation and did not belong to the poor and vulnerable class of persons whose protection was foremost in the Legislature's mind when PIE was enacted. Tshiqi J found that PIE was not applicable in the matter, thus there had been a spoliation. The order was granted.

LABOUR LAW

CITY POWER (PTY) LTD V GRINPAL ENERGY MANAGEMENT SERVICES (PTY) LTD & OTHERS (2015) 36 ILJ 1423 (CC)

Case heard 18 November 2014, Judgment delivered 20 April 2015

City Power, a municipal entity in terms of the Local Government: Municipal Systems Act, was a state owned entity established by the Johannesburg Municipality to provide electricity to Alexandra Township. City Power then outsourced to Grinpal. The service level agreement was subsequently terminated, and it was agreed that City Power would take over the services from Grinpal. The key question was whether,

upon termination of service level agreements, there was a transfer of business as a going concern as contemplated in s 197 of the Labour Relations Act. The Labour Appeal Court had ruled, in favour of Grinpal, that a transfer had taken place.

Tshiqi AJ (Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring) held that:

> "A mere reliance on the fact that City Power is a private company does not take into account the fact that these entities are usually established for the sole purpose of performing public functions as required in terms of section 86E. In terms of section 86E(1) a municipality may establish a municipal entity only for the 'purpose of utilising the company as a mechanism to assist it in the performance of any of its functions or powers' and where the functions of such a municipal entity would benefit the local community. The public nature of the functions performed by City Power and the restrictions imposed on such municipal entities by the Municipal Systems Act distinguish them from other private entities." [Paragraph 20]

> "City Power, like SASSA, is a private company performing a public function. The fact that it performs a public function bears relevance in its classification and cannot be ignored. As in AllPay 2, once City Power concluded the service level agreements, it delegated some of its functions to Grinpal which, as a result, also became a municipal entity for the purposes of those functions and only insofar as that section of its business was concerned. For the purposes of the present dispute, Grinpal and City Power are organs of state that perform public functions akin to those of a municipality. The Johannesburg Municipality cannot avoid its constitutional obligations and public accountability for the rendering of public services by forming a municipal entity like City Power. It remains accountable to the people of South Africa for the performance of those functions by City Power. Likewise, City Power cannot avoid its constitutional obligations and public accountability by delegating its functions to Grinpal." [Paragraph 23]

As to whether section 197 of the LRA is applicable to both entities, Tshiqi JA ruled that a reading of those provisions alone would suggest that s 197 of the LRA shows that the LRA supersedes the Municipal Systems Act. The LRA states that it should prevail: "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any other Act expressly amending this Act, the provisions of this Act will prevail." What it means in this context is that the provisions of the LRA prevail over the Municipal Systems Act in employment matters. Section 197 was thus found applicable to City Power and other municipal entities, unless such entities have specifically made provision for its exclusion in the form prescribed by s 197(6). There was no dispute that City Power took over the full business "as is"; the project continued after termination of the service level agreements and completion of the handover process. The business, ultimately continued, save that it was now conducted by a different entity. [Paragraphs 34 and 39]

The appeal was dismissed.

CRIMINAL JUSTICE

S v BOTHA 2019 (1) SACR 127 (SCA)

Case heard 24 August 2018, Judgment delivered 1 November 2018

In this case the appellant had been charged with murder after an altercation at a restaurant. The deceased arrived at the restaurant where she found her husband and the appellant, who were involved in a love relationship, and had assaulted the appellant. During the altercation, appellant had grabbed a knife, and "directed a stabbing movement towards the deceased", who was standing behind her. The appellant was convicted in the regional court, and sentenced to 15 years' imprisonment. On appeal, the High Court substituted the conviction of murder *dolus directus* with one of murder with *dolus eventualis*, and reduced the sentence to 12 years' imprisonment. This was a further appeal against the conviction and sentence.

Tshiqi J (Seriti JA, Zondi JA, and Mokgohloa AJA concurring) held that, while the appellant was clearly faced with a situation in which she was being assaulted and had to retaliate in order to protect herself, she must have foreseen the possibility that by directing the knife towards the deceased's upper body, she might injure or kill her. Tshiqi JA held further, that although she had foreseen that possibility, it was not clear that the appellant had reconciled herself with the occurrence of death or disregarded the consequences of it occurring. There was no evidence that she had deliberately or purposefully aimed a firm thrust at the deceased. On the contrary, the evidence showed that she had simply turned around while sitting, and directed a stabbing movement towards the deceased's upper body. This suggested that her conduct was not an impulsive reaction to the attack being inflicted on her. The state did not prove all the elements of murder in the form of *dolus eventualis*, and the conviction fell to be set aside and substituted with one of culpable homicide.

The sentence was reduced to 3 years' imprisonment, as found there to be substantial mitigatory factors. Schippers JA dissented, and would have acquitted the appellant on the basis that the appellant's conduct did not meet the test for negligence, and that it could not be said that her version was not reasonably possibly true. In the circumstances she should have been acquitted.

S v SINGH AND OTHERS 2016 (2) SACR 443 (SCA)
Case heard 2 March 2016, Judgment delivered 24 March 2016

This appeal related to an undercover operation termed 'Operation Texas' conducted by the South African Police Service (SAPS) in 2007 and 2008 in terms of section 252A of the Criminal Procedure Act. Members of SAPS conducted an undercover operation targeted at eliminating a syndicate which had hijacked large trucks. An undercover agent was used by the SAPS to infiltrate the syndicate. The Director of Public Prosecutions approved the application for the operation, and issued guidelines under which it was to be conducted. Through the agent's involvement, the appellants were ultimately arrested and indicted on 20 counts including racketeering, robbery with aggravating circumstances, corruption, kidnapping, unlawful possession of firearms, attempted murder and money-laundering. The appeal dealt with the legality of the undercover operation and the admissibility of the evidence gathered therein.

Tshiqi JA (Swain JA, Mbha JA, Tsoka AJA and Victor AJA concurring) ruled that:

> "The use of undercover agents by the police, both for the prevention and the detection of crime, is long established, and is acceptable in our Constitutional democracy. Section 35(5) of the Constitution does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. The enquiry as to whether the admission of evidence would be detrimental to the administration of justice centres around public interest. Since the enquiry is purely a legal question, the question of the incidence and quantum of proof required to discharge the onus of proof does not arise. It essentially involves a value judgment" [Paragraph 16]

Tshiqi JA held that the operation was aimed at protecting the general public, and agreed with the finding that the benefit outweighed any risks. Tshiqi JA held that the undercover agent had always disclosed his movements to the investigations team and was "very cautious". The interests of the administration of justice therefore outweighed the risk to potential victims and the public. The challenge on the rights violations accordingly failed and the convictions had to be upheld. The appeal against the convictions was thus dismissed. However, the appeal against sentences was upheld partially, with the effective prison term for each appellant being reduced.

S V RAGHUBAR 2013 (1) SACR 398 (SCA); (148/12) [2012] ZASCA 188
Case heard 1 November 2012, Judgment delivered 30 November 2012

The appellant was charged with indecent assault of a 14-year-old male complainant. He was convicted in the regional court and sentenced to a term of ten years' imprisonment. His appeal against conviction to the High Court was dismissed. In the Supreme Court of Appeal, Tshiqi AJ (Ponnan JA and Mbha AJA concurring) had to rule on whether there had been proper compliance by the trial court with the provisions of section 164 read with sections 162 and 163 of the Criminal Procedure Act in respect of the complainant, the minor child in so far as giving evidence is concerned.

> "The reason for giving evidence under oath (s162), affirmation (s163) or admonishment (s164) is to ensure that the evidence given is reliable [...]. If a child does not have the ability to distinguish between truth and untruth, such a child is not a competent witness. It is the duty of the presiding officer to satisfy himself or herself that the child can distinguish between truth and untruth. The court can also hear evidence as to the competence of the child to testify. Such evidence assists the court in deciding (a) whether the evidence of the child is to be admitted, and (b) the weight (value) to be attached to that evidence. The maturity and understanding of the particular child must be considered by the presiding judicial officer, who must determine whether the child has sufficient intelligence to testify and a proper appreciation of the duty to speak the truth. The court may not merely accept assurances of competency from counsel". [Paragraphs 4 and 5]

It could not be accepted that the magistrate managed to determine merely from such an elementary line of questioning pertaining to the complainant's age, date of birth and level of education that the complainant was competent to testify. Furthermore, the appellant's legal representative was not qualified to express an opinion on the complainant's competency. No reliance could be placed on the evidence of the complainant, and the conviction could not stand.

> "The cautionary rule was applicable to the evidence of the complainant. He was a single witness to the alleged indecent assault and he was very young when the offences were allegedly committed and during the trial. It appears, however, that the court merely paid lip service to the cautionary rule because it ignored several contradictions in his own testimony and that of the other State witnesses. His evidence was confusing and very difficult to follow. [...] Whilst I accept that it is not unusual for young children to experience difficulties when relating to the court what actually happened with the precision expected of an adult, especially pertaining to incidents concerning sexual behaviour as well as incidents that occurred a while ago. The need for caution cannot be ignored.". [Paragraphs 11 - 12]

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

MOTSISI V THE STATE (513/11) [2012] ZASCA 59

Case heard 16 February 2012, Judgment delivered 2 April 2012

The appellant was charged with rape, it being alleged that he had sexual intercourse with a female aged 24 years who was "mentally retarded". He was convicted and sentenced to the prescribed minimum term of 15 years' imprisonment. His appeal to the High Court was dismissed. He appealed to the SCA against conviction and sentence. The issue was whether the trial court, having decided not to have the complainant take the oath or affirmation in terms of s162 and s163 of the Criminal Procedure Act, properly administered the admonition in compliance with s164 and s165 of the Act.

Tshiqi JA (Navsa and Wallis JJA and Petse and Ndita AJJA concurring) held that it appeared that the magistrate decided that the complainant would not understand the nature and import of the oath and instead of requiring sworn testimony from her decided to admonish her in terms of s164(1) of the Criminal Procedure Act. Before a court may admonish a witness in terms of s164 read with s165 of the Criminal Procedure Act, it must satisfy itself whether or not the witness understands what it means to speak the truth. Once the magistrate formed that view, there was one further step that he was required to take, namely to enquire whether the complainant was capable of distinguishing truth from falsehood.

> "The duty to ensure that a witness has properly taken the oath, affirmation or admonition is imposed on a presiding judicial officer. It is the judicial officer who has to be satisfied that the witness comprehends what it means to speak the truth. The fact that a judicial officer may utilise the services of an interpreter or an intermediary or a registrar of the court to communicate with a witness does not relieve the judicial officer of the duty to perform this function, but what it does is that it provides the judicial officer with a means of utilising the assistance of these functionaries to perform his or her functions. ... It does not appear ex facie the record that the regional magistrate performed this function himself as required by the Criminal Procedure Act. What appears ex facie the record are the words 'admonished (through interpreter)' and nothing more. A judicial officer cannot simply abdicate his or her responsibilities and hope that an interpreter or intermediary will be able to admonish a witness, as it appears to have been the case in this particular matter." [Paragraph 15]

A perusal of the record showed that there was no evidence, apart from that of the complainant from which the appellant could have been convicted. Since her evidence has not properly been placed on record there was no manner of determining whether the charge against the appellant was well founded. T's evidence alone could not be elevated to constitute proof that sexual intercourse had taken place

between her and the appellant, nor could it cure the other inherent problems in the State case. The appeal succeeded, and the conviction and sentence were set aside.

JUSTICE XOLA PETSE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 10 July 1954

BProc, University of Fort Hare (1975 – 1978)

LLB, University of Natal – Pietermaritzberg (1988 – 1989)

CAREER PATH

Acting Justice, Constitutional Court (2018)

Justice, Supreme Court of Appeal (2012 -)

Judge, Eastern Cape High Court (Mthatha) (2005 – 2012)

Acting Judge (1997 – 2005)

Director, XM Petse Incorporated (1994 – 2005)

Partner, Sangoni Partnership (1982 – 1988)

Professional Assistant, Hughes Chisholm & Airey Attorneys (1982 ; 1990 – 1994)

Chancellor, Anglican Diocese of Mbhashe (2011 -)

Anglican Diocese of Mthatha

Chancellor (2009 – 2011)

Vice Chancellor (2006 – 2008)

Registrar (2000 – 2005)

Councillor, Cape Law Society (1998 – 2001)

SELECTED JUDGMENTS

SOCIO – ECONOMIC RIGHTS

MALEDU AND OTHERS V ITERELENG BAKGATLA MINERAL RESOURCES (PTY) LIMITED AND ANOTHER (CCT265/17) [2018] ZACC 41; 2019 (1) BCLR 53 (CC) (25 OCTOBER 2018)

Case heard 24 May 2018, Judgment delivered 25 October 2018

This was an application for leave to appeal against a judgment of the High Court, which had granted an eviction order against applicants and all persons occupying, "through or under them", a farm. It also interdicted respondents from entering, bringing their livestock onto, or erecting structures on the farm. At issue were the right of applicants to occupy and enjoy the farm which had been occupied for over a century by themselves and their predecessors in title; and the right of the respondents to mine on the farm. It was accepted that applicants were informal land right holders under the Interim Protection of Informal Land Rights Act (IPILRA).

The issues before the Constitutional Court were: (1) whether section 54 of the Mineral and Petroleum Resources Development Act (MPRDA) was available to the respondents, and if it was, whether they were precluded from obtaining an interdict before exhausting the s 54 mechanisms; and (2) whether applicants had consented to being deprived of their informal land rights to or interests in the farm.

Petse AJ (Zondo DCJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Theron J concurring) began by noting "[t]hat since ancient times land has been the most treasured possession to all and sundry throughout all generations is a truism that brooks no argument to the contrary", [paragraph 2], and that whilst mining was "one of the major contributors to the national economy",

> "there is a constitutional imperative that should not be lost from sight, which imposes an obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress." [Paragraph 5]

Regarding issue (1), Petse AJ held that section 54 required the holder of a mining right or permit to notify the Regional Manager if they were prevented from commencing or conducting mining operations because the owner or lawful occupier of land in question refused to allow them entry. In the ordinary course, respondents were required to take all reasonable steps to exhaust the section 54 process before approaching a court for an eviction and an interdict [paragraph 91].

Section 54 only applied to lawful occupation. Respondents argued that applicants' informal land rights were terminated, in terms of section 2 of the IPILRA, by the grant of the mining right or the entering into the surface lease agreement. [Para 93]. Petse AJ rejected this argument:

> "The fact that the respondents' mining rights are valid … does not mean that the applicants are, in consequence, occupying the land in question unlawfully. The existence of a mineral right does

not itself extinguish the rights of a landowner or any other occupier of the land in question." [Paragraph 103]

Respondents had to comply with the prescripts of the IPILRA [paragraph 105]. Petse AJ held that the MPRDA had to be read, insofar as possible, congruently with the IPILRA. This meant that the award of a mining right did not, without more, nullify occupational rights under IPILRA. More is required to demonstrate that the IPILRA informal right holder was lawfully deprived of his or her right to occupy as required by section 2 of IPILRA. There was no conflict between the two statutes; each had to be read in a manner that permited each to serve their underlying purpose. [Paragraph 106]

Petse AJ found that there was no evidence to support the argument that applicants were deprived of their informal land rights in terms of section 2(4) of the IPILRA (i.e. at a community meeting), and held that it was not open to the respondents to bypass the provisions of s 54 of the MPRDA. That section provided a remedy, "which must mean that resort cannot be had to an alternative remedy available under the common law." [Paragraph 110]

The decision of the high court was overturned.

The judgment was praised for setting "a massive precedent" in emphasising the role of communities in deciding whether mining operations can proceed, and "fundamentally chang[ing] the power dynamics". It was further commended as "an excellent judgment that's going to go a long way for communities that are unprotected and relocated all the time into dismal conditions".

- Greg Nicholson, "Ruling 'fundamentally changes power dynamics' as communities win big in ConCourt" *Daily Maverick* 26 October 2018, available at https://www.dailymaverick.co.za/article/2018-10-26-ruling-fundamentally-changes-power-dynamics-as-communities-win-big-in-concourt/

ADMINISTRATIVE JUSTICE

MAMLAMBO CONSTRUCTION CC V PORT ST JOHNS MUNICIPALITY & OTHERS [2010] JOL 26063 (ECM) Case heard 29 January 2010, Judgment delivered 24 June 2010

This case concerned the validity of a tender awarded by the first respondent to the second respondent. Applicant, who had submitted a tender, argued that there was no logical basis for the award, and that on the available information the tender should have been awarded to the applicant.

Petse ADJP considered an argument that the applicant had failed to exhaust internal remedies, and after considering academic authority and Supreme Court of Appeal case law, held that the applicant had no effective and/or adequate appeal remedy, and that there would have been no virtue in appealing against the award of the tender to the second respondent when it was evident that the respondent had evinced a determination to begin with the works through the second respondent. Petse ADJP held that this situation was further exacerbated by the fact that the respondent had steadfastly refused to give the

undertaking sought that it would not carry on with the works until the applicant's review application had been determined. [Paragraph 32]

Petse ADJP found that the award of the tender could not "bear[] close and intense scrutiny", and

> "I do not for one moment believe that I have strayed outside the parameters set by judicial precedent which enjoin the courts to "take care not to usurp the functions of administrative agencies". On the contrary it is my conviction that in coming to the decision that I have reached … I have done no more than "to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution"…" [Paragraphs 41 – 42]

The award of the tender to the second respondent was declared invalid and set aside, and the tender referred back to the first respondent for reconsideration.

CRIMINAL JUSTICE

MLUNGWANA AND OTHERS V S AND ANOTHER (CCT32/18) [2018] ZACC 45; 2019 (1) BCLR 88 (CC) (19 NOVEMBER 2018)

Case heard 21 August 2018, Judgment delivered 19 November 2018

The issue in this case was whether the criminalization of a convener's failure, wittingly or unwittingly, to give written notice or adequate notice to a local municipality when convening a gather of more than 15 people, as per section 12(1)(a) of the Regulation of Gatherings Act, was constitutional. The High Court made a finding of constitutional invalidity.

Petse AJ (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, **Goliath** AJ, Khampepe J, Mhlanthla J, and Theron J concurring) found that the right to assemble and demonstrate freely in terms of section 17 of the Constitution was infringed, and that section 12(1)(a) limited the right in s 17 in a manner that went beyond mere regulation:

> "The possibility of a criminal sanction prevents, discourages, and inhibits freedom of assembly, even if only temporarily. In this case, an assembly of 16 like-minded people cannot just be convened in a public space. The convener is obliged to give prior notice to avoid criminal liability. This constitutes a limitation of the right to assemble freely, peacefully, and unarmed. And this limitation not only applies to conveners, but also to all those wanting to participate in an assembly. If a convener is deterred from organising a gathering, then in the ordinary course (save for the rare spontaneous gathering) a gathering will not occur." [Paragraph 47]

This finding was supported by reference to decisions from the United Nations Human Rights Committee, the European Court of Human Rights [paras 48 – 55].

As to whether the limitation could be justified under the limitations clause (section 36 of he Constitution), Petse AJ held that the right of freedom of assembly was central to constitutional democracy [paragraph 69], and enabled people to exercise or realise other rights [section 70].

> "To limit the right to freedom assembly therefore poses a real risk of this proliferating into indirect limitations of other rights." [Para 71].

Petse AJ found that the importance and purpose of the limitation was undercut by other fundamental considerations [paragraphs 74 – 81], and the limitation of the right was found to be severe [paragraph 83 ff]. Petse AJ held that the broad definition of a gathering meant that convening an innocuous assembly without notice would be a crime [paragraph 84].

> "This breadth and, by all accounts, legislative overreach, point to how section 12(1)(a) results in criminalisation without regard to the effect of the protest on public order. This exacerbates the severity of the limitation." [Paragraph 85].

Petse AJ held that the limitation was neither sufficient nor necessary to achieve the ultimate purpose of the limitation – namely ensuring peaceful protests through a police presence [paragraph 94]. Finally, Petse AJ held that there were less restrictive means available to achieve the same purpose [paragraphs 95 – 100].

Petse AJ concluded that section 12(1)(a) was unconstitutional, and the order of the High Court was confirmed, save for variations to the order: no suspension of the declaration of invalidity was granted, and the order was not apply with retrospective effect, but was limited to cases that had not yet been finalised, or where review of appeal avenues still remained. [Paragraphs 101 – 110].

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG v MG 2017 (2) SACR 132 (SCA)

Case heard 2 May 2017, Judgment delivered 2 June 2017.

Respondent was prosecuted on the regional court on various charges involving rape, the use of child pornography and sexual grooming of children. He was convicted on 5 of the 6 counts by the Regional Court, but on appeal the High Court reduced two of the rape convictions to convictions to sexual assault. Pertinently, the sentence for rape was reduced, the court finding that the "strong suspicion that the victim was not an unwilling participant in the events" was an "important factor" to be taken into account in considering sentence [SCA judgment paragraph 11]. The DDP appealed to the SCA on a question of law, arguing that in terms of the Sexual Offences Act, a child under the age of 12 is incapable of consenting to a sexual act, and therefore her 'consent' could not, as a matter of substantive law, be taken into account in sentencing.

Petse JA (Lewis and Mathopo JJA and Gorven and Mbatha AJJA concurring) found that the High Court had imputed consent to the complainant, "despite the clear and unequivocal provisions of s 57(1) of the Sexual Offences Act". In doing so, the High Court had committed an error of law. The interests of justice dictates that the sentence imposed by the High Court be set aside. [Paragraph 28]

Petse JA held that the dictum in the earlier SCA decision of *Mphaphama*, that 'the exercise of a judicial discretion in favour of a convicted person in regard to sentence . . . cannot be a question of law', was "cast too wide".

> "In particular, it does not deal with the position where that discretion has been exercised on an incorrect legal basis. An exercise of a judicial discretion based on a wrong principle or erroneous view of the law is clearly a question of law decided in favour of a convicted person." [Paragraph 29]

The appeal was upheld, and the case referred back to the High Court for the appeal on sentence to be reconsidered.

S V ROMER 2011 (2) SACR 153 (SCA)

Case heard 25 February 2011, Judgement delivered 30 March 2011

The respondent had been convicted on one count of murder and two of attempted murder, the High Court finding that he was in a state of diminished responsibility, though not acting as an automaton, at the time of the offences. The respondent was sentenced to 10 years imprisonment, wholly suspended for five years, and to three years correctional supervision. The State appealed against the sentence.

Petse AJA (Lewis and Bosielo JJA concurring) found that the respondent's "bizarre conduct" on the day in question, when he had shot three strangers, randomly and at different places, was attributed by his expert witnesses to an intake of anti-depressant medication that had been prescribed for him by various doctors (including psychiatrists), as well as over-the-counter medication. Respondent had consulted doctors about his emotional upheaval, which had been triggered by the disintegration of his marriage. [Paragraph 14]. The High Court had found that, although the respondent had suffered from diminished responsibility, he had not acted in a state of sane automatism when shooting. The court accepted evidence that he had been able to direct his actions. [Paragraph 18]

> "But the court, in imposing sentence, did place great emphasis on Romer's condition, induced by drugs. Of course, Romer's conduct and its consequences are horrific. ..." [Paragraph 19]

Petse JA found that the grounds of appeal relied on by the State urged that the trial court had over-emphasised the personal circumstances of the respondent at the expense of the gravity of the crimes committed, the interests of society and the interests of the victims [paragraph 24], but

> "I am ... not persuaded that the court a quo committed any misdirection in imposing the sentence it did, or that such sentence is disturbingly inappropriate. I am satisfied, after much anxious consideration, that deterrence of Romer or others is not an overriding consideration, regard being had to 'the concatenation of circumstances' which were of a highly unusual, if not bizarre, nature and which are unlikely to recur." [Paragraph 31]

The appeal was dismissed.

CUSTOMARY LAW

NETSHITUKA V NETSHITUKA AND OTHERS 2011 (5) SA 453 (SCA)

Case heard 10 May 2011, Judgment delivered 20 July 2011

This case dealt with the validity of a civil marriage which had been entered into while a spouse was a partner in an existing customary union. The appellant had sought an order declaring the marriage between the first respondent and the late Mr Netshituka null and void ab initio, and that the last will and

testament of Mr Netshituka was invalid. The first applicant (respondent) averred that she had been married to Mr Netshituka by customary rites. It appeared that Mr Netshituka had been married to three other women, including one Martha, by customary rites. None of these marriages were registered with the Department of Home Affairs.

Petse AJA (Mpati P, Bosielo, Tshiqi and Seriti JJA concurring) held:

"In customary law, where a husband has deserted his wife, his offence is not irreparable and does not give her the right to refuse to return to him when he comes to phuthuma [Footnote: "The husband is obliged to phutuma (fetch) his wife who has left him, whether through his fault or hers, unless he intends to abandon her"]her. ... But on the authority of Nkambula a customary law wife who has left her husband as a result of his having contracted a civil marriage with another woman would be entitled to refuse to return to him when he goes to phuthuma her. She would be entitled to assert that he had terminated the union between them. It seems to me, however, that nothing would prevent her from returning to him if she were prepared to do so. ..." [Paragraph 12]

"... [T]he deceased did not have to phuthuma his customary law wives because they never left him after he had married Martha. His continued cohabitation with them after the divorce was clear evidence of a husband who had reconciled with his 'previously deserted' wives. And in his last will and testament ... the deceased refers to Tshinakaho, Diana and the first respondent as his first, second and third wives respectively. What is important ... is the intention of the parties, which can be inferred from their conduct of simply continuing with their relationships and roles as partners in customary unions with the deceased after the divorce. Their conduct clearly indicated that to the extent that the deceased's civil marriage to Martha may have terminated his unions with his customary law wives, those unions were revived after the divorce." [Paragraph 13]

Petse AJA then found that there was no evidence that the deceased had been mentally incapacitated when he attested to his will. The appeal was upheld in part, with the court a quo's decision to reject the application to declare the marriage between the deceased and the first respondent invalid being overturned.

The judgment has been criticised by **P. Bakker and J. Heaton, "The co-existence of customary and civil marriages under the Black Administration Act 38 of 1927 and the recognition of Customary Marriages Act 120 of 1998 - the Supreme Court of Appeal introduces polygyny into some civil marriages", *Tydskrif vir die Suid-Afrikaanse Reg*, 2012, p. 586 – 593**. The authors argue that:

1. Although the practice of *phutuma* might not be practices by all groups, Petse AJA simply assumed that the custom applied to the deceased and his customary wives.
2. It was 'startling' that Petse AJA could come to the conclusion that "to the extent that the deceased's civil marriage to Martha [M] may have terminated his unions with his customary law wives, those unions were revived after the divorce". Since it is legally impossible to revive a marriage that has been terminated, "one must assume that the acting judge of appeal simply phrased the statement inaccurately and meant to convey that the customary marriages were never terminated by the civil marriage."
3. Based on Petse AJA's interpretation of the *Nkambula* case, the Court concluded that the deceased was still married to his customary wives when he entered into the civil marriage with

N. According to the authors it is questionable whether Petse AJA's interpretation of the *Nkambula* case and, consequently, his findings that "the deceased was still married to his customary wives when he entered into the civil marriage with N is correct." The authors asserted that the statements made by the Court in the *Nkambula* case clearly indicate that an existing customary law marriage must automatically come to an end if the husband enters into a civil marriage with another woman. The authors therefore noted that the Court created an incorrect precedent because it failed to properly consider the whole of the *Nkambula* judgment and all the *dicta* in it, and because it ignored earlier case law.

4. An additional concern raised by the authors related to Petse AJA's assumption that *phutuma* was practiced by the groups of which the deceased and his customary wives were members simply because there was no proof that it did not exist in the relevant tribe. The authors criticised Petse AJA for presuming that *phutuma* is practiced by all tribal groups in South Africa.
5. The authors concluded that the consequence of Petse AJA's decision is that customary marriages and civil marriages which "a husband concluded with different woman before 2 December 1988 *co-exist* as valid marriages. In this way, the fundamentally monogamous nature of civil marriage is negated and polygyny permitted in a particular group of civil marriages."

M. Buchner-Eveleigh, "*Netshituka v Netshituka* 2011 (5) SA 453: revival of a customary marriage previously dissolved by a subsequent civil marriage : recent case law", *De Jure,* Vol. 45, Issue 3, Jan 2012, p596-605 criticised Petse AJA's conclusion regarding the validity of customary marriages prior to 2 December 1988. The effect of the rule is that dissolved customary marriages will now be regarded as suspended marriages which can be revived if the civil marriage is terminated by divorce or death. The author indicates that this "is clearly contrary to positive law, which does not recognise latent (suspended) marriages. This would also produce intractable legal problems as far as the property rights of the women are concerned." As a result the Supreme Court of Appeal has "released on us an arcane mystery void of legal certainty."

The author also discussed the issue of whether it was competent for the deceased to contract a civil marriage during the subsistence of the customary marriages. The author asserts that the Court came to the conclusion that since the deceased had been a partner to existing customary marriages, the civil marriage was a nullity. The author argues that had the Court properly applied the *Nkambula* judgment, the court's findings would most likely have been the opposite, i.e. the civil marriage would have been considered valid. The author laments that it is unfortunate that the Court did not indicate why it chose to apply positive law in the one instance and not in the other. According to the author, the Court paid greater homage to the rights of the discarded customary marriage wives, "to the extent of excluding the patrimonial, and indeed also human rights (such as to respect her dignity, physical and emotional integrity) of the civil law wife."

The author concludes by stating that because the judgment is inconsistent in its application of positive law, it "meanders into the sphere of usurping the powers of the legislature. The court has also failed to give an equitable solution to the rights of both the customary marriage and civil marriage wives."

JUDGE DANIEL DLODLO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 4 April 1952

LLB, University of Zululand (1982)

BProc, University of Zululand (1979)

CAREER PATH

Acting Justice, Supreme Court of Appeal (2016, two terms; 2019)

Acting Justice, Constitutional Court (2018)

Acting Judge, Labour Appeal Court (Two terms – 2013; two terms - 2014)

Judge, Western Cape Division of the High Court (August 2004 -)

Acting Judge, Labour Court (2002)

Commissioner, Small Claims Court, Vryheid, KwaZulu-Natal (1991)

Attorney, Dan Dlodlo and Company, Vryheid, KwaZulu-Natal (1982) [Note: the candidate's application form only lists the date 1982, but this involvement presumably continued until his appointment to the bench].

Professional Assistant: George-Hattingh Kie Attorneys, Vryheid, KwaZulu-Natal (1981)

Court Interpreter, Nqutu Magistrate Court (1980)

Public Prosecutor, Nqutu Magistrate Court (1980)

Ordinary member, Black Lawyers' Association (until 2004)

Member, KwaZulu – Natal Law Society (for 24 years)

Secretary, Rotary Club (until 2016)

SELECTED JUDGMENTS

PRIVATE LAW

VISSER v HULL AND OTHERS 2010 (1) SA 521 (WCC)

Case heard 17 February 2009, Judgment delivered 21 May 2009

This case concerned whether a spouse married in community of property can alienate property without consent of the other spouse. The deceased had sold and transferred immovable property jointly owned by the spouses, who were married in community of property, to the first to fourth respondents, who were close relatives. The applicant was not aware of the sale and transfer until after the death of her husband when the respondents served her with eviction papers. The applicant approached the High Court to set aside an agreement of sale. The selling price was R10 500, although the municipal valuation of the property was R98 000.

Dlodlo J held that section 15(2)(b) of the Matrimonial Property Act forbade the sale by a spouse, married in community of property, without the written consent of the other, of immovable property falling into the joint estate. [Paragraph 5] He further held that a third party was required to take steps to establish whether the contracting spouse had obtained the consent of the non-contracting spouse. The third party could not simply rely on a bold assurance by the contracting spouse that he or she was unmarried. An adequate inquiry by the third party was required. The third party's special knowledge of the marital circumstances of the contracting spouse was also a factor to be taken into consideration. [Paragraphs 8 – 11]

> "In my view the respondents knew very well that the transaction was being conducted behind the applicant's back. They connived with the deceased and the purpose was obviously to prejudice the applicant's interests on this asset of the joint estate. They did not take any steps at all in satisfying themselves about the nature of the marriage between the deceased and the applicant. It is reasonable to have expected them even to come and ask the applicant and/or any of her children. They could also have asked the members of the community. McGregor is a very small place where everybody knows virtually everything about each other. It was easy to find out. They never investigated because they knew that they were assisting their relative (the deceased) to succeed in compromising the interests of the applicant in this matrimonial asset." [Paragraph 11]

Dlodlo J found further that section 15(3)(c) read with s 15(8) of the Matrimonial Property Act forbade donations or alienations without value. In the present case there was a deemed donation of the difference between the municipal valuation and the selling price of the property, and such donation would clearly prejudice the interests of the applicant. Further, if a husband, married in community of property, made a donation out of the joint estate to a third party in deliberate fraud of his wife, then the wife or her estate had a right of recourse against him or his estate on dissolution of the marriage and, where necessary, she or her estate could proceed with an action directly against the third party for the gift or its value. The same principles applied equally to a fraudulent transaction in some form other than a donation, such as a fraudulent transaction for the sale of land. The wife in the latter instance would

have to show: (1) fraud on the part of her husband; (2) that the sale was unreasonable; and (3) that the third party colluded in her husband's fraud. The applicant had proved all of those requirements. [Paragraphs 12 – 15] Dlodlo J thus concluded that the sale was null and void, and fell to be set aside.

H Scott, in **"Unjustified Enrichment", Annual Survey of South African Law, 2010,** argues that Dlodlo J "did not clearly distinguish between the validity of the contract of sale concluded between the deceased and the respondents and the validity of the transfer itself." As a result, the judge "did not make a clear finding as to whether ownership had in fact passed to the respondents." [Page 1406] However, the author asserts that the judge was correct in resisting "the temptation to treat this as a bar to the relief sought by the applicant", and in holding that "it was for the respondents to seek to recover the purchase price from the deceased estate in a separate action." [Page 1407].

CIVIL AND POLITICAL RIGHTS

ECONOMIC FREEDOM FIGHTERS AND OTHERS V SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS [2018] 2 ALL SA 116 (WCC)

Case heard 30 and 31 October 2017, Judgment delivered 29 January 2018

This judgment followed the return day of a two-pronged application. Part A of the application sought urgent interim relief to interdict the Speaker of the National Assembly from implementing a decision taken by Parliament to impose a sanction of suspension without remuneration on the applicants. The relief in Part A was sought pending the outcome of the application in Part B. Part A having been granted, the court had to determine the relief sought in Part B. This relief included a declaratory order that the decision taken by the National Assembly to adopt the report of the Powers and Privileges Committee suspending the applicants without remuneration was constitutionally invalid; reviewing and setting aside the disciplinary process where applicants were found guilty of misconduct; that the report of the Committee be reviewed and set aside; and a declaratory order that the National Assembly had failed to fulfil its obligations to ensure that the President had accounted in relation to the steps that he was required to take in order to comply with the findings in the Public Protector's "Secure in Comfort" report regarding security upgrades at the President's Nkandla private residence. The disciplinary proceedings in question related to parliamentary proceedings on 21 August 2014 which Dlodlo J described as having "descendd into chao due to the conduct of the applicants." [Paragraph 6].

Dlodlo J (Mantame J concurring) rejected the argument that there was no debate on the Committee's report [paragraph 15]. Regarding the argument that the disciplinary proceedings should be nullified for non-comlaince with procedural fairness and for unreasonableness; Dlodlo J held the approach of discussion and seeking advice from Parliamentary legal advisors when there were differences of opinion, was fair [paragraph 18]. Dlodlo J further held that applicants had not made out a case to support the alleged failure of Parliament to hold the executive, specifically the President, to account. Furthermore, Dlodlo J held that this relief fell within the exclusive jurisdiction of the Constitutional Court [paragraph 33].

Dlodlo J held that the primary obligation of the speaker was to maintain order in the House, and that or was necessary to conduct debates:

> "One needs to emphasise that even when debate is robust, members should always act with dignity and decorum and in an orderly manner. The truth is that if they do not, it is one of the important tasks of the Speaker to enforce order in order to ensure that the House is at all times able to function in terms of its constitutional mandate." [Paragraphs 36 – 37].
>
> "[T]he Speaker formed the view that the behaviour of the applicants was in deliberate contravention of the Rules, in contempt, was disregarding the Speaker's authority and was grossly disorderly. Having read the Hansard and having viewed the DVD recordings for that day, I accept that the Speaker's view in this regard was correct. The Speaker furthermore perceived that the applicants would not withdraw if she ordered them to do so and that they were intent upon disrupting the business of the day. In the circumstances, she correctly deemed it necessary to call on the Sergeant-at-Arms for assistance. …" [Paragraph 41]

Dlodlo J further declined to overturn the sanctions imposed:

> "I hold a firm view that it is not the function of this Court to second-guess the National Assembly as to the appropriateness of the sanctions(s) imposed. Imposing sanction is as a difficult task as imposing a sentence on the guilty person in a criminal matter. … In my view one cannot fault the finding that these are serious transgressions. They are indeed serious. Such behaviour in the National Parliament shall not be curbed if those involved are not appropriately punished." [Paragraph 45].

The Rule Nisi was discharged, and the Part B application was dismissed, with no order as to costs. Bozalek J dissented regarding the lawfulness of the penalties imposed.

PRIMEDIA BROADCASTING LTD AND OTHERS v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS 2015 (4) SA 525 (WCC)

Case heard 20 April 2015, Judgment delivered 28 May 2015

This was an application relating to two events during the 2015 Presidential state of the nation address, namely the State Security Agency employing a device that jammed mobile telecommunications signals; and the parliamentary television feed not showing events as members of the Economic Freedom Fighters (EFF) were removed from the Chamber by parliamentary security. At issue was the constitutionality of the provision of Parliament's policy on filming and broadcasting relating to broadcasting incidents of grave disorder and unparliamentary behaviour, and the jamming incident.

Dlodlo J (Henney J concurring) held that the impugned provision of the policy was reasonable:

> "I agree that the public has the right to know what happens in Parliament but that right cannot be absolute. If Parliament has seen fit in its wisdom to place these limitations … maybe the only question that should occupy our minds is rather whether these limitations are reasonable — regard being had to what they seek to achieve." [Paragraph 23]
>
> "I am of the view that the actual impact of the measures on the public and the media is minor, compared to the damage that may arise in the absence of these measures. It is important to note that during any incidents of grave disorder or unparliamentary behaviour, the public, including

> the media, are not excluded from the House. They remain present to observe the happenings and they report on this comprehensively. …" [Paragraph 33].

Dlodlo J held that the court lacked jurisdiction to consider an attack on the policy as a whole [paragraph 40]. Regarding the jamming device, he found that no case had been made out against the relevant respondents, and that the issue was moot [Paragraphs 47; 51].

> "Indeed given the minister's acknowledgment of the mistake, as well as an acknowledgment of a general duty to ensure the openness of Parliament, obtaining declaratory relief, to the effect that the continued use of the device was unconstitutional and therefore unlawful, in my view will serve no purpose whatsoever. …" [Paragraph 47]

> "I am of the view that courts should guard against conduct which amounts to what can be described as an intrusion into the constitutional domain of Parliament, which is not only unprecedented but which also has obvious major constitutional implications. If I were to grant the order sought by the applicants herein, standing rules and procedures established by the houses of Parliament in terms of their constitutional obligation to control their internal arrangements, proceedings and procedures, would have to be amended. This would certainly amount to the court usurping the constitutional powers not only of Parliament but also of the houses of Parliament, including provincial legislatures." [Paragraph 61]

The application was thus dismissed, with each of the parties paying their own costs. Savage J dissented, finding that the measures in the policy were unconstitutional, and that as the jamming had not taken place with the permission of the Speaker or Chairperson of the NCOP, its use on the parliamentary precinct was unlawful.

J Brickhill & M Bishop, "Constitutional Law", *Annual Survey of South African Law,* 2015, argue that the minority judgment should be preferred on both issues, as the majority judgment "adopted an approach that was overly deferential to Parliament and overemphasized the 'dignity of Parliament.'" Regarding the majority's approach to signal jamming, the authors argue that "a finding that unlawful and unconstitutional conduct was the result of a 'mistake' by an official is no reason not to grant a declaration of unlawfulness." [Pages 152 – 153].

The majority judgment overturned by the SCA in **Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others 2017 (1) SA 572 (SCA)**.

CRIMINAL JUSTICE

S v MT 2018 (2) SACR 592 (CC)

Case heard 10 May 2018, Judgment delivered 3 September 2018

The three applicants applied for leave to appeal against life sentences imposed under the Criminal Law Amendment Act (Minimum Sentences Act) Act, on the basis was that the High Court was precluded from sentencing under the Act where an accused person is not made aware of its potential application from the beginning of the trial. At issue was whether the state failed adequately to inform the applicants of

the minimum-sentencing regime at relevant times in each of their trials and, if so, what the effects of these alleged failures were in each case.

Dlodlo AJ (Mogoeng CJ, Cachalia AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J concurring) held that a significant proportion of each case concerned factual determinations by the courts a quo: on the question whether the applicants were prejudiced by not knowing that the minimum-sentencing legislation might apply, the applicants failed to prove such prejudice; and what the applicants may have done differently had they known that the prescribed minimum-sentencing legislation applied. A challenge to a decision on the basis that it was wrong on facts was not a constitutional matter and fell outside of the court's jurisdiction. [Paragraphs 28 – 31]

The question of whether the failure to include the relevant section of the minimum-sentencing legislation in a charge-sheet infringed an accused's right "to be informed of the charge with sufficient detail to answer it" was a constitutional matter, and the court therefore had jurisdiction to determine it. [Paragraph 35] However, Dlodlo AJ found that although it was desirable that the charge-sheet referred to the relevant penal provision of the minimum- sentencing legislation, this should not be understood as an absolute rule, and each case had to be judged on its particular facts. The cases before the court, however, were entirely unsubstantiated and failed to present arguments as to which Supreme Court of Appeal approach was constitutionally correct. Questions around these issues might yet be considered and dealt with by the court if they arose in a subsequent matter. [Paragraphs 40 – 42]. The applications for leave to appeal were dismissed.

AVONTUUR & ASSOCIATES INC AND ANOTHER v CHIEF MAGISTRATE, OUDTSHOORN, AND OTHERS 2013 (1) SACR 615 (WCC)

Case heard 8 May 2012, Judgment delivered 6 June 2012

This was an application to set aside search and seizure warrants, which had bene obtained in the course of investigations into alleged fraud relating to debt collection work conducted by the applicants on behalf of a municipality. It was alleged that the fraud was perpetrated by means of bills of costs drawn up for the applicants by a firm of costs consultants. Correspondence and accounts drawn up by the costs consultants were seized from the offices of the first applicant and at the home of the second applicant in the course of searches conduct under the warrants. The applicants argued that the communications between the applicants and the costs consultants were privileged and the files themselves were privileged; and that the magistrate had failed to properly exercise his discretion when deciding whether or not to authorise the warrants, in that the investigating officer did not inform him that a less invasive means existed to obtain the files.

Dlodlo J held that the broad principle was that only confidential communications and material integral thereto between attorney and client, made for the purpose of obtaining legal advice, were privileged. In an attorney's file there would invariably be documents and information which in the ordinary course would not be privileged, such as statements of account and particulars of the attorney's fees and disbursements. Such unprivileged documents could be seized. In claiming privilege the attorney had to act not in his own interests or on his own behalf, but always for the benefit of the client. Unless the

attorney did so, his claim to privilege may be regarded as not genuine. In that situation, a court would be entitled to disregard the claim to privilege and permit seizure.

> "[T]he applicants' claim to privilege over the files in the instant matter is not genuine as it was inimical to the municipality's interests." [Paragraph 30]

Dlodlo J then dealt with an argument imputed waiver of any privilege over the files by the municipality. After considering foreign and South African case law, Dlodlo J held that the applicants had not claimed privilege at the time of the search and seizure operation:

> "It is rather strange the Applicants have done nothing to demonstrate that the representatives of the Respondents who participated in the search … in fact gained any access to any privileged material. They … have not identified a single document which could actually qualify as a "privileged document" …" [Paragraphs 43 – 44]

Dlodlo J held further that the state was not required to prove that less invasive means would not produce the documents. [Paragraph 48]. The application was dismissed.

S v ADAMS 2009 (1) SACR 394 (C)

Case heard 22 August 2008, Judgment delivered 22 August 2008

This case concerned an irregularity in a rape trial. After all the evidence had been led, the matter was adjourned for closing argument and judgment. On resumption, the magistrate proceeded to deliver judgment without affording the parties an opportunity to address the court. The irregularity was brought to the magistrate's attention by defence counsel, whereupon he referred the matter to the High Court on special review, asking that the case be referred back to him so that he could hear closing argument and then give judgment again, taking the submissions of the State and the accused into account.

Dlodlo J (Traveso DJP concurring) held that section 175 of the Criminal Procedure Act made it clear that failure to allow the defence and the prosecution an opportunity to address the court prior to judgment was an irregularity. The question was whether or not it was an irregularity that had 'poisoned' the proceedings to the point of vitiating the trial. [Paragraph 3] Although Section 35(3) of the Constitution, the bedrock of the right to a fair trial, contained no express provision in this regard, the right to be heard before any decision was taken affecting him or her was one of the most fundamental rights of an accused person. This was not only an expression of the *audi alteram partem* rule, but also an integral component of the right to adduce and challenge evidence embodied in section 35(3)*(i)* of the Constitution. The right to participate in the proceedings was a fundamental principle, the denial of which was per se an infringement of the right to a fair trial, regardless of the prospects of success. [Paragraphs 6 – 7]

Dlodlo J held that the fairness of the trial had been compromised, and the judgment was void and without legal efficacy. The whole proceedings were to be set aside, and the matter was to be tried *de novo* before a different magistrate.

CUSTOMARY LAW

FANTI v BOTO AND OTHERS 2008 (5) SA 405 (C)

Case heard 3 December 2007, Judgment delivered 13 December 2007

This case dealt with the requirements for the validity of a customary law marriage. The daughter of the first respondent had passed away, and the day before she was to be buried, an urgent application was brought by the applicant, seeking an order declaring that he was entitled to the custody and control of the body of the deceased and that he was the person qualified to determine where, when and under what circumstance the deceased shall be interred, and that the first and second respondent be interdicted from taking possession and control of the body of the deceased and from burying same at their place of choice. Applicant argued that he had bene married to the deceased under customary lw, on the basis inter alia of lobolo having been delivered to the first respondent [paragraph 3].

Dlodlo J noted that payment of lobolo remained merely one of the essential requirements for a valid customary marriage. Even if payment of lobolo were properly alleged and proved, that alone would not render a relationship a valid customary marriage in the absence of the other essential requirements. [Paragraphs 19 - 20]

> "The applicant seemingly alleged that … he merely wrote a letter to inform the first respondent (mother of the deceased) about what was to happen. The applicant probably was of the view that the first respondent merely because she is the mother and not the father had no locus standi in the contemplated customary marriage proceedings. I want to make it very clear that the mother of a girl whose father died or is for some other acceptable and understandable reason absent and/or unable to discharge duties normally meant for the 'kraalhead', is quite entitled to act as the head of the family. Such mother becomes the 'father' and legal guardian of the children of her family. I state categorically that such a mother would legitimately negotiate for and even receive lobolo paid in respect of her daughter. That would in no way be repugnant to the customary law of marriage as practised in this country. In my view, if courts do not recognise the role played or to be played by women in society, then that would indicate failure and/or reluctance on their part to participate in the development of the customary law, which development is clearly in accordance with the 'spirit, purport and objects' of our Constitution." [Paragraph 21]

Dlodlo J held that there had been no handing over of the bride to the applicant and / or his family [paragraph 22], and that there was no evidence that rituals and celebrations had taken place, and that they had involved the first respondent's family [pargraph 23].

> "The fact of the matter is that the customary marriage is and remains an agreement between two families (the two family groups). Regard being had to the respondent's case, clearly none of the relatives and close friends of the deceased and/or her clan for that matter have any knowledge of the existence of the customary marriage between the deceased and the applicant in the instant matter." [Paragraph 23]

Dlodlo J further held that there was no evidence that lobolo negotiations had been completed [paragraph 25]. The application was dismissed with costs.

JUDGE TREVOR GORVEN

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 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

Acting Justice, Supreme Court of Appeal (June 2014 – May 2015; July 2015 – September 2015; December 2016 – September 2017)

Judge, KwaZulu Natal High Court (November 2008 – present)

Acting Judge, High Court of South Africa, KZN Division (2006, 2007, 2008))

Senior Counsel (February 2006)

Advocate (1988 – 2008)

Pupil Advocate (1988)

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

General Secretary, Student YMCA, UKZN Durban (1981 – 1985)

Assistant Secretary, Student YMCA, UKZN, Durban (1980 – 1981)

Prosecutor, Department of Justice (1978 – 1980)

Faculty Member, General Council of the Bar Intermediate Advocacy Training Course and Advanced Teacher Training Course, Stellenbosch (2018 – present; July 2017; January 2015)

Faculty Member, General Council of the Bar Regional Pupillage Advocacy Training Course, Kwa-Zulu Natal (July 2018)

Faculty Member, Advanced Appeal Advocacy Course (General Council of the Bar), (2011, 2012, 2014, 2016 and 2017).

Member, Kwa-Zulu Natal Judges' Finance Subcommittee (Jan 2014 – present)

Deputy Chair, Judiciary and Administration Information and Communication Technology Strategy Steering Committee (May 2013 – present)

Chair, Kwa-Zulu Judges' Information and Communication Technology Sub-Committee (2012 – present)

Chair, Society of Advocates of Kwa-Zulu Natal, Pietermaritzburg (2006 – 2008)

Advocacy Trainer, Society of Advocates of Kwa-Zulu Natal, Pietermaritzburg (2005 – present)

Pupillage Co-ordinator, Society of Advocates, KwaZulu Natal ((2006 – 2008)

Bar Council Member and Committee Member, Bar Council of the Society of Advocates, KwaZulu Natal (2002 – 2004)

Member of Executive, Pietermaritzburg branch, NADEL (1989 – 1990)

Member, NADEL (1998 – 2008)

Member, Society of Advocates of Kwa-Zulu Natal (1998 – 2008)

Member, Lay Preacher and Lay Minister, St Matthews Anglican Church (1985 – present)

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

Board Member, Epworth school (2005 – 2011)

Director, Dusi UMngeni Conservation Trust (2006 – present)

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 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 that leniency applicants did not enjoy immunity in civil actions. [Paragraph 16]. As to whether the Tribunal had the power to grant the order, Gorven AJA held that the Tribunal was a creature of statute. It had only the powers given to it by the Act, and had to exercise its functions in accordance with the Act. The power of the Tribunal to determine a complaint only arose when referral was made in terms of the Act, generally by the Commission:

> "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]

Gorven AJA held further that the Tribunal's power was limited to those particulars referred to it by the Commission. In this case, Premier had not been cited in the complaint referrals, and no relief was soguht against Premier in the referrals. It was argued that the particulars of the complaint relating to Premier nevertheless fell within the ambit of the referrals [paragraphs 19, 22]. The Commission argued that as Premier had participated in proceedings on the basis of admitted involvement in cartel activity, and order could be made against it.

> "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]

Gorven AJA held that whilst Premier knew that other members of the cartel had been cited as respondents and that relief was sought against them, this did not mean that it should have anticipated that relief would be sought against it, since the referral told it the opposite. [Paragraph 30]. The fact that the conduct of Premier was not part of the referral to the Tribunal meant the Tribunal had no power to grant any order against it. The declaration was thus a nullity. [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 that there was nothing in the language of s 22(3) which limited the power to extend permits to the period prior to the exhaustion of the internal remedies. [Paragraph 12]. Gorven AJA held that:

> "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]

Gorven AJA noted that section 39(2) of the Constitution required courts to interpret statutes so as to promote the spirit, purport and objects of the Bill of Rights. [Paragraph 27] Gorven AJA held that section 22(3) was

> "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 found that it was accepted that attorney-client contracts had been with the companies, not between applicants and respondents, and that the contracts related to disputes that involved the companies, not the applicants personally. The attorney-client contracts were no longer in existence, and the companies did not assert any right to confidentiality. [Paragraph 43]

Regarding standing, Gorven J considered whether the applicants had 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." [Paragraph 44]

Gorven J rejected an argument that the first applicant could be classified as an "informal client", [paragraph 48], and found that no case had been made out on the papers that any confidential information personal to the applicants was disclosed to the respondents. Gorven J held that properly construed, the right that the applicants asserted was not to be examined at the section 417 enquiry. None of the requiremetns to assert that right had been met. [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.

The judgment was discussed by **J Brickhill, H Corder, D Davis & G Marcus, "The Administration of Justice",** ***Annual Survey of South African Law,*** **2013.** The authors applaud Gorven J for the "thorough, courteous and clear manner" in which he reached his various findings and decisions. They state that this is "commensurate with the best traditions of judicial impartiality and accountability, both to the parties and to the wider public, in this country."

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, and 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 found that the NDPP said that she had relied on information under oath and evidence contained in the dockets. [Paragraph 27]. The respondents conceded that no statements in the dockets implicated the applicant in any of the offences with which he was charged. Gorven J held that the dockets "could therefore not have provided a rational basis for arriving at the impugned decisions." [Paragraph 29] Gorven J held further that:

> "[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." [Paragraph 34]

Gorven J held that "[e]ven accepting the least stringent test for rationality imaginable, the decision of the NDPP does not pass muster" [Paragraph 36], but emphasised that the decision was "based purely on the facts of the present case.", and did not "provide a basis for opening the floodgates to applications to review and set aside decisions to issue authorisations to prosecute". [Paragraph 38] Gorven J further rejected an attempt to interdict the NDPP from issuing fresh authorisations in the absence of facts before her, under oath, implicating the applicant. To grant such an order, Gorven J held, "would amount to an unjustified intrusion into executive territory and would offend the principle of the separation of powers." [Paragraph 40]

W Freedman, "Constitutional Aspects of Criminal Justice", 2015 (2) *SACJ* 215 describes the judgment as "slightly disappointing" for failing to give an indication of what the difference between the tests actually is, and for not giving any indication of the "sorts of circumstances in which each test should be applied." [Page 218].

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 upset 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 with other officers. 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 that diminished criminal responsibility was not a defence, but was relevant to sentence because it reduced culpability. The question was the extent to which the particular circumstances reduced the powers of restraint and self-control of the accused. [Paragraph 16] Gorven J found that whilst the accused was "clearly emotional about the infidelity of the deceased" and "clearly found repugnant" the idea of the deceased establishing a romantic relationship with somebody else, no diminished criminal responsibility had been esaatblished. [Paragraph 26]

Gorven J held that little significance could be attached to the fact that the accused had pleaded guilty, as he had bene caught re-handed with eyewitnesses present. However, the accused had expressed remorse, and Gorven J found that "significant character evidence" suggested that he had been "a stable, productive member of the community and engaged in uplifting actions over a long period of time." Gorven J found that the accused was a candidate for rehabilitation. [Paragraph 27] However, an aggravating factor was that he had "treated a defenceless woman as a chattel who existed purely for his benefit." [Paragraph 28]. Gorven J cited a 2012 study by the Medical Research Council, which showed that one out of every two women murdered was 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." [Paragraph 29].

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.

A. Van der Merwe, "Sentencing", ***South African Journal on Criminal Justice,*** **2014 (3) 453** highlights the court's sensitivity to constitutional values which led to "the consideration and recognition of an aggravating factor often overlooked by courts in the past." [Page 454].

S v MN 2010 (2) SACR 225 (KZP)

Case heard 26 January 2010, Judgment delivered 2 February 2010.

Appellant had been charged with the rape of his biological daughter, who was 13 years old at the time. The complainant was a single witness. The appellant was convicted of rape, and the matter was remitted to the High Court for sentencing, and the prescribed minimum sentence was applied.

Gorven J (Steyn J and Chili AJ concurring) held that the defence of a lack of mens rea could be raised on appeal.

> "On the facts it cannot be said that the State proved that the appellant knew that the complainant did not consent to the sexual intercourse. The fact that the appellant had approached in the dead of night does not lead to the necessary inference that he intended to rape the complainant. This is particularly so after the first occasion on which no subsequent protest was raised. The complainant did not cry, she did not raise the matter with anyone or in any way give any indication that she had not consented to this conduct. A further factor is the enquiry by the appellant, when the complainant stretched after the second occasion, as to what she was doing. This does not appear to me to be consistent with a guilty mind on the part of the appellant. The test for mens rea must be distinguished from the test concerning whether the complainant in fact consented. She did not. I cannot find, however, on the evidence before the court a quo, that it was proved by necessary inference that the appellant knew that the complainant did not consent." [Paragraph 13]

The conviction was set aside, and replaced with a conviction for the crime of incest. The accused was sentenced to eight years imprisonment, two years of which were suspended.

C Du Toit, in **"Children",** ***Juta's Quarterly Review of South African Law,*** **2010 (3)** criticises the judgment, arguing that it "wholly neglects to examine the power relationship that exists between father and daughter and the psychological aspects of rape of a child by his or her own parent." However, the author does concede that an "appeal court is bound by the record from the magistrate's court and the blame must therefore be placed with the Prosecuting Authority".

JUDGE CAROLINE HEATON NICHOLLS

BIOGRAPHICAL INFORMATION

Date of Birth: 28 November 1956

BA, University of Cape Town (1977)

LLB (1978) University of Cape Town (1978)

Certificate in Trusts and Deceased Estates, University of South Africa (2002)

CAREER PATH

Acting Justice of Appeal; Supreme Court of Appeal (October 2016 – March 2017, June - November 2018).

Judge; Johannesburg High Court (September 2009 – to date).

Acting Judge, Johannesburg High Court (2008 – 2009).

Partner, Nicholls, Cambanis and Associates (1990 – 2007)

Partner, Naidoo, Nicholls, Koopasammy and Pillay (1987 – 1990)

Articled Clerk and Professional Assistant, Priscilla Jana and Associates (1983-1987).

Articled Clerk, CA Friedlander (1981 - 1982).

Member, National Association of Democratic Lawyers (NADEL) (1988 – 2009)

NEC member, NADEL (2001 – 2003)

Councillor of Law Society of the Northern Provinces (NADEL Representative): 1999 – 2007

Member of the following committees of the Law Society:

Finance and Audit Committee;

Gender and Transformation Committee; and

Staff and Human Resources Committee.

Member in good standing, International Association of Women Judges.

SELECTED JUDGEMENTS

PRIVATE LAW

PREMIER OF WESTERN CAPE V KIEWITZ OBO JAYDIN KIEWITZ [2017] ZASCA 41

Case heard: 22 February 2017, Judgment delivered: 30 March 2017

The issue in this case was whether the plaintiffs, who had claimed delictual damages against the provincial government, were obliged to mitigate their damages by accepting a tender for future medical treatment at a provincial health facility, rather than receiving a monetary payment for assessed future medical expenses.

Nicholls AJA (Leach, Tshiqi, Majiedt and Swain JJA concurring) found that, despite claims to the contrary, the appellant's tender "cannot be construed as anything other than an attempt to abolish the long- established common law rule that compensation for patrimonial loss should sound in money." [Paragraph 6]. Nicholls AJA held that the undertaking would not finally dispose of the issues between the parties, as the nature of the treatment required and whether the provincial health services would adequately meet those needs would remain undetermined, and "provide fertile ground for future litigation", which situation the 'once and for all' rule was designed to avoid. [Paragraph 7]

Nicholls JA held that the tender offended against the 'once and for all' rule, and the rule that comensation for bodily injury comprise a monetary award. [Paragraph 13] The appeal was therefore dismissed.

GOLD REEF CITY THEME PARK (PTY) LTD V ELECTRONIC MEDIA NETWORK LIMITED 3 ALL SA 323 (GSJ)

Case heard: 24 August - 17 September, 28 – 29 September 2010, Judgment delivered: 23 February 2011

Dealt with a defamation suit brought against Mnet and Carte Blanche, regarding comments made in a television broadcast about the safety of rides at an amusement park.

Nicholls J held that trading corporations have a personality right worth of protection from defamation. The corporation's right to sue was held to not be inconsistent with the Constitution.

> "In my view the common law requires no development to bring it into harmony with the spirit purport and objects of the Bill of Rights." [Paragraphs 46 – 48]

Nicholls J found, obiter, that a "compelling case" had been made out for damages for a trading corporation's claim for loss of profit should be limited to general damages only.

> "In respect of loss of profit, the enormity of the awards will certainly have a chilling effect on the freedom of expression. In my view this cannot serve the interests of democracy and the disproportionality may well constitute an unjustifiable limitation to the right of freedom of speech." [Paragraph 51]

However, as the case related only to liability and not the quantum of damages, the issue did not need to be decided [Paragraph 51].

Nicholls J then considered the meaning of the alleged defamatory statements.

> "The overall impression on first viewing the programme immediately alerts one to safety problems at Gold Reef City. To tell members of the public who may attend the amusement park that if they use the rides they are at risk because there is reason for them to be concerned about their safety is a clear warning to any prudent person not to use the rides in the amusement park." [Paragraph 62]

Nicholls J held that the defamatory meaning relied on by the plaintiffs had been proved:

> "A viewing of the insert together with the emotive commentary, only serves to instil fear in the mind of any reasonable viewer. The distinction between the rides being unsafe as opposed to there being concerns about the safety of the rides is a distinction that would be lost on the reasonable viewer. The insert permits only one interpretation, namely that the rides are not safe and that the lives of users were at risk." [Paragraph 64]

Nicholls J dismissed defences of truth and public benefit [paragraph 79].

> "The importance of the press in a democratic society cannot be overemphasized. The public increasingly depends on investigative journalism to expose corruption, incompetence and other matters of public interest. But the public should be able to accept that what they are informed by the press is substantially true, alternatively there must be a good reason why they got it wrong. It cannot serve democracy to enable the press to publish falsehoods with impunity, particularly when those very statements have far-reaching and damaging consequences for those to whom they refer." [Paragraph 97]

The programme insert was held to be defamatory.

COMMERCIAL LAW

DU BRUYN NO AND OTHERS V KARSTEN 2019 (1) SA 403 (SCA)

Case heard 28 September 2018, Judgment delivered: 28 September 2018

Described in the judgment as "yet another example of the inconsistencies and resultant confusion to which the NCA has given rise" [paragraph 1], this case dealt with a dispute over a transaction's validity considering the credit provider's failure to register under the National Credit Act (NCA). The central question was under what circumstances registration as a credit provider in terms of the NCA was obligatory.

The first question was whether the transaction fell within the ambit of the NCA. Nicholls AJA (Shongwe ADP, Makgoka JA, Schippers JA and Mokgohloa AJA concurring) held that the transaction in question had been at arm's length, despite the previous relationship of the parties [paragraphs 14 – 17]. On whether a once off credit provision was exempt from the NCA, Nicholls AJA found that the NCA covered once off transactions provided they exceeded the monetary threshold under the NCA. Nicholls AJA disagreed with the judgments in *Friend* and *Shaw*, and held the transaction in question exceeded the threshold, and thus it was a requirement that the credit provider be registered under the NCA. Nicholls AJA found that although this amounted to an imperfect solution, it was the task of the legislature to remedy the defect rather than for the court to impute a meaning not justifiable by the statute's wording. [Paragraph 27] Nicholls AJA therefore held that the transaction was invalid, as it did not comply with the NCA.

NATIONWIDE AIRLINES (PTY) LTD (IN LIQUIDATION) V SOUTH AFRICAN AIRWAYS [2016] 4 ALL SA 153 (GJ)

Case heard: 1 - 23 February, 30 March 2016, Judgment delivered 8 August 2016.

This was a delictual claim, described as the first of its kind, for damages arising from anti-competitive conduct by the defendant. Defendant denied that its conduct caused the loss, and alternatively disputed the quantum of the loss. The claim arose following a finding by the Competition Tribunal that certain conduct by the defendant constituted a prohibited practice in terms of the Competition Act [paragraph 4].

Nicholls J identified the main issue in the case was the quantification of damages [paragraph 14] In quantifying the lost profit, the court stated that it had to look at the plaintiff's performance before the abuse and after the abuse and estimate how it would have performed had the anti-competitive conduct been absent. It held that a linear interpolation model, that used market share on all routes, was the appropriate methodology to make the estimation. This was balanced with a contingency deduction to arrive at the final determination of damages [see summary of findings at paras 158 – 162]. Plaintiff was thus awarded damages of R104.625 million arising out of the anti-competitive conduct of the defendant.

M Ratz, "Flying into new heights - damages claims arising from contraventions of the Competition Act", *De Rebus,* 1 February 2017, 34 praises the judgment for confirming some important aspects. Notwithstanding this, the author indicates that the judgment falls short in some regards. The author argues that:

> "The judgment (albeit not necessary) could have provided some important insights into the assessment of the elements of a delictual claim of this nature. Nicholls J confirmed that the claim is delictual, however, fails to give a more detailed analysis of how the elements of the delict should be assessed within the context of competition law contraventions, rather merely bypassing over these elements and focussing predominately on the quantification and the debate between the experts."

The author further argues that Nicholls J erred in the awarding of interest on the damages sum. The order provides for interest on the damages sum as from date of judgment, however, s 65(10) of the Competition Act entitles a claimant to interest as from the date on which a s 65(6) certificate is issued. Nevertheless, the author anticipates that "the judgment will play a significant role in future litigation of this kind and will undoubtedly serve as the judgment that will get the wheels of private competition damages actions moving in the right direction."

COCHRANE STEEL PRODUCTS (PTY) LTD V M-SYSTEMS GROUP, [2015] 2 ALL SA 162 (GJ)

Case heard 20 August 2014, Judgment delivered 29 October 2014

Applicant, a manufacturer of security fencing, sought a final interdict to restrain the respondent from using the trademark "ClearVu" as a keyword in the Google AdWords system. As there was no trademark registered over "CleaVu", the claim was based on the common law ground of unlawful competition, rather than on statutory infringement.

Nicholls J analysed the operation and functioning of the Google AdWords system [paragraphs 4 – 13], and then proceeded to consider an allegation of visual use by the respondent. Nicholls J held that to include a claim of visual use would require an amendment of the notice of motion, which had not been sought. The further affidavit seeking to deal with the issue was not admitted into evidence [paragraphs 20 – 21].

Applicant relied on two common law causes of action, namely passing off and "leaning on". "Leaning on" was not part of South African law [paragraph 22], and Nicholls J held that there was no room for developing the common law to include it.

> "It is evident that "leaning on", albeit described somewhat differently, has indeed been dealt with in our law and rejected. The courts have unanimously held that in the absence of passing off, no proprietary rights can be enjoyed in an unregistered trade mark. Litigants have repeatedly faced criticism for attempting to introduce causes of action based on unlawful competition when confronted with difficulties in proving passing off." [Paragraph 35]

Nicholls J then considered the ground of passing off, and held that the use of keyword advertising would only be prohibited if it causes deception or confusion. The judgment held the alleged trademark's attachment to the respondent's product searches was not likely to result in confusion to the reasonably observant consumer. [Paragraphs 55 – 57]. Nicholls concluded that the applicant had failed to make their case for unfair competitive conduct through leaning on and or passing off. Accordingly, application was dismissed with costs.

The judgment was upheld by the SCA in ***Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another*** **(2016 (6) SA 1 (SCA) (27 May 2016)**.

J Neethling & J Potgieter, "The Law of Delict", ***Annual Survey of South African Law,*** **2015** comment that although they could not fault the judgment as an expression of the law as it exists, they did find it unfortunate that the court "did not see its way clear to recognising leaning on as a common-law

ground of unlawful competition, and in this way provide protection for the advertising value of trademarks."

CIVIL PROCEDURE

DOMBO COMMUNITY V TSHAKHUMA COMMUNITY TRUST & OTHERS (1078/2017) [2018] ZASCA 190

Case heard 22 November 2018, Judgment Delivered 19 December 2018

This was an appeal from the judgment of the Land Claims Court, which had dismissed an application to rescind a default judgment setting aside the approval of the appellant's approved land claim in favour of the respondents. For the majority, Zondi JA (Tshiqi, Seriti and Mba JJA concurring) found that there was good cause for interfering with the decision as the court a quo had failed to clarify the factors taken into account in its exercise of its discretionary power to dismiss the rescission application. The court a quo had also failed to deal with the prospects of success. In addition, the finding was also premised on the fact that the matter was of importance to both parties and given the constitutional foundations behind the Restitution Act, the principle of fairness had to be upheld. Zondi JA (Tshiqi, Seriti and Mba JJA concurring) thus set aside the default judgment.

Nicholls AJA wrote a separate concurring judgment, agreeing that the appeal be upheld, but for different reasons. Nicholls AJA held that whilst the appellants would have to overcome "several obstacles" to resist the main application:

> "Notwithstanding the above, I would exercise the wide discretion that a court exercises in applications for rescission. There is a woeful paucity of information. The main application is not before us. The judgment of the court a quo does not shed any light. There is a suggestion that other land may be involved which does not form part of the merged land claim and against which the Dombo's may have a legitimate claim. This is not clear on the papers before us." [Paragraph 44].
>
> "Claims for restitution of land arise out of the country's horrendous history of land deprivation which the Restitution Act seeks to correct. It is important that the claims of each community are fully ventilated. In my view it is for the Land Claims Court to make a final determination once it has all the facts before it. For this reason, I concur with the main judgment." [Paragraph 45]

The appeal was therefore upheld.

JUDGE YVONNE MBATHA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 19 July 1960

BProc, University of Zululand (1983)

Post-graduate Diploma Maritime Law, University of Kwa-Zulu Natal (2019 – ongoing)

CAREER PATH

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

Judge, KwaZulu Natal High Court (June 2011 – present)

Acting Judge, KwaZulu Natal High Court (2005, 2006, November 2010, May 2011)

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

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

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

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

Admitted as attorney (April 1987)

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

Experimental legal employment, Charmaine Pillay & Associates (June 1984 – November 1984)

South African Chapter: International Association of Women Judges

Chairperson, Provincial Coordinator (KwaZulu-Natal) (2018)

Member (2017 -)

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

Law Society of South Africa

Committee member, Intellectual Property (2005 – 2010)

Committee member, Insolvency (2008 – 2010)

Committee member, Road Accident Fund (2008)

Committee member, Gender (2004 – 2010)

Black Lawyers' Association

Chairperson, Northern Natal region (2008 – 2010)

Executive member (2003 – 2009)

Member (1992 – 2010)

KwaZulu Natal Law Society

Council Member (2005 – 2010)

Vice President (2006 – 2007)

Board Member, St Anthony's Children's 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)

Member, St. Anthony's Children's Home (2005 – 2010)

Member and Chairperson, Blaauwbosch Rosary Clinic (1992 – 2010)

Member, Roman Catholic Church, Newcastle and Pietermaritzburg (1973 to date)

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 … 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, finding that "we would do well to carefully distinguish inference from conjecture or speculation", and that "I am far from persuaded that each of those inferences [by the High Court] are indeed the most readily apparent and acceptable inference in the circumstances." [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[s] to be prohibited where it would result in the violation of human rights or would amount to an injustice." [Paragraph 34]
>
> "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]

Mbatha J held that occupation had been as "old as the hills of Eshowe", was a *bona fide* occupation, that the first respondent was aware of it when it sold the property, and that second and first respondents had a Constitutional duty to provide 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 and Fourie AJA concurring) held that the underlying reasons given for why the records were required did not relate to the exercise of the right to claim damages, but to the evaluation of whether the appellants should do so or not. This did 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, holding that the appellants had satisfied the criteria set out in s 50(1) of PAIA, and the civil proceedings in question had not commenced. [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]

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, and found that the court a quo had committed a material misdirection in finding that premeditation was established. [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, concurring with Mbatha AJA that the appeal against conviction should be dismissed, and with her judgment on sentence and the order proposed. Gorven AJA agreed with Rogers AJA that the re-opening of the state case was irregular, but I disagreed that the irregularity was of such a nature that the proceedings were thereby vitiated. Gorven AJA further disagreed 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 been a competent witness, and that her evidence was admissible. The appeal against both conviction and sentence was dismissed.

MEDIA COVERAGE

'*Judges Express Mixed Feelings About Acting Stint at SCA'*, published on TimesLive, 9 April 2018, available at https://www.timeslive.co.za/news/south-africa/2018-04-09-judges-express-mixed-feelings-about-acting-stint-at-sca/

Judges being interviewed for SCA posts expressed their feelings on experiences acting as SCA judges. Mbatha reported as saying that there had been times when she had been criticised and once was threatened to have a judgment assigned to someone else. Having said that, she found the majority helpful and believes that it is important that all feel accepted as an acting judge at the SCA.

Quoted in an article on judicial training:

"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/)

Newspaper article regarding comments in a court hearing:

"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

Date of Birth : 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 – present)
Acting Judge, Gauteng High Court, Johannesburg (7 – 24 March 2005; 20 – 24 February, 29 May – 1 June; 9 October – 11 November 2006; 30 April – 11 May & 27 August – 12 November 2007)
Advocate, Johannesburg Bar (1986 – 2007)
Senior counsel, Johannesburg Bar (2004 – 2007)

Member, Society of Advocates of South Africa (Johannesburg Bar) (1986 – 2007)
Member, Evangelical Lutheran Church (1994 – present)
Member, Dutch Reformed Church (1978 – present)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

DEMOCRATIC ALLIANCE V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS; ECONOMIC FREEDOM FIGHTERS V STATE ATTORNEY AND OTHERS (21405/18; 29984/18) [2018] ZAGPPHC 836 (13 DECEMBER 2018)

Case heard 6-7 November 2018, Judgment Delivered 13 December 2018

This case involved an application for the review and setting aside of the decisions taken by the Presidency and the State Attorney to procure private legal representation for former President Zuma and for the state to pay the legal costs incurred by him in his personal capacity in the criminal prosecution against him. The DA, furthermore, sought for the impugned decisions to be judicially reviewed under the provisions of PAJA or the principle of legality, and the EFF sought the judicial review of impugned decision under the principle of legality.

Meyer J (Ledwaba DJP and Kubushi J concurring) set out the background of the relevant litigation history [Paragraphs 6 – 23]. Meyer J then dealt with Mr. Zuma's argument that both the EFF and DA had delayed initiating the review application, and that such delay is unreasonable and ought to non-suit the applicants. [Paragraph 45] Meyer J found, however, that the applicants only came to learn of the nature and extent of the impugned decisions in March 2018 when the new administration disclosed the President's liability, whereupon the DA instituted legal action and the EFF did so within a month of becoming aware of the amount of public money spent. Thus, the delays in initiating action were not undue or unreasonable, and, even if they were, the court was of the view that the interests of justice dictated that any insufficiency in the explanations for the delay be overlooked. [Paragraphs 50 – 52]

Furthermore, the court granted condonation for the delay in instituting the review application in terms of PAJA's 180-day period on the basis that it was in the interests of justice to do so. [Paragraph 56] With regards to the legislative provisions invoked to approve such expenses, the Meyer J held that section 3 of the State Attorney Act did not provide authority for the appointment of private legal representatives for government officials to represent them in their private capacities in criminal proceedings (and related civil proceedings) against them. [Paragraph 62] Furthermore, the requirements of s3 had not been met in Mr. Zuma's case, as 1) the work was not performed on behalf of the government or administration of any province or the South African railways and Harbours administrate, 2) the work was not performed at the State Attorney's office or any of its branches, 3) the government was a party to the criminal and related civil proceedings, 4) no government or public interest existed to have appointed private attorneys for Mr. Zuma. [Paragraph 64]

Meyer J found that while the Presidency could not fund the legal costs in question, Mr. Zuma still had the constitutional right to a fair trial, which included the right to have a legal practitioner assigned to him by the state at the state expense, as is the case with all other accused persons in South Africa. [Paragraph 69] The charges against Mr. Zuma had nothing to do with his official functions either as MEC or as President of the Republic and thus fell foul of s3 of the State Attorney Act regarding the procurement of private legal representations. The impugned decisions, therefore, amounted to a breach of the principle of legality, were unconstitutional and fall to be set aside. They also fell to be reviewed and set aside in

terms of PAJA. [Paragraphs 74 – 75] Finally, Meyer J held that the State Attorney was to render an account of all private legal costs incurred by Mr. Zuma, and take the necessary steps to recover such costs. [Paragraph 81]

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 that the language used in the regulation “clearly confers a discretion on the minister to publish operational guidelines”, and the application of the AMA Guidelines did not depend on the existence of operational guidelines. [Paragraph 13].

> “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]

“Meyer AJA held that the use of “the permissive or facultative word 'may'” in other regulations referred to by the appellants and not in regulation 3(1)(b)(iv) was no indication that the publication of operational guidelines was peremptory. The statutory provision was not framed in words with “an affirmative or imperative character”, and there were no other provision in the regulations, or in the Act, which imposed an obligation on the minister to publish operational guidelines in order for the AMA Guides to find application.” [Paragraph 15]

Meyer AJA found that the interpretation advanced by the appellants would result in an absurdity, in that the AMA Guides, which were central to the determination of whether the injury was 'serious' in order to qualify for general damages under the Act, could not be applied until the minister published operational guidelines, even if the minister did not consider this t be necessary. The AMA Guides could also be implemented in the absence of operational guidelines. [Paragraph 16]. Meyer AJA found that the construction advanced by the appellants was "linguistically and contextually untenable" [paragraph 18], and dismissed the appeal.

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 that the appellant had exercised control over and used the land, and 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. Meyer AJA held that appellant was not the owner of the land in question, and that its contention that it remained a landowner until the land was transferred to Pamodzi was clearly 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]

"Meyer AJA held that the wording of ss (3) made it clear that the legislature had 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. Meyer AJA held that nothing in the wording of ss (3) or in the other provisions of s 19 justified the conclusion that the Minister's powers under ss (3) were intended to be limited in that he or she may only order a landholder to take anti-pollution measures for as long as they remained a landholder." [Paragraph 23] The rationale of the subsection was to direct the landholder to address pollution or the risk thereof. That rationale was not removed when the landowner ceased 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."

The restrictive interpretation contended for by the appellant 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]

Meyer AJA found that in interpretation that did not impose the limitation contended for was consistent with the purpose of the NWA, and accorded with NEMA principles of reducing and avoiding pollution, and gave expression to the constitutional right to an environment that was not harmful to health and wellbeing. [Paragraph 25].

The appeal was dismissed.

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 that intention to defraud had two main aspects: an intention to deceive, and an intention to induce a person to change or refrain from changing their legal position. Such intention could 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]

Meyer AJA rejected any suggestion that the appellant did not know the representation in question was false "lacks a factual foundation and would therefore amount to impermissible speculation or conjecture." [Paragraph 17].

"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.

The judgment is praised by **S Hoctor, "General Principles and Specific Offences, *SAJCJ,* 2016,** for "usefully confirming the prevailing approach to establishing the elements of fraud."

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 found that the respondent's retention of K was wrongful under article 3 of the Hague Convention, and the court had to order K's return unless the defence that K objected to being returned to his mother in Australia, was established. [Paragraph 4] Meyer J found that article 13 gave the court a discretion to refuse to order the return of the child, if the stated requirements were met [Paragraph 6]. Meyer J rejected an argument that the court could not have regard to welfare considerations, but had to balance the nature and strength of the child's objections against the Hague Convention considerations:

> "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]

Meyer J found that K had consistently maintained his objection to returning throughout this year, for substantive reasons, [Paragraph 15] and that the respondent might have influenced K's objection, but could not 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]

Meyer J held that balancing all the relevant considerations led to the conclusion that K's objection should prevail. [Paragraph 20] The application was dismissed, with no order as to costs.

The judgment has been praised by **J Heaton, "Family Law", *Annual Survey of South African Law,* 2012**, and **C du Toit, "Children", J*uta's Quarterly Review of South African Law,* 2012(1)**. Du Toit commends Meyer J's "insight into and sensitivity regarding the child's circumstances and state of mind. The author contends that the guidance provided by Meyer is "invaluable and is a significant contribution to a judicial practice in which the views of adolescent children caught in disputes between their parents are treated with respect and consideration." Moreover, the author indicates that the judgment strikes an "appropriate balance between giving due weight to the voice of the child and cautioning against accepting the child's opinions at face value."

DEPUTY JUDGE PRESIDENT FIKILE MOKGOHLOA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 1 June 1961

B JURIS, University of the North West (1987)

LLB, University of the North West (1990)

CAREER PATH

Acting Justice, Supreme Court of Appeal (June - November 2017, June – November 2018, December 2018 – March 2019)

Deputy Judge President, Limpopo High Court (July 2016 – present)

Judge, Limpopo High Court (January 2016 –)

Judge, Kwa-Zulu Natal High Court (November 2008 – January 2016)

Acting Judge, Kwa-Zulu Natal High Court (July – November 2008)

Acting Judge, Northern Cape High Court (June 2006 – June 2008)

Acting District Magistrate (2005 – 2006)

Acting Regional Magistrate (2001 – 2004)

Partner, Mokgohloa Attorneys (2000)

Commissioner, Small Claims Court (1997 – 2001)

Partner, Hack Stupel & Ross Attorneys (1996 – 1999)

Professional Assistant, Hack Stupel & Ross Attorneys (1993 – 1995)

Candidate Attorney, Tshegofatso Monama Attorneys (1990 – 1993)

Board Member, Praise Tabernacle Church, Pretoria (2002 – present)

SELECTED JUDGMENTS

PRIVATE LAW

M v J (2195/2015) [2015] ZAKZDHC 70; 2016 (1) SA 71 (KZD)

Case heard 14, 16 April 2015, Judgment delivered 2 September 2015

The parties were married under Islamic law, and the marriage was not registered in terms of the Marriage Act. In a divorce action the wife sought recognition of the validity of such marriages under the Act. Pending finalisation of divorce proceedings, the wife instituted a rule 43 application for an order pendente lite granting her (a) primary residence of her two minor children, (b) maintenance for herself and her minor children, and (c) contribution towards her legal costs in the divorce action. The husband objected in limine, arguing that no marriage existed and accordingly rule 43, which pertained to matrimonial matters, did not apply. He argued that he had already terminated the marriage by pronouncing a talaq (divorce) and that a marriage according to Islamic law was not valid in terms of the Act.

Mokgohloa J held that it was not necessary to determine the issue of whether the parties were divorced. What fell to be determined was whether these proceedings constituted "matrimonial action" in terms of rule 43(1). [Paragraphs 8 – 9]. After reviewing case law relating to Muslim marriages [paragraphs 11 – 13], Mokgohloa J held that imposing restitutionary conditions would render "the relief granted in terms of rule 43 useless to a wife who approaches the court precisely because she is unable to maintain herself and her children pending the divorce action", and that restitutionary provisions were thus antithetical to the purpose of an application under rule 43 [paragraph 15]. Mokgohloa J found that it was

> "unnecessary for the applicant in a rule 43 application to prove prima facie the validity of the marriage. In my view, the entitlement to maintenance pendente lite arises from a general duty of a husband to support his wife and children." [Paragraph 17]

The applicant could thus not be precluded from obtaining relief under Rule 43(1) by virtue of her Muslim marriage, "irrespective of whether the respondent pronounced a talaq or not." [Paragraph 18].

Accordingly, the applicant cannot be precluded from obtaining relief in terms of rule 43 (1) by virtue of her Muslim marriage,." [Paragraph 18]

It was ordered that the primary residence of the minor children shall be with the applicant and the respondent was granted *pendente lite* contact with the minor children. Further, among other relief, the respondent was directed to pay maintenance to the applicant for herself and the minor children in the sum of R20 000 per month, and to contribute the amount of R15 000.00 towards the applicant's legal costs.

CIVIL AND POLITICAL RIGHTS

V & V CONSULTING ENGINEERS (PTY) LTD V UMLALAZI LOCAL MUNICIPALITY 2016 JDR 0136 (KZP)

Case heard 19 November 2014, Judgment delivered 3 February 2016

This was an application for access to information of a public body in terms of the Promotion of Access to Information Act (PAIA). The applicant sought access to certain documents in respect of the design and supervision of a road rehabilitation project in the CBD of Eshowe.

Mogkohloa J rejected several points in limine, including the first respondent's suggestion that the right to request information under PAIA was limited to a requester being a registered consultant and participating in the tender. [Paragraph 8]

> "[T]he importance of access to information held by a public body as a means to secure accountability and transparency justifies the approach adopted in section 32 (1)(a) of the Bill of Rights namely that, unless one of the specifically enumerated grounds of refusal obtains, citizens are entitled to information held by a public body as a matter of right. This is so regardless of the reasons for which access is sought and regardless of what the public body believes those reasons to be." [Paragraph 11]

Mokgohloa J held that the grounds for refusal under PAIA had to be understood in the context of the legislative scheme which sought to balance "access to information, a third party's right to privacy and to protect its commercial interest in a manner which is constitutionally defensible in terms of the limitations." [Paragraphs 12 – 13] An argument that applicant had to show it had a right or interest in the information requested was rejected, as such provision was inapplicable to records in the possession of public bodies. [Paragraph 17].

Mokgohloa J found that the first respondent had displayed obstructive behaviour that

> "flies in the face of section 32 of the Constitution, the letter and spirit of PAIA and descent [sic] values of government. I find that the first respondent's conduct of failing to respond to the applicant's request was done with the intention to frustrate the applicant's right to explore all avenues to have access of the information requested." [Paragraph 21]

Mokgohloa J found that this conduct was sufficiently egregious to justify a punitive costs order. [Paragraph 22] The application was granted with costs on a scale as between attorney and client.

CIVIL PROCEDURE

UAP AGROCHEMICAL KZN (PTY) LTD AND ANOTHER V NEFIC ESTATES (PTY) LTD (AR515/11) [2012] ZAKZPHC 79

Case heard 3 August 2012, Judgment delivered 20 November 2012

The respondents had brought an application to compel the appellants to discover documents claimed to be privileged. Respondents had instituted an action against the appellants for damages sustained to citrus trees, allegedly caused by an insecticide supplied by first appellant and manufactured by second appellant. The appellants appointed experts to investigate the cause of the damage, but refused to make the expert reports available. The court a quo found in favour of the respondent, and ordered the appellants to pay the respondent's costs on the scale as between attorney and own client. The appellants appealed against the judgment and costs order. The respondent argued that the order was not appealable, the documents were not privileged, and that the parties had concluded an agreement that expert reports would be made available to the respondent for inspection.

Mokgohloa J (K Pillay and Kruger JJ concurring) held that an appeal would only lie against a judgment or order. [Paragraph 6]. Appellants' arguement that, once the documents in respect of which they claimed privilege were handed over, the contents would become irreversibly known to the respondents, was accepted, and the order to hand over privileged documents has a final effect. It cannot be altered by the judge granting it or another judge, and it is therefore appealable. [Paragraph 11].

Mokgohloa J held that all documents produced after appellants had appointed their attorney were privileged, as they had been created to gather information to enable the attorney to provide legal advice. The order compelling discovery of these documents was wrong. [Paragraph 15]

Mogkohloa J then dealt with the documents created during the period 12 January 2004 to 17 May 2004. It was clear that by 1 December 2003 the damage causing event had already occurred. It had been suggested that the second appellant's product was the cause of the damage, and some of the farmers had identified a possible external manifestation of the problem with the second appellant's product Mokgoahloa J held that she was satisfied that there were clear indications of the likelihood of litigation since December 2003. "Therefore, the reports were commissioned for submission to the appellants' attorneys to advise and assist on the contemplated litigation." [Paragraph 20]

Mokgohloa J then dealt with the alleged agreement to make the documents available. The respondent alleged that during January 2004 an oral agreement was concluded, the terms of which were that the appellants would appoint experts to investigate the nature and extent of the losses suffered by the farmers and that the investigation reports and results would be made available to the farmers. Mokgohloa J examined correspondence exchanged between the parties relating to an alleged oral agreement in terms of which, it was claimed, expert investigative reports and results would be made available to the farmers, and found that the evidence did not support the existence of the alleged agreement [paragraphs 30 – 32].

The appeal was upheld, and the order granted by the court a quo set aside.

CRIMINAL JUSTICE

DIRECTOR OF PUBLIC PROSECUTIONS LIMPOPO V MOTLOUTSI (527/2018) [2018] ZASCA 182 (4 DECEMBER 2018)

Case heard 1 November 2018, Judgment delivered 4 December 2018

This was an appeal against the sentence of the accused, who had been convicted of theft and rape. The case dealt with the issue of whether the personal circumstances of the accused constituted substantial and compelling circumstances to impose a more lenient sentence. The court a quo had found that the accused's level of education, his sobriety, his pleading guilty of the crime and the physical effects of the rape were all substantial and compelling reasons to depart from the minimum sentence. The accused was sentenced to 12 months' imprisonment for theft, and five years' imprisonment for rape.

Mokgohloa AJA (Tshiqi, Swain and Dambuza JJA and Mothle AJA concurring) found, however, that insufficient weight was placed on the seriousness of the offence and the interests of society, and that the court had failed to consider the three necessary elements of sentencing as set out in *S v Zinn*. [Paragraph 19]

Further, the court held that the trial court unduly emphasised the personal circumstances of the respondent at the expense of the seriousness of the offense and the interests of society. [Paragraph 18] Mokgohloa AJA held that that despite the discretion that trial courts are afforded when sentencing, the sentence imposed by the trial court in this case as so disproportionate and shocking that no reasonable court could have imposed it. While the appeal only concerns the sentence, Mokgohloa AJA found it necessary to comment about the way in which the presiding judge in the trial court conducted himself with respect to his view on whether or not the complainant was raped by two different men. [Paragraphs 21, 23]. Mokgohloa AJA held that the judge in the court a quo had,

> "in questioning the prosecutor exceeded the bounds of what was reasonable in order for him to understand why the prosecutor refused to accept the plea, as tendered. The prosecutor was subjected to undue pressure to accept the plea tendered, simply because [the judge] believed that because the complainant was unable to identify the other assailant, a plea of guilty to a single rape should be accepted by the prosecutor. In doing so, he failed to have regard to his own admonition not to enter the arena." [Paragraph 24]

Mokgohloa AJA held further that the "case serves as a stark reminder of the danger of a judicial officer forming a preconceived erroneous view on a particular issue and thereafter imposing that view on counsel, without affording a proper opportunity to counsel to persuade him or her, to the contrary." [Paragraph 27]. The appeal was upheld, and the accused was sentenced to 1o years' imprisonment.

BOTHA NO AND ANOTHER V NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (920/2017) [2018] ZASCA 146 (11 OCTOBER 2018)

Case heard 11 September 2018, Judgment delivered 11 October 2018

This was an appeal against an order declaring immovable property and certain shares forfeited in terms of the Prevention of Organised Crime Act. The property was registered to a deceased person, Ms Botha. Respondent alleged that she had facilitated and secured the award of tenders involving six lease

agreements to the Trifecta group of companies, to the value of some R81 million, on very favourable terms. In the process she was alleged to have flouted tender procedures to the detriment of the state. In return, Trifecta paid for renovations to the property in the order of R1.2 million and the deceased received 10% shares of Trifecta, which at the time was valued at R28 million. First appellant was the mother of the deceased and executrix of the deceased's estate. The issue in the appeal was whether the shares and property constituted the proceeds of unlawful activities and whether it was properly declared as forfeited to the state.

Mokgohloa AJA (Majiedt, Swain, Mathopo and Schippers JJA concurring) undertook a proportionality enquiry to determine whether the grant of the forfeiture order amounted to an arbitrary deprivation of property in contravention of s 25(1) of the Constitution [paragraph 40].

> "The proper application of a proportionality analysis weighs the forfeiture and its effect on the owner concerned against the purpose that forfeiture serves. It has been held that the broader societal purpose served by POCA includes removing the incentive for crime. This purpose has been found to be more relevant where one is dealing with the forfeiture of proceeds of unlawful activities as in the present case." [Paragraph 43]

Mokgohloa AJA found that the NDPP made it clear in the replying affidavit that it sought a forfeiture order for the value of the renovations to the property, not the entire property, an issue the High Court had overlooked. [Paragraph 43]. Mokgohloa AJA found that the deceased had paid back some monies to Trifecta, which fell to be deducted from the impugned renovation costs. [Paragraph 44].

Mokgohloa AJA found that the forfeiture order made against the entire property was disproportionate, and the appeal was upheld in part. The appeal against the forfeiture of the shares to the state was dismissed [paragraphs 45 – 46].

S V SITHOLE (AR353/11) [2012] ZAKZPHC 3

Case heard 1 February 2012, Judgment delivered 8 February 2012

The appellant was convicted of rape in the Regional Court. The Regional Magistrate referred the matter for sentencing to the High Court, and the High Court confirmed the conviction and sentenced the appellant to 15 years' imprisonment. This was an appeal against sentence.

Mokgohloa J (Ploos van Amstel and Koen JJ concurring) dealt with the question of whether the accused had been correctly sentenced to 15 years' imprisonment, when the prescribed minimum sentence was 10 years' imprisonment, without the appellant being notified of the intention to impose a sentence greater than that prescribed. [Paragraph 5]. Mokgohloa J considered previous judgments of the division [paragraphs 7 – 8], and held that the charge sheet in the instant case had been specific.

> "Furthermore at the commencement of the trial the magistrate warned the appellant of the applicability and consequences of the Act. I am therefore satisfied that the ppellant was well aware of the sentence/s he may have to face." [Paragraph 9]

The appeal was dismissed, and the sentence confirmed.

MEDIA COVERAGE

'*Judge Fikile Mokgohloa: Hard Work is Key'*, published in Weekend Review, 21 April 2016, available at https://reviewonline.co.za/145648/judge-fikile-mokgohloa-hard-work-is-key-2/

This article about Judge Mokgohloa was written after her interview for Deputy Judge President of the Limpopo High Court. She discusses her reasons for studying law, and the inspiration her background had on starting the Street Law Project, which aimed to teach people living in rural areas about the practicalities surrounding criminal law. It also aimed to teach women about domestic violence, a topic Judge Mokgoloa is deeply passionate about. She then relates her enthusiasm about women taking up prominent positions not only because it is a matter of equality that they be afforded an opportunity to excel but also because she believes that women are competent and capable to undertaking work in the manner and standard expected. The article states that Judge Mokgoloa prides herself on her perfectionism and believes in punctuality, organisation and steering clear of procrastination.

JUDGE SELEWE MOTHLE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 24 July 1956

B Proc, University of South Africa (1979)

LLM, Georgetown University (1987)

National Institute for Trial Advocacy Diploma, Harvard University (1987)

CAREER PATH

Acting Justice, Supreme Court of Appeal (December 2017 – September 2018)

Judge of the High Court, Gauteng Division (October 2010 – present)

Acting Judge, Transvaal Provincial Division & Gauteng High Court (2008 – 2010)

Advocate, Pretoria Bar (2001-2010, admitted as an advocate May 1998). Senior counsel (2008 – 2010)

Executive Director, Independent Electoral Commission (1998 – 2000)

Chief Director of Investigation, Independent Complaints Directorate (1997 – 1998)

Special Legal Advisor, Premier Northern Province (Limpopo) (1994 -1996)

Legal Consultant and Chief Representative, International Organisation for Migration (1992 -1994)

National Director, Lawyers for Human Rights (1988 – 1992)

Partner, Mothle Matlala Mahlangu & Moabi Attorneys (1983 – 1986)

Professional Assistant, Seriti Moseneke & Mavundla (1982 – 1983)

Articled Clerk, Maluleke, Seriti & Moseneke (1980 – 1982)

Member of the National Bar Examination Board (2017 – present)

Advocates for Transformation

Member of the National Executive Committee (2005 – 2007)

Chairperson, Pretoria branch (2003 – 2005 and 2007)

Pretoria Bar Council

Representive, Pretoria Bar on the General Council of the Bar of South Africa (2007, 2008)

Member (2007 – 2009)

Member, National Association of Democratic Lawyers (NADEL) (1992 – 2003)

Co-National Director, Lawyers for Human Rights (LHR) (1988 -1992)

Co-founder and Vice President, Democratic Lawyers Congress (1984 -1986)

Member, Black Lawyer's Association (1982 – 1983)

SELECTED JUDGMENTS

COMMERCIAL LAW

ACKERMANS LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2015 (6) SA 364 (GP)

Case heard 5 - 7 November 2014, Judgment delivered 20 February 2015

This case dealt with the jurisdiction of the High Court to review the SARS Commissioner's decision to raise an additional tax assessment. The taxpayer applied to review a number of additional assessments which the Commissioner had issued more than three years after the last assessment, and after a delay of more than six years since indicating an intention to do so. Section 79 of the Income Tax Act provided for a limitation of the period within which it was permissible to raise an additional assessment, i.e. within three years from the date of the last assessment, unless the Commissioner was satisfied that the amount assessed in the relevant additional assessment was not assessed in the last assessment due to fraud, misrepresentation or non-disclosure of material facts by the taxpayer. Among the grounds for review was that the delay rendered the decision unreasonable and was procedurally unfair administrative action under s 6 of the Promotion of Administrative Justice Act (PAJA). The Commissioner countered inter alia by taking the point in

limine that the High Court did not have jurisdiction to decide the matter, because it raised complex issues requiring the expertise of the tax court.

Mothle J held that the review application under PAJA raised an issue concerning the protection of a fundamental right, and that the court had the jurisdiction to hear it. Section 105 of the Tax Administration Act specifically provided for the High Court as a '(f)orum for dispute of assessment or decision'. [Paragraphs 19 – 20] Regarding the delay, Mothle J held that is was imperative that all constitutional obligations executed by organs of state in the exercise of public power must be performed diligently and without delay; an unreasonable delay would result in a procedurally unfair administrative action which would be reviewable conduct in terms of section 6 of PAJA. [Paragraph 27]

It was not disputed that there was a delay of approximately six years in issuing the additional assessments. The question was whether this delay was unreasonable. Section 237 of the Constitution did not state what period would constitute an unreasonable delay. This was left to the courts to determine, having regard to the circumstances of each case. A determination of the reasonableness of the delay required a consideration of time periods within which it was permissible to raise additional assessments, and whether the proviso in s 79(1)*(c)*(i)*(aa)* applied. There was clearly a dispute of fact regarding the evidence required to decide whether the proviso applied. This required the expertise of a tax court to adjudicate. [Paragraphs 35 – 38]

> "I am of the opinion that it would be appropriate to defer to the internal remedies in the ITA, which Ackermans may resort to by way of appeal to the tax court, should it not be satisfied with the decision on the objection." [Paragraph 40]

The application was thus dismissed, with each party bearing their own costs.

CRIMINAL JUSTICE

THE DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE DIVISION, GRAHAMSTOWN V YOYO 2018 JDR 1284 (SCA)

Case heard 16 February 2018, Judgment delivered 20 March 2018

This was an appeal against a sentence of six years' imprisonment, three years of which were suspended for three years, imposed on the 52-year-old accused, who had attempted to rape the 4-year-old daughter of his girlfriend.

Mothle AJA (Swain and Mbha JJA concurring) held that the sentence imposed by the High Court was disproportionate and shocking, and replaced it with a sentence of 10 years' imprisonment. Mothle AJA found that "[T]he violence and abuse perpetrated on children is a scourge which has become prevalent in South Africa. The lenient sentences imposed by some of the courts fail to deter would-be perpetrators." [Paragraph 9] Given the gravity of the offence in this case and the circumstances in which it was committed, Mothle AJA found that there was no doubt that the respondent abused the trust the complainant had in him. The offence was committed under circumstances where the

complainant expected safety in the sanctity of her home and protection of her parents. That fact alone was aggravating.

> "As to how the High Court imposed a sentence of 6 years for this serious and aggravating offence is not explained. What is more disturbing is that the High Court, for inexplicable reasons, suspended half of the sentence." [Paragraph 11]

Mothle AJA held that this approach constituted a misdirection "which was disturbingly disproportionate to the seriousness of the offence." The appeal was upheld.

THE RE-OPENED INQUEST INTO THE DEATH OF AHMED ESSOP TIMOL (IQ01/2017) [2017] ZAGPPHC 652 (12 OCTOBER 2017)

Judgment delivered 12 October 2017.

This was a re-opened inquest to investigate the death of Ahmed Timol, who had died in 1971 while held in the custody of the Security Branch of the South African Police. The original inquest had found that Timol committed suicide. he re-opened inquest investigated the circumstances leading up to Timol's death in light of further evidence that had been uncovered [paragraph 1]. Te proceedings were the first instance of an inquest being re-opened in South Africa. [Paragraph 6].

Mothle J dealt with the law relating to inquests [paragraphs 13 – 28], noting that "the re-opened inquest is neither an appeal nor a review of the initial inquest." [Paragraph 27]. The judgment then discussed the security legislation in force in 1971 [paragraphs 37 – 45], before summarising the evidence of both the 1972 and 2017 inquests [paragraphs 53 – 237]. Mothle J noted that "[t]he nub of the case is what really caused Timol to fall to his death." [Paragraph 241]. After evaluating the evidence, Mothle J rejected the original verdict of suicide [paragraphs 249 -250; 315]

> "The evidence of assault and other forms of torture of detainees … is so overwhelming that the denial and lack of knowledge thereof by the three former Security Branch police officers who testified is disingenuous." [Paragraph 261]

Mothle J found that Timol's death was brought about by having being pushed from the 10th floor of the John Vorser Square building, and that there was *prima facie* evidence implicating the surviving security policemen in causing his death. Another former policeman was implicated in concealing the crime. The record f the proceedings was submitted to te Director of Publci Prosecutions [paragraphs 335 – 336]

S v SN 2012 (2) SACR 317 (GNP)

Case heard 14 December 2011, Judgment delivered 14 December 2011

During the course of a criminal trial in a magistrates' court on a charge of rape where the accused was a minor and the witnesses were also minors, the court appointed an intermediary in terms of s 170A of the Criminal Procedure Act (CPA). The role of the intermediary was to facilitate

communication with the minor witnesses, including the complainant. At a later stage, the prosecution disclosed to the presiding officer that it had come to its attention that the intermediary did not have the required qualifications for an intermediary as proclaimed in the *Government Gazette*. The court noted that at the end of the proceedings the matter would be referred to the high court for special review, for a determination whether the use of the intermediary had or had not affected the conduct of the proceedings and what should be the fate of those proceedings. The trial proceeded with the intermediary's services being utilised. It appeared that the intermediary did not have the two years' experience in social work as required by para *(e)*(i) of Government Notice R597 of 2 July 2001, nor a qualification of a two-year course in Child and Youth Care approved by the National Association of Child Care Workers, as contemplated in para *(d)* of the same Notice.

Mothle J (Legodi J concurring) held that the intermediary's qualifications fell short of the requirements as stated in Government Notice R597. [Paragraphs 12, 20 - 21] Insofar as the trial itself was concerned, Mothle J held that there had been no breakdown in communication, no irregularity or breach of procedure, when the intermediary had acted. The mere lack of qualifications did not per se vitiate the proceedings. [Paragraph 26]

> "[W]hen looking at the record of the proceedings in the trial, Mhlanga, even though not qualified as intermediary, successfully and competently bridged the communication gap between the minor witnesses (including the complainant) and the officials in court, which include the prosecutor and the attorney defending the accused. There appears … no irregularity or breach in the proceedings which could be so serious as to vitiate the entire proceedings." [Paragraph 27]

Mothle J held that the question of whether the minor witnesses had been subjected to mental stress or suffering so as to affect the admissibility of their evidence, had to be determined by the magistrate. [Paragraphs 28 – 29]. The matter was referred back to the trial court.

CHILRENS' RIGHTS

M AND ANOTHER v MINISTER OF POLICE 2013 (5) SA 622 (GNP)

Case heard 18 April 2013, Judgment delivered 3 July 2013

M had died as a result of an assault by detainees in a police cell. V and R, who were each the mother of a daughter with M, claimed damages on behalf of their daughters for infringement of their right to parental care under s 28(1)*(b)* of the Constitution. The parties settled a claim for loss of support, and presented a stated case to the court for adjudication on the question of constitutional damages.

Mothle J held that a child whose parent had died because of unlawful conduct of a third party, could claim constitutional damages for infringement of the right to parental care. Mothle J ruled that the common law loss of support/dependent child's action was no longer governed by common law, but by the Constitution and Children's Act, and any claim for damages arising out of infringement of child's rights must be based on s 28 of Constitution read with relevant provisions of Children's Act.

Mothle J found that the right of a child to family care or parental care is a constitutional right which is also expressed in the Children's Act, and premised his ruling on that the principle that any party whose constitutional rights have been infringed may seek a remedy under the rubric of "appropriate relief" in section 38 of the Constitution. A child's constitutional right to family care or parental care, like all other rights, deserves constitutional protection and enforcement; its (unlawful) infringement by third parties, where it results in damages, should be compensated. The cause of action for these constitutional damages should be stated in terms of s 15 of the Children's Act, as appropriate relief, in the form of a claim for compensation arising out of the loss of parental care. [Paragraphs 52 – 54]. Defendant was found to be liable for proven constitutional damages arising from the unlawful deprivation of their father's parental care.

The judgment was criticised by **J Heaton, "Family Law",** ***Annual Survey of South African Law,*** **Vol 2013.** The author questioned that the judge held that the plaintiffs "had a right to claim constitutional damages on behalf of their children for the unlawful deprivation of their father's care, even though the facts indicate that the parties had already reached a settlement about the children's claim for loss of support."

This decision was reversed on appeal in ***Minister of Police v Mboweni and Another*** **2014 (6) SA 256 (SCA)**, on the grounds that that the high court failed to properly analyse the right; facts proving loss of parental care had not placed before the court due to a misapplication of rule 33 on stated cases, and faced with a stated case inadequately stating the facts, the judge ought to have refused to hear it; that the court failed to consider whether the right applied to the policemen, and whether they owed a legal duty to his children to prevent an infringement of the right; that the court did not consider whether damages for loss of support was, on its own, an adequate remedy; and that parties with an interest in the decision were not given an opportunity to intervene. The SCA referred the matter to the back to the High Court.

CUSTOMARY LAW

NETSHIMBUPFE AND ANOTHER V CARTHCART AND OTHERS [2018] 3 ALL SA 397 (SCA)

Case heard 21 May 2018, Judgment delivered 4 June 2018

This case dealt with a dispute between two cousins over succession to the position of senior traditional leadership of the Tshimbupfe Traditional Community in Limpopo. The first appellant was identified for the position of senior traditional leader at a royal family meeting, while the fifth respondent was identified for the same position at a meeting of the royal council. Prior to the institution of these proceedings, the first appellant and the fifth respondent had separately approached the Premier to be recognised as senior traditional leader. At the time of the hearing of the appeal, the Premier was still seized with the separate applications for recognition. The issue before the Court was whether the application was premature and should have been left to the Premier to deal with it in terms of s 12(2) of the Limpopo Traditional Leadership and Institutions Act (the Limpopo Act).

Mothle AJA (Seriti and Mathopo JJA concurring) held that "the essence of the respondents' contention was to put the composition of both royal structures at the centre of the dispute." This raisd the question of who should have populated each structure, and who was entitled to be present when the traditional leader was identified. Mothe AJA held that this "required a factual enquiry, whose ansr should have been sought from customary law." However, the full bench of the High Court had not done so. [Paragraph 15].

> "Section 211(3) of the Constitution obligates the courts to apply customary law, when it is applicable. The full court thus erred in not applying customary law as it was applicable. It should have referred the matter forthwith to the Premier, without making any finding." [Paragraph 16]

Mothle AJA held that the notion that customary institutions must take precedence in the resolution of disputes concerning customary law does not mean that the jurisdiction of the courts is ousted. On the contrary, the Constitution recognises that parties may approach the courts and as such, it obligates the courts, in such instance, to apply customary law.

> "In this instance, until the Premier had made a decision in terms of s 12(2) of Limpopo Act, it would be premature for parties to approach court for a resolution of the dispute before exhausting the statutory prescribed dispute resolution mechanism, internal to customary law, custom and processes." [Paragraph 21]

What distinguished this case from the others that served in this and other courts was that this case was launched after the Premier had been approached for recognition of the person identified in terms of s 12(1) but has not yet made a definitive decision. The Premier had not had an opportunity to use his or her discretion in consulting the provincial and local houses of traditional leaders or cause this dispute to be referred to the royal family as envisaged in the Limpopo Act.

> "This review application effectively invited the High Court, the full court and this Court on appeal, to encroach, in breach of the doctrine of separation of powers, onto the terrain of the exercise of the Premier's statutory executive authority and functions." [Paragraph 23]

The appeal was thus dismissed. Dambuza and Van der Merwe JJA wrote a separate concurring judgment.

ADMINISTRATION OF JUSTICE

GRAHAM AND ANOTHER V LAW SOCIETY, NORTHERN PROVINCES AND OTHERS (ROAD ACCIDENT FUND INTERVENING) 2014 (4) SA 229 (GP)

Case heard 27-28 January 2014, Judgment delivered 15 April 2014

Applicants lodged a complaint of overcharging with the Law Society of the Northern Provinces against their erstwhile attorneys, Ronald Bobroff and Partners Inc, and Ronald and Darren Bobroff. Dissatisfied with the manner in which the Law Society dealt with their complaint, applicants sought

an order inter alia that the court should take over the Law Society's disciplinary enquiry or allow it to continue under the court's supervision. The disciplinary enquiry had been postponed pending the outcome of the application.

Applicants argued that the Law Society had shown an unwillingness to expeditiously and diligently comply with its duties to investigate the Brobroffs. Mothle J identified four main grounds for this complaint: a failure to deal with a report on the Bobroffs' accounting practices (the Faris report); the Law Society's position on common law contingency fee agreements; allowing the Bobroffs to "play possum", and delays in dealing with the complaint. [Paragraph 41]

Mothle J held that the applicants had been "rather impatient" with the procedures followed in relation to the Faris report, but that the report:

> "raises serious allegations concerning the management of the trust accounts of the Bobroffs. The report recommends further inspection of these accounts. ... The council did not reject the report but sent it to the disciplinary department, to be dealt with in the normal course of the pending enquiry. Considering the seriousness of the findings in the Faris report, I am of the view that the disciplinary department must inspect the Bobroffs' books of ... before the next sitting of the disciplinary enquiry." [Paragraphs 47, 49]

Mothle J ruled that there was no evidence to support the allegation of a conflict of interest regarding contingency fees, and that making such a finding before the conclusion of the disciplinary enquiry would in any event be premature. [Paragraphs 55 – 57]. Regarding the securing of requested documents, Mothle J held that although the applicants were correct in expecting the Law Society to assist them in securing the documents, subsequent correspondence showed they had effectively withdrawn the request, and therefore the Law Society did not fail in its duty in this regard. [Paragraphs 60. 63] Finally, Mothle J held that as the Bobroffs was not required to disclose their defence either during the enquiry or before the court, the allegation that the Law Society was allowing them to 'play possum', as well as the complaint of undue delay in the prosecution of the complaint, were premature and unfounded. [Paragraph 70]. There was accordingly no basis for the granting of the declaratory orders or for censure of the Law Society. Nor did the circumstances call for an intervention or takeover by the court. Mothle J ruled that the Law Society should be allowed to complete its enquiry, and dismissed the application.

JUDGE CLIVE PLASKET

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 3 October 1957

BA, University of Natal, Pietermaritzburg (University of KwaZulu – Natal) (1981)

LLB, University of Natal (1982)

LLM, University of Natal (1986)

PHD, Rhodes University (2003)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (December 2010 – March 2012, September 2012 – May 2013, December 2015 – March 2016, July 2017 – May 2018).

Judge. Eastern Cape High Court, Grahamstown (June 2003 – present)

Acting Judge, Eastern Cape High Court (2001 – 2003)

Associate, Nettletons Attorneys (1998 – 2003)

Faculty of Law, Rhodes University

- Associate Professor (2000 – 2003)
- Senior Lecturer (1998 – 1999)
- Temporary Lecturer and Lecturer (1983 – 1986)

Legal Resources Centre, Grahamstown

- Acting Director, Director (1992 – 1997)
- Attorney (1991 – 1997)

Cheadle Thompson & Haysom

Associate Partner (1990 – 1991)

Professional Assistant (1989 – 1990)

Articled Clerk (1987 – 1989)

Founder member, member of steering committee, Administrative Justice Association of South Africa (2012 – 2016)

Member, Commonwealth Magistrates and Judges Association (2007 -)

National Association of Democratic LAwyers, Johannesburg branch

Branch chairperson (1989 – 1990)

Member (1998 – 1991)

Member and secretary, Lawyers for Human Rights, ietermaritzburg branch (1983 – 1984)

Rhodes University

Member, Board of the Faculty of Law (2006 -)

Member, University Council (2008 – 2012)

Trustee, Integrated Community Development Programme Trust (2004 -)

SELECTED JUDGMENTS

PRIVATE LAW

ENGELBRECHT v MERRY HILL (PTY) LTD AND OTHERS 2006 (3) SA 238 (E)

Case heard 29 November 2005, Judgment delivered 11 January 2006

This was an urgent application for an interim interdict to restrain the first respondent from transferring two erven to the second respondent and the third respondent, pending an application for a final order. The relief was premised on the existence of a contract of sale by instalments of the properties entered into between the applicant as purchaser and the first respondent as seller. The point in issue was whether, when the first respondent purported to cancel the sale of the properties to the applicant, he complied with s 19(2)(c) of the Alienation of Land Act. The section requires a seller of immovable property who decides to take action consequent upon a breach of contract by the purchaser to furnish, in the notice required by s 19, 'an indication of the steps the seller intends to take if the alleged breach of contract is not rectified'.

Plasket J held that the only issue in dispute was whether the first respondent's notice to the applicant complied with s 19(2) of the Act, by indicating the steps that he intended taking against the applicant in the event of a failure on the applicant's part to rectify the breach. [Paragraphs 13 – 14] Plasket J held that there was "no difficulty in requiring unequivocal conduct on the part of the seller when he or she gives notice in terms of s 19". [Paragaph 20] Plasket J held that informing the purchaser of the choices available to the first respondent in terms of the contract did not constitute the giving of an indication of what steps the first respondent intended to take:

> "[I]n effect, all he did was to remind the applicant of what the contract said of the possible consequences of breach on the part of the applicant. To hold that this would suffice for compliance with s 19(2)(c) would dilute the section to such an extent as to make it a meaningless formality and it would provide no protection, reasonable or otherwise, to a purchaser, as intended by the Legislature. ..." [Paragraphs 22 – 23]

Plasket J held further that no indication was given to the applicants of the steps that the first respondent intended to take pursuant to the applicant's breach of their contract, as required by s 19(2) *(C)* of the Act, and that, as a result, the notice was invalid. [Paragraphs 24 – 25]. The application was granted.

The decision was overturned on appeal: **Merry Hill (Pty) Ltd v Engelbrecht 2008 (2) SA 544 (SCA)**.

ADMINISTRATIVE JUSTICE

MINISTER OF HOME AFFAIRS V PUBLIC PROTECTOR 2018 (3) SA 380 (SCA)

One Mr Marimi had been employed by the Department of Home Affairs and stationed at the South African embassy in Cuba. Following complaints about his conduct by the Cuban government, he was recalled to South Africa and his cost of living allowance stopped. Following a complaint, the Public Protector found maladministration by the Department in relation to Mr Marini's transfer, and

remedial action was ordered. Appellant brought an application to have the report set aside, but this was dismissed in the High Court.

On appeal, Plasket AJA (Lewis, Majiedt and Willis JJA and Mothle AJA concurring) considered the basis for the review:

> "Review in terms of both the PAJA and the principle of legality stems from the rule of law. Section 33(1) and (2) of the Constitution as well as PAJA give effect to the rule of law in respect of only administrative action. The principle of legality gives effect to the rule of law in relation to all other exercises of public power, such as executive power." [Paragraph 27]

Plasket AJA held that an applicant does not have a choice regarding their avenue of judicial review:

> "[I]f the impugned action is administrative action, as defined in PAJA, the application must be made in terms of s 6 of PAJA; if the impugned action is some other species of public power, the principle of legality will be the basis of the application for review." [Paragraph 28]

Plasket AJA held that the decisions of the Public Protector did not constitute administrative action, and therefore that PAJA did not apply to the review of exercises of power by the Public Protector. Instead, the principle of legality applied to such reviews. [Paragraphs 34 – 37].

> "It does not matter in this case that the application for the review is based on the principle of legality rather than on PAJA. No procedural differences arise and the grounds of review that apply in respect of both pathways to review derive ultimately from the same source – the common law …" [Paragraph 38]

Plasket AJA considered and rejected the challenges to the Public Protector's findings. [Paragraphs 39 – 55] The appellants having failed to establish any of the grounds of review, the appeal was dismissed.

In **M Murcott and W van der Westhuizen, "Administrative Law", *Juta's Quarterly Review of South African Law,* 2018 (1)**, the authors approve of Plasket AJA's "careful characterisation of the Public Protector's powers as not administrative in nature", but find the statement that it made no difference whether the review was founded in PAJA or legality, the authors find the statement "jurisprudentially unsound".

EHRLICH v MINISTER OF CORRECTIONAL SERVICES AND ANOTHER 2009 (2) SA 373 (E)

Case heard 24 April 2008, Judgment delivered 5 May 2008

The applicant, a sentenced prisoner and qualified karate instructor, brought an application to review and set aside the decision of the second respondent, the head of Mdantsane prison, to deny medium category offenders supervised access to the gymnasium in the maximum security section of the prison for the purposes of development programmes.

Plasket J held that section 195(1) of the Constitution bound those who, "like the second respondent, are public administrators, to 'the democratic values and principles enshrined in the Constitution', including the provision of services 'impartially, fairly, equitably and without bias'." [Paragraph 9] Plasket J further noted that one of the objects of the Correctional Services Act was to provide for the custody of prisoners under conditions of human dignity. [Paragraph 10]

Plasket J held that:

> "... [T]he applicant has represented himself throughout these proceedings. While the legal basis upon which the relief is sought should ordinarily be identified by the applicant, this rule cannot be applied rigidly and certainly not when a lay litigant represents himself or herself. " [Paragraph 36]

Plasket J held further that the decision by the second respondent was an administrative decision, and it was clear that PAJA applied. [Paragraphs 37 – 38] Plasket J held that the decision violated the right to lawful administrative action, as it was based on an error of law, the second respondent having erred in interpreting his powers – in particular, having "erred materially in believing that he had no discretion when in fact he had discretion." Plasket J found that this error was material in that it resulted in him not applying his mind properly to the matter. The decision was set aside. [Paragraph 40]

NTAME v MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE AND TWO SIMILAR CASES 2005 (6) SA 248 (E)

Case heard 4 December 2004, Judgement delivered 11 January 2005

In the first application in this case ('the *Ntame* case') the applicant had been in receipt of a disability grant for 11 years until it was stopped in December 1996 without notice to her. In June 1999 it was reinstated and she was given an amount of R1 100 as 'back pay'. She applied for an order setting aside the suspension of her grant and an order directing the respondent to pay the amount of R13 460 that was owed to her. In the second and third matters ('the *Mnyaka* cases') the applicant had applied in June 1997 for a maintenance grant. By the time that maintenance grants were phased out in April 2001, she had still not had a response. Ms Mnyaka applied for an order directing that the respondent's failure to consider the application be declared unlawful.

Plasket J began by considering whether the claims for the payment of a disability grant, in the first case, and for the payment of maintenance grants, in the second and third cases, had prescribed. Plasket J found that in all three cases the debt would have prescribed if the respondent had opposed and taken the point in answering papers. [Paragraphs 8 – 9] After finding that the common law rule of delay, rather than the relevant provisions of PAJA, applied, Plasket J held:

> "[T]he conclusion is inescapable, in my view, that the delays from the time of the causes of action arising to the launching of all three of these applications, when viewed objectively, are unreasonably long, even though, once the applicants were placed in contact with attorneys who could advise them and represent them, the steps that followed were taken with reasonable haste. I have, in the exercise of my discretion, decided to condone the unreasonable delays ...." [Paragraph 24]

Plasket J held that the issue of condonation had to be considered "mindful of the fact that s 34 of the Constitution enshrines a fundamental right of access to court and that s 39(2) enjoins a court either interpreting legislation or developing the common law or customary law to 'promote the spirit, purport and objects of the Bill of Rights' ..." [Paragraph 25]

> "The applicants are unsophisticated people with little formal education. When this is taken together with their poverty, their access to court is severely hampered and a more lenient

> approach to the time they took to find attorneys to advise them is warranted. ....." [Paragraph 26]

Plasket J held that as Ms Ntame had not been afforded a hearing prior to the stopping of her disability grant, the administrative act of stopping it was performed in a procedurally unfair manner, and was thus invalid. Regarding Ms Mnyaka's complaint, Plasket J held that a failure to exercise a discretion when a duty is placed on an administrative decision-maker to do so violated the right to lawful administrative action. [Paragraphs 35 – 36] Plasket J held that simply declaring the impugned acts inconsistent with the Constitution would be insufficient, and that it was necessary to order payment of the withheld amounts, plus interest, and compelling decisions to be taken regarding qualification for the maintenance grant." [Paragraphs 41, 43]

CIVIL PROCEDURE

HARVEY v NILAND AND OTHERS 2016 (2) SA 436 (ECG)

Case heard 15 October 2015, Judgment delivered 3 December 2015

This was an urgent application to interdict the first respondent from breaching fiduciary duties owed to a Close Corporation, of which applicant and first respondent were the only members. One of the main issues was the striking out of an annexure to the founding affidavit, being a print out of Facebook communications by the first respondent. It was accepted on the papers that the first respondent's Facebook page had been hacked, and first respondent argued that the annexure should thus be struck out as unlawfully obtained evidence [paragraphs 13 – 15].

Plasket J identified the common law rule as being that all relevant evidence not rendered inadmissible by an exclusionary rule was admissible, irrespective of how it was obtained, subject to a discretion to exclude unlawfully obtained evidence [Paragraph 38]. Plasket J held that the Electronic Communications and Transactions Act, being silent on the issue of evidence obtained in violation of the Act, allowed for the admission of unlawfully obtained evidence subject to the direction of the court to exclude it. [Paragraph 43]

Plasket J held that in exercising the courts discretion, all relevant factors had to be considered, including the extent to which, and the manner in which, a party's right to privacy (or other right) had been infringed, the nature and content of the evidence concerned, whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means, and the Constitution did not countenance "unrestrained reliance" on the argument that "the ends justify the means". [Paragraph 47].

> "The relevant material that was accessed ... established that Niland had been conducting himself in a duplicitous manner, contrary to the fiduciary duties he owed to Huntershill. That duplicity was compounded by the fact that he had denied that he was acting in this way and had also undertaken not to do so. In these circumstances, his claim to privacy rings rather hollow." [Paragraph 49]

Plasket J held that the lawful means available to the applicant of obtaining the evidence were "more apparent than real", as he would not have been able to bring proceedings without the evidence. [Paragraphs 50 – 51]

> "it seems to me that right-thinking members of society would believe that Niland's conduct, particularly in the light of his denials and the undertakings that he gave, ought to be exposed and that he ought not to be allowed to hide behind his expectation of privacy. It has only been invoked, it seems to me, because he had something to hide." [Paragraph 52]

The annexure was admitted, and an interdict was granted.

MEDIA COVERAGE

Speech reported at Rhodes University Faculty of Law:

> "[Judge Plasket] raised 'deference' and the complex dimension it added to the dispensation of administrative justice. Essentially he argued that deference as a concept is a much misused and misunderstood concept in administrative law. He considered that courts could not 'defer' in respect of review for unlawfulness, unreasonableness, or procedural unfairness. Essentially, he argued, all of these grounds are a reason for setting an administrative decision aside, no matter what amount of deference is argued.
>
> In considering cases where deference has been referred to by a court, Judge Plasket noted that its application has never changed a result. He praised the courts and administrative bodies in recent democratic history for remaining objectively independent within their jurisdiction by making decisions based on the facts of the matters presented. …
>
> In concluding, Plasket used these cases to demonstrate that the concept of 'deference' is little more than a short-hand way of saying to the parties to a dispute, the public at large and perhaps mostly directed at politicians that: the judge knows his or her role, understands the difference between review and appeal, and is alive to the doctrine of separation of powers. Apart from this role, Plasket closed by suggesting that the term was 'essentially meaningless'."

- Lelo Macheke and Helen Kruuse, Judge Plasket puts deference in administrative law into context (16 October 2017). Available at https://www.ru.ac.za/law/latestnews/judgeplasketputsdeferenceinadministrativelawintocontext.html

Interview for LRC Oral History Project, 2 September 2008. Available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdft/AG3298/AG3298-1-151-text.pdf

> "My parents were not particularly liberal, I suppose, but had a well-developed sense of right and wrong, and even though they were products of their time. And I suppose all of those things helped a bit, but it was really at university where…and I studied History that I started realising that something was wrong. And the moment one starts studying, to start…the moment one starts studying South African history, and it's not the version that you were given at school, your eyes start to open, so I suppose that's really where I started seeing things differently to…to I suppose, many of my contemporaries." [Page 1]

SELECTED ARTICLES

"HUMAN RIGHTS IN SOUTH AFRICA: AN ASSESSMENT" 2006 OBITER

This article examines the development of South Africa's progress to democratic government from the Langa Massacre of 1985 until 2005. The author argued that "it is as important to stop every now and again to take stock and to asses our progress" in South Africa's transition to democracy. [Page 2] The article discusses South Africa's constitutional system and pre-constitutional history of discriminatory and repressive practices, before briefly discussing the drafting of the Constitution. The article then discusses the right to life, and how the decision in *S v Makwanyane* helped to establish the fundamental principle of constitutional jurisprudence "that those who exercise public power are required by the Constitution to justify their exercises of power on rational grounds." [Pages 9 - 10]

The article then considers detention without trial, and how the fundamental right to freedom and security of the person provided in section 12 of the Constitution now "makes it impossible in all but the most limited circumstances." [Page 13] The author notes the central role played by the rules of administrative law "in the efforts of human rights lawyers to control these exercises of power, as well as the other invasive powers enjoyed by State functionaries … What made the task of controlling these excesses of power all the more difficult was that a sovereign parliament could oust the jurisdiction of the courts if it wished to, could provide that these types of powers could be exercised without giving those affected by them a hearing and it could empower its officials with the broadest and most unrestrained types of discretions. …" [Pages 14 – 15] The author proceeds to argue that ouster clauses are now rendered unconstitutional [page 16], and concludes that the Bill of Rights has resulted in "a legal system that is at the same time more caring and more rational, and it would be evident to any observer that the country … is a far better place now than it was 20 years ago, or 10 years ago for that matter." [Page 17]

''ADMINISTRATIVE JUSTICE AND SOCIAL ASSISTANCE" (2003) 120 South African Law Journal 494

The author argues that "there are immense problems in the system of social assistance, resulting in hardship and privation for many of the most vulnerable and marginalized members of society." One of the major causes is identified as the fragmentation of the system of social assistance by apartheid, and the resulting need to integrate the different systems into one system for each of the nine provinces.

> "The hardships that this process has visited on many poor people, as well as corruption, gross inefficiency and often appallingly callous attitude on the part of officials to those who require social assistance, has meant that social assistance issues have become something of a focal point for those lawyers and human rights activists who are interested in seeing that proper is given to the socio-economic rights that form an important part of the Bill of Rights." [Page 495]

After considering the constraints on administrative law in the pre- Constitutional era (Pages 495 - 496), the article then reviews the application of administrative law principles in social assistance cases. (Pages 497 - 499). The author differs with the approach of Conradie JA in *Jayiya v MEC for Welfare, Eastern Cape and another* towards the relief that is possible under section 8 of PAJA (page 504). The article discusses procedural fairness in the context of social assistance cases (pages 504 - 506), and then deals with the issue of reasonableness:

> "There appear to be two obvious aspects of the administration of the Social Assistance Act that are vulnerable to challenge on the basis of the right to reasonable administrative action. The first is the decision as to whether an applicant for a disability grant is ... disabled for purposes of the Act. The second is the decision to categorize a disabled person as either permanently ... or temporarily disabled." (Page 508)

The article also deals with the requirement of giving reasons for decisions, and issues surrounding standing, deceased estates, failures to comply with orders and administrative inefficiency, before concluding:

> "It may be tempting to view the cases discussed ... as a limited number of isolated claims by individuals ... Such a view would ignore that fact that each applicant's problem is replicated over and over ... [E]ach case in this field – and not only those in which extended standing was recognised – has either had an impact on a significant number of people, or will positively affect a large number of people when the administration either complies with judgments or is forced to do so..." (Pages 522 - 523)

> "Secondly, it is significant that it is in the field of social assistance that the extended standing provisions of the Constitution have been given life ... [T]he cases dealing with standing may be seen as cases that vindicate and extend the rule of law and constitutionalism. ... Thirdly, the cases illustrate the vitality and importance of administrative law as a means of ensuring that official action complies with the Constitution, its commitment to the rule of law, and the values of accountability, responsiveness and openness. ... " (Page 523)

JUDGE OWEN ROGERS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 22 October 1958.

BA, University of Cape Town (1982)

Honours, University of Cape Town (1983)

LLB, University of Cape Town (1985)

CAREER PATH

Acting Justice of Appeal, Supreme Court of Appeal (2017 – 2019)

Judge, Competition Appeal Court (2016 -)

Judge, Western Cape High Court (2013 -)

Member, Cape Bar (1988 – 2012)

Articled clerk, Sonnenberg Hoffman & Galombik (1986 – 1987)

Member, Advisory Panel, South African Judicial Education Institute.

Honorary Judicial Member, Society of Tax and Estate Practitioners (2014 -)

Trustee, Supera Moras Trust (Wynberg Boys High School) (2011 -)

SELECTED JUDGMENTS

PRIVATE LAW

ROAD ACCIDENT FUND v MOHOHLO 2018 (2) SA 65 (SCA)

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

The main question in this case was whether the respondent was entitled to damages for loss of support due to the death of her nephew (Otsepeng). The argument was not based on a blood relationship, but on the basis of having taken the deceased into her home and looked after him as her own son. Respondent had testified that Otsepeng had continued to live with her and provide her with financial support [paragraphs 7 – 9]

Rogers AJA (Leach JA and Meyer, Mokgohloa and Makgoka AJJA concurring) held that the Court had "on several occasions in recent years considered the extension of claims for loss of support to persons who do not fall within categories recognised by the common law". [Paragraph 10]. Rogers AJA held that whilst the legal convictions of the community are not static, and that "ideas of morals and justice may not, in general, insist on support between more distant relatives", it did not follow "that the same approach should be followed where the blood relationship has been fortified by additional circumstances." In dealing with the issue, it as necessary to have regard to the values underlying our Constitution, one of which was ubuntu. [Paragraph 12] Rogers AJA found that it was also necessary to consider that, in terms of s 211(3) of the Constitution, the court must apply customary law when that law was applicable, subject to the Constitution and any legislation that specifically deals with customary law." [Paragraph 13]

Rogers AJA held that whilst as no expert evidence as to customary law had been led,

> "[T]he plaintiff testified as to what was required by her culture and her evidence was not put in issue. It may well be that, once she agreed to care for Otsepeng following family consultation, she had by customary law a legal duty to support him but it is unnecessary to go so far. On her evidence, she at least felt under a duty to do so. She started caring for him when he was still an infant and continued to maintain him until he became self-supporting. Her behaviour, and the way Otsepeng reciprocated when he became an adult, gave expression to ubuntu. For all practical purposes the plaintiff adopted him, even though according to her there was no formal process of adoption in her culture. The de facto relationship between them was that of mother and child. This de facto relationship was every bit as real as the de facto life partnerships which our courts have accepted as giving rise to reciprocal duties of support." [Paragraph 14]

Rogers AJA held that it would be consistent with the legal convictions of the community to recognise a reciprocal duty of support between the plaintiff and Otsepeng. [Paragraph 17]. Rogers AJA rejected na argument that this decision would "open the floodgates" to similar claims against the RAF [paragraphs 18 – 19]. The appeal was dismissed with costs.

INTERCAPE FERREIRA MAINLINER (PTY) LTD AND OTHERS V MINISTER OF HOME AFFAIRS AND OTHERS 2010 (5) SA 367

Case heard 8 - 9 June 2009, Judgment delivered 24 June 2009

This case concerned an application brought by several companies who occupied office space nearby a refugee reception office run by the Department of Home Affairs (DoHA). The applicants contended that the use of the premises by the DoHA contravened the zoning scheme of the Municipality of Cape Town (City) and constituted common-law nuisance.

Rogers AJ held that the term "nuisance" connoted "a species of delict arising from a wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference." Wrongfulness was to be assessed, as in other areas of our delictual law, by the criterion of objective reasonableness, where considerations of public policy are to the fore..." [Paragraph 142] Rogers AJ held that "[t]he sacrificing of individual rights in the public interest should ordinarily be governed by statute", and that without such legislation a court should be slow to regard an interference with individual rights as justifiable by public welfare.

> "Where interference with private rights is contained in a law of general application its constitutionality can be tested and it is open to the State to attempt to justify any derogation from fundamental rights on the grounds set out in s36 of the Constitution. ... In an individual case such as the present one which arises under common law, the court is not well-placed to explore all the issues relevant to the balancing of governmental objectives and individual rights, and indeed neither side advanced the sort of evidence which could be expected if the constitutional validity of legislation were in issue." [Paragraph 166]

Rogers AJ accepted that the activities of a refugee office had an important social utility, but found that the conditions were "so far in excess of what neighbours should have to bear that the social utility of the Department's conduct cannot neutralise the unreasonableness of its use of the premises", and that the nature and extent of the ongoing inconvenience experienced by the applicnats was objectively unreasonable [Paragraphs 167 - 168]

An order was granted declaring that the operation of the refugee office was unlawful because its use had not been approved by the Urban Planning Committee, and that it constituted common-law nuisance. The DoHA was given just over three months to cease activities on the premises.

COMMERCIAL LAW

LORCOM THIRTEEN (PTY) LTD v ZURICH INSURANCE COMPANY SOUTH AFRICA LTD 2013 (5) SA 42 (WCC)

Case heard 8 – 9 April 2013. Judgment delivered 29 April 2013.

Plaintiff sued the defendant insurer n terms of an insurance policy, issued by the defendant, in respect of a fishing vessel that had been lost at sea. At trial, the two issues to be determined were whether the plaintiff had an insurable interest, and whether the loss fell within the ambit of the cover. Plaintiff argued

that it had an insurable interest on one or more of the grounds that: it was the sole shareholder of the owner of the vessel; it was vested with ownership of the vessel in terms of a purchase agreement; it had a right of use of the vessel; and it held the relevant fishing permit. [Paragraph 18]

Rogers J considered the law on what constitutes an insurable interest, both in terms of general principle and South African case law [paragraphs 21 -] Rogers J held that it was well established that a person other than an owner could have an insurable interest in relation to an asset, but that in the case of a non-owner the insurable interest (ie the extent to which they would suffer financial harm from damage to or destruction of the asset) would often be less than the market value of the asset. [Paragraph 36]. Therefore "one cannot say, merely because the insured party has an insurable interest in an asset, that he has an insurable interest sufficient to sustain cover of the kind for which the particular policy provides in respect of the asset." [Paragraph 37]

Rogers J held that the contract did not require the plaintiff to show that it had suffered patrimonial loss. The issue was rather whether plaintiff "had an interest sufficient to render enforceable a policy providing cover measured with reference to the value of the vessel." [Paragraphs 49 - 50]. Rogers J held that:

> "[T]he combination of Lorcom's right of use, its well-founded expectation that such use would continue until it became the owner of the vessel, and its well-founded expectation that Crous by virtue of his contract with Theart would procure that Lorcom became the owner of the vessel by the effective date … gave Lorcom an insurable interest in cover measured with reference to the market value of the vessel." [Paragraph 56]

Judgment was granted in favour of the plaintiff.

The judgment is discussed by **JP van Niekerk, "Insurance Law",** ***Annual Survey of South African Law,*** **Vol 2013, Issue 1**, who describes the judgment as "wide-ranging and at times groundbreaking and controversial".

The judgment is also discussed by **M.F.B Reinecke, "Insurable Interest",** ***TSAR*** **2013 (4),816 - 824**, who praises the judgment for being "a thoughtful contribution to the debate on insurable interest in the context of property insurance." [Page 816]. The author argues that while the decision is beyond critique, that is not so for the court's reasoning and obiter dicta [page 817]. The author argues that "[to] divorce idemnity insurance from the principle of indemnity as a basic premise cannot be supported. It would fly in the face of ages of history, long – standing precedents and international thinking." [Page 820]. The author further suggests that "the court's interpretation of the marine policy … to men that it was intended to make provision for payment simply in the event of physical loss of the vessel irrespective of patrimonial loss is not convincing." [Page 821].

CIVIL AND POLITICAL RIGHTS

IRVIN & JOHNSON LTD V TRAWLER & LINE FISHING UNION & OTHERS 2003 (24) ILJ 551 (LC)

The applicant sought an order declaring that the voluntary and anonymous HIV testing it sought to offer to its employees was outside the ambit of s 7(2) of the Employment Equity Act, or alternatively that such testing was justifiable under s 7(2). The applicant would have access to the statistics resulting from the testing, but would not have access to the names of the employees who submitted themselves to testing, nor to the results of the test.

Rogers AJ held that section 7 contemplated that an employer could form and act on its own view as to whether medical testing for conditions other than HIV infection were justifiable, whereas the justifiability of testing for an employee's HIV status had to be determined in advance by the Labour Court. [Paragraph 15]. Rogers AJ found that section 7 formed part of a chapter in the Act dealing with the prohibition of unfair discrimination. One of the main purposes of the Act being to "achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination", the purpose of section 7 seemed clear:

> "An employer should not unfairly discriminate against an employee on the basis that the latter suffers from some or other medical condition. One of the ways of reducing the likelihood of such discrimination is to limit the circumstances in which an employer may ascertain the employee's medical condition through testing." [Paragraph 18]

Rogers AJ found that the testing in the present case did not have the purpose of enabling the applicant to ascertain the HIV status of any identifiable employees, but considered whether this would nevertheless be its effect.

> "During argument I expressed to [counsel for the applicant] a concern that in certain of the job categories … the numbers were very small. In response, he stated that the applicant was willing to combine persons … in a single group for statistical purposes or alternatively to eliminate the distinction between shore-based and seagoing staff for purposes of receiving information on the age group 16 to 25. It seems to me that either of these adjustments would be sufficient to eliminate any reasonable possibility that an individual's HIV status could be deduced from the statistical information." [Paragraph 26]

Rogers J held that there was "good reason to conclude that the legislature did not intend section 7 to apply to voluntary testing", and that medical testing was not itself an act of discrimination. [Paragraph 33] Rogers AJ found that section 7 as a whole applied only to compulsory testing, and not to voluntary testing. Provided testing is truly voluntary, it did not matter whether the initiative for testing came from the employer or the employees. [Paragraph 36] Rogers AJ concluded that the testing in question did not fall within the ambit of section 7(2), and that the applicant did not require the authority of the Court before allowing its employees to be tested. [Paragraph 42]

ADMINISTRATIVE JUSTICE

SHELFPLETT 47 (PTY) LTD V MEC FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING AND ANOTHER 2012 (3) SA 441 (WCC)

Case heard 22 – 23 November 2011, Judgment delivered 28 February 2012

Applicant was seeking to develop a retirement village, and submitted an application for the amendment of a Regional Structure Plan (RSP) to the MEC. The RSP designated the applicant's land in question for "recreation" use. Applicant sought to amend this to "township development" use. Although supported by the municipality, the MEC refused the application. Applicant sought to review and set aside the MEC's decision.

Rogers AJ found that the RSP had been prepared and approved at a time "when the full panoply of apartheid legislation, including the Group Areas Act … was in force", and noted that the applicant attached the validity of the RSP as "a document rooted in the policy of apartheid" that contemplated and promoted the development of the area in question "from the perspective and to the benefit of the white group", and was unconstitutional. [Paragraph 33]

After considering Constitutional Court jurisprudence [paragraph 36], Rogers AJ held that in the RSP, "[a]partheid thinking and its effects are apparent, at least explicitly, only where land use by humans is under discussion", and rejected the MEC's contention that there was not offensive apartheid social planning. [Paragraphs 38, 45],

> "In laying down guidelines for the future spatial development of an area … the authors of the guide plan had to strike a balance between residential development and other uses. It is apparent that this is what the authors of the KWP RSP were trying to do. However, they struck this balance on assumptions regarding township development that were … rooted in apartheid policy." [Paragraph 45]

Rogers AJ found that there was no suggestion that the RSP had ever been amended in order to give effect to a new vision in accordance with the values of the Constitution, [Paragraphs 49 - 50] and was thus "an instrument that violates the founding values of human dignity and non-racialism in s 1 of the Constitution and the fundamental rights of equality and dignity in ss 9 and 10 of the Constitution." [Paragraph 51] The RSP was declared invalid. Rogers AJ found that considering the remaining grounds of review, had the validity of the RSP been upheld, the application would have been dismissed.

CRIMINAL JUSTICE

S v TS 2015 (1) SACR 489 (WCC)

Case heard 29 October 2014, Judgment delivered 29 October 2014.

The accused, aged 13 when the offence was committed, had been charged with culpable homicide, having stabbed her father and caused his death. The accused pleaded guilty and was sentenced to five years compulsory residence in a Child Youth Centre. On automatic review, questions were raised about whether reports by a psychologist and psychiatrist were sufficient to rebut the onus on the state to overcome the presumption that the accused lacked criminal capacity. The accused was described in the reports as suffering 'borderline mental retardation' [paragraph 4]. Questions were also raised about whether the accused's statement in terms of section 112(2) of the Criminal Procedure Act was sufficient to satisfy the court of her guilt beyond a reasonable doubt; and over the severity of the sentence.

Rogers J (Saldanha J concurring) held that "at least in relation to children, criminal capacity is relative rather than absolute, in the sense that a child could notionally be criminally capable in respect of one particular crime but not criminally capable in respect of another." [Paragraph 15]. Noting that "hardly any of the cases dealing with the criminal capacity of children are concerned with crimes of negligence", [paragraph 18], Rogers J examined delictual cases relating to capacity, and found that, although the issue did not need to be decided finally in this case, there was "much to be said for the view that the subjective frailties of the child find their proper place in the assessment of criminal capacity. If the child has criminal

capacity (ie can be held accountable as an adult would), negligence is tested objectively with reference to the standard of the reasonable person." [Paragraph 23].

"If in our law we were, in cases involving children, to judge negligence by the standard of the reasonable child of the same age, it appears inevitable that the threshold enquiry into delictual or criminal capacity would also have to be adapted. If the child is only to be judged by the standards of the reasonable child of the same age, capacity would logically have to be directed at the question whether the child in question had the same capacities for appreciating wrongfulness, and acting in accordance with such appreciation as the reasonable child of the same age." [Paragraph 27]

Rogers J held that because the magistrate could not properly have been satisfied that the accused had criminal capacity, she should not have convicted the accused on the basis of her guilty plea. [Paragraph 40]. The plea explanation was also not sufficient to satisfy the magistrate that a defence of private defence could not have succeeded [Paragraphs 41 – 44]. The conviction and sentence were set aside, and the case was remitted to the court *a quo*.

S Walker, in **"Determining the criminal capacity of children aged 10 to 14 years: a comment in light of S v TS 2015 (1) SACR 489 (WCC)", 2015, *SACJ,* Vol 28 (3),** praises the court's interpretation of section 11(1) of the Child Justice Act. Although the author welcomes the interpretation, she notes that it is not entirely clear on what basis the court considered that it was entitled to depart from the wording of the statute. [Page 342 ff]

L Jordaan, "General Principles and Specific Offences", 2015, *SACJ,* Vol 28 (3), commends Rogers J for "providing clear guidelines to magistrates in the exercise of their responsible task of assessing the blameworthiness of juvenile offenders." [Page 375].

MEDIA COVERAGE

Quoted comments about advocates' fees:

"Last year, Owen Rogers, a senior counsel and former chairperson of the Cape Bar, wrote an article in the journal Advocate, in which he said the silk system (or conferral of senior counsel status on advocates) puts "significant upward pressure on the cost of litigation".

Rogers quoted an English judge, Sir Gavin Lightman, who said that the "granting of silk was tantamount to a licence to print money" and that "the silks' inflated fees became the benchmark for juniors' fees".

Rogers argued that, while top advocates' fees were on par with those charged by top executives and auditors, this was a reflection of a "distorted pattern of remuneration" in which top executives earned disproportionately more than the rank and file.

"As members of an honourable profession, we should be distinguished by our absence, not our presence at this feeding trough," he wrote."

- http://www.lhr.org.za/news/2013/r45-000-day%E2%80%99s-work

SELECTED ARTICLES

'THE ACTION OF THE DISAPPOINTED BENEFICIARY' (1986) 103 SOUTH AFRICAN LAW JOURNAL 583

This article deals with the question of whether attorneys who prepare a will can be liable to a beneficiary of the will if, due to the attorney's negligence, the gift to the beneficiary is void. It notes two main categories of problems identified with the action of a disappointed beneficiary: first, issues relating to the recoverability of pure economic loss, liability for negligent advice and omissions, and the extent to which a party who is not privy to a contract may sue on the basis of an act which constitutes a breach of that contract. Second, the loss complained of takes the form of a failure to obtain a benefit. To establish such loss, "the disappointed beneficiary must prove that the testator intended to benefit him, and yet he must needs rely on something other than a valid will." [Page 584]

The article then examines case law from the United States, Canada, England, Australia, New Zealand and Germany, before concluding that "the action of the disappointed beneficiary has found favour in a number of foreign jurisdictions." [Page 594] The article then considers whether such an action could be accommodated in South African law, particularly under the law of delict. The article discusses the Appellate Division's decision in *Lillicrap* in detail:

> "Does *Lillicrap* mean, ... as its reasoning apparently implies, that the disappointed beneficiary's action must fail because, there being no contract between him and the attorney, the attorney owes him no duty? It is submitted that it does not. The court's reasoning has been subjected to trenchant criticism. Certainly it is difficult to understand how it can be said at this stage in our legal development that a person who renders professional services to another cannot be liable to the latter in the absence of a contract. This was certainly not the attitude of Rumpff CJ in *Administrateur, Natal v Trust Bank van Afrika Bpk* nor of any of the judges in *Siman & Co (Pty) Ltd v Barclays National Bank Ltd*, ... If in *Lillicrap's* case there had in fact been no contract, and the action had been brought in delict, it is inconceivable that the action would have failed." [Page 601]
>
> "Thus it is almost certain the ratio of *Lillicrap* will be restricted will be restricted to the proposition that where a relationship is governed by contract, a concurrent delictual action for the recovery of pure economic loss will not lie. ... This ... leaves the way open to recognise a duty in delict towards a third party whose relationship with the professional is not governed by contract. ..." [Page 602]

The article then considered policy factors in favour of such liability, and rejected a possible objection that allowing the action would undermine the Wills Act [Pages 602 – 603]. The author argues that "policy considerations justify the recognition of a legal duty resting on an attorney to a beneficiary to ensure, by the exercise of reasonable diligence and skill, that the beneficiary's inheritance is not frustrated by defective execution." [Page 604]

After examining the additional elements of delictual liability, the article concluded that "the Aquilian action can and should be extended to allow the disappointed beneficiary's claim." [Page 614]

MS FEZIWE RENQE

BIOGRAPHICAL INFORMATION

Date of birth: 10 November 1975

B.Proc, University of the North (Limpopo) (1997)

Post Graduate Diploma in Corporate Law, UNISA (2004)

Management Advancement Program, University of the Witwatersrand (2006)

Master of Laws in Intellectual Property Law, University of South Africa (2007)

CAREER PATH

Acting Judge of the High Court Eastern Cape Division

Bisho (May – July, October – December 2017; January – March 2018)

Grahamstown (August - September 2017)

Grahamstown and Port Elizabeth (January - March 2016)

Mthatha (October – November 2015)

Acting Judge of the High Court: Western Cape Division (April – June 2016).

Director; Renqe FY Incorporated (2015 -)

Director: Renqe Kunene Incorporated (2006 – 2015)

Legal Advisor, Department of Environment Affairs & Tourism (2000 – 2005)

Attorney, Seriti Mavundla & Partners (1999)

Candidate Attorney, Seriti Mavundla & Partners (1998)

Labour law Officer: National Entitled Workers Union (1998)

Member, Black Women Lawyers' Association (2018)

Member, Black Lawyers' Association (2018)

Member, Black Conveyancer's Association (2007)

Member, Northern Province Law Society (1999)

Member: Advisory Group of Lukhanyiso Charity, Grahamstown (2008 – 2015)

SELECTED JUDGEMENTS

PRIVATE LAW

KEMP V SHOPRITE CHECKERS (PTY) LTD T/A SHOPRITE DESPATCH (2740/2014) [2016] ZAECPEHC 19 (5 MAY 2016)

Case heard 18 February 2016, Judgment delivered 5 May 2016

Plaintiff claimed for delictual damages which arose from injuries sustained after the plaintiff slipped and fell on the floor at the butchery section of the defendant's store. The main issues before the court was whether plaintiff suffered injuries as a result of the defendant's negligence and whether the defendant was aware of the potential danger and took precautionary measures to prevent the risk of harm.

Renqe AJ held that from the evidence which showed that the floor was wet, there was a foreseeable possibility of someone slipping and possibly getting injured which the defendant should have foreseen. Further, it was held that as the incidence was reasonably foreseeable, the defendant should have taken reasonable steps to safeguard against the incidence. The failure to do so therefore showed negligence on the defendant's part. Regarding the defendant's counter pleading, the judgement held that the defendant had failed to show contributory negligence by the plaintiff. Renqe J therefore held the defendant liable for the damages to be proved by the plaintiff.

ADMINISTRATIVE JUSTICE

FORTUIN V CHURCH OF CHRIST MISSION OF THE REPUBLIC OF SOUTH AFRICA 2016 JDR 0821 (ECP)

Case heard 4 February 2016, Judgment delivered 5 May 2016

This was an application to review the decision of the respondents to "disfellowship" the applicant from his pastoral duties as an ordained minister, due to his divorce from his first wife and remarriage. Respondents raised three points in limine: that the court lacked jurisdiction, as the impugned decision had been taken in Pretoria; that there had bene a misjoinder of second and third respondents; and that the court lacked the powers to determine religious disputes.

Renqe AJ held that the decision in issue had been confirmed and ratified in Port Elizabeth, and therefore the court had jurisdiction in terms of the Superior Courts Act, as the cause of action arose within its jurisdiction. [Paragraph 15]. Renqe AJ further rejected the argument of misjoinder. [Paragraph 16]. Regarding the question of whether the court could exercise review authority over religious disputes, Renqe AJ held:

> "In my view there is ample authority in support of the proposition that courts are empowered to interfere with the decision made by a tribunal where the fundamental principles of fairness have been flouted. The issue to be taken into consideration is whether or not the tribunal was competent to make that decision and whether it complied with the requirements of procedural and substantive fairness." [Paragraph 19]

Renqe AJ found that the evidence supported applicant's claim that there had been no hearing, in violation of the church's constitution. [Paragraph 21]. Respondents had failed to comply with their own Constitution, and applicant had made out a case for the relief sought. The decision to disfellowship and/or suspend the applicant was set aside.

CIVIL PROCEDURE

SPECIAL INVESTIGATING UNIT V MEC FOR THE DEPARTMENT OF EDUCATION, EASTERN CAPE 2018 JDR 0237 (ECG)

Case heard 23 November 2017, Judgment delivered 20 February 2018

At issue was whether the plaintiff's particulars of claim were vague and embarrassing and should be struck out.

Renqe AJ considered the law relating to exceptions [paragraphs 12 – 15], and found that the particulars of claim did not fall to be struck out.

> "[I]t is my view that the plaintiff's claim and the material facts are unequivocally set out in the particulars of claim to enable the second defendant to plead. The grounds upon which the plaintiffs rely upon are clear and are sufficient in law to support the action…. I have looked at the entire particulars of claim and cannot find any vagueness or embarrassment that would lead to any form of prejudice to the excipient. In all the grounds raised by the excipient, I am not satisfied that it has discharged the required onus of proof for this court to uphold the exception." [Paragraph 21]

The exception was therefore dismissed.

CRIMINAL JUSTICE

S V LUNA 2017 JDR 1470 (ECM)

Case heard 25 August 2017, Judgment delivered: 5 September 2017.

Appellant was convicted of raping an 8 – year old girl and sentenced to life imprisonment in the Regional Court. On appeal, the issue was whether the state had established the appellant's guilt beyond a reasonable doubt, and whether the sentence was disproportionate.

Renqe AJ (Mbenenge AJ concurring) noted that the state's case rested on the evidence of a single child witness [Paragraph 16]. However, the complainant's version of the rape

> "was clear and straight forward. She did not contradict herself and remained unshaken under cross-examination. It is evident that the complainant had a good recollection of and was able to narrate the event very well. She was intelligent enough to answer the questions that were put to her even though she was a child witness." [Paragraph 18].

The complainant's evidence was corroborated by her mother.

> "Much was made by the appellant's counsel of the fact that the complainant had to be beaten up before reporting that she had been raped by the appellant. It is widely accepted that there are many factors which may inhibit a rape victim from immediately disclosing the assault. It is clear in this matter that the complainant feared the consequences of disclosure, given the fact that she had been threatened by the appellant. There was thus nothing unusual about the complainant's behaviour of not immediately reporting the appellant. No other cogent reason was advanced before us against the trial court's credibility finding in respect of the complainant, its assessment of her evidence and the rest of the State's version." [Paragraph 19].

By contrast, Renqe AJ was dissatisfied with the appellant's version, and found his account of events "far from convincing." [Paragraph 22]. Renqe AJ found that the sentence imposed by the court a quo was fully justified. [Paragraph 34]. The appeal was thus dismissed.

MS ONICA VAN PAPENDORP

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 18 December 1967

B. Juris, University of Port Elizabeth (1988)

LLB, University of Port Elizabeth (1990)

LLM, UNISA (2011)

CAREER PATH

Acting Judge, Eastern Cape High Court (Port Elizabeth and Grahamstown January – March 2015, April – June 2016, October – December 2016, Port Elizabeth and Mthatha April – June 2017, June 2017)

Chairperson of Association of Regional Magistrates of Southern Africa, Eastern Cape

Facilitator, South African Judicial Education Institute (2013 –)

Regional Magistrate, Queenstown (2010 – Present)

District Magistrate, Queenstown (2003 – 2010)

Acting Magistrate, Mdantsane (2003)

Acting Magistrate, Queenstown (April 2003)

Acting Magistrate, Special Court Ezibeleni (2002 – 2003)

Attorney, Van Papendorp Attorneys (2001)

Professional Assistant, Fiveash & Cloete Attorneys, Queenstown (2000 – 2001)

Attorney, Van Papendorp Attorneys, Wellington (1995 – 2000)

Professional Assistant, Minitzer Attorneys, Paarl (1994 – 1995)

Admitted as practicing Attorney, Grahamstown High Court (May 1993)

Candidate Attorney, Squire Smith & Laurie Attorneys King Williams Town/Bisho, (1990 – 1993)

Member, NADEL (2016 -)

Provincial Chairperson, ARMSA (2010 -)

SELECTED JUDGMENTS

PRIVATE LAW

POHL V WEYER [2016] ZAECPEHC 21

Case heard 28 April 2016, Judgment delivered 10 May 2016

Applicant sought the termination of a joint venture agreement and concomitant termination of the respondent's right to continue performing radiography services from a hospital laboratory, and to vacate the laboratory.

Van Papendorp AJ held:

"Having regard to the various letters and attempts to settle the differences between the parties and the subsequent failure to do so, which is attached to the Applicant's founding affidavit, it is clear that the relations between the two parties soured to the extent that any continued working relationship has become strained and almost impossible. On these grounds alone, the Applicant would be entitled to have terminated the joint venture agreement as she did.." [Paragraph 39]

"... I have concluded that the Applicant was well within her rights to terminate the agreement." [Paragraph 40]

The termination of the agreement was confirmed.

JUDGE EDWIN MOLAHLEHI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 25 October 1956

BA, National University of Lesotho (1983)

LLB, University of Witwatersrand (1986)

LLM, University of Georgetown, United States of America (1990)

CAREER PATH

Judge, Gauteng High Court (2017 -)

Judge, Labour Court (2007 – 2016)

Arbitrator, Mediator and Trainer, Independent Mediation Service of South Africa (2005 – 2007)

Board Member, Deputy Chairperson, Legal Aid South Africa (2006 – 2014)

Chairperson, Department of Labour Essential Services Committee (2006)

Chairperson, Public Service Sectoral Bargaining Council (1997 – 2007)

Panel Member, Tokiso Dispute Resolution (2006)

Part time Senior Commissioner, CCMA (2006)

Acting Judge, Labour Court (2001; December 2006 – March 2007)

Director, CCMA (2003 – 2005)

Executive Mayor, West Rand District (January 2001 – March 2003)

Chairperson, Department of Labour: Employment Condition Commission (2000 – 2003)

Director, Centre for Applied Legal Studies Community Dispute Resolution Trust, Wits University (1992 – 1994)

Lecturer, Vista University (1992)

African National Congress, Chairperson of Region (2001, one term)

Member of executive Committee, South African Civic Organisation (1992 – 1994).

SELECTED JUDGMENTS

LABOUR LAW

MTATI V KPMG SERVICES (PTY) LTD (2017) 38 ILJ 1362 (LC)

Case heard 3 October 2016, Judgment delivered 18 October 2016.

This was an urgent application in which the applicant sought to interdict the respondent from proceeding with a disciplinary hearing after she had resigned.

Molahlehi J held that:

> "[A]n employer has no authority or the power to discipline an employee who resigns from his or her employment once the resignation takes effect. In other words, where the resignation is with immediate effect, the employer loses the right to discipline the employee, also with immediate effect." [Paragraph 16].

Molahlehi J held that the issues raised were not moot, as the adverse finding made by the chairperson of the disciplinary hearing had a direct and ongoing impact on the right of the applicant "in relation to the power of the respondent to discipline her after she had resigned." [Paragraph 19]. Molahlehi J held that the giving of notice to terminate an employment contract did not take away the power of the employer to discipline an employee whilst they are serving the notice period. [Paragraph 20]. If an employer took disciplinary action against the employee and dismissed them prior to the end of the notice period, the employment relationship would be terminated, due to a dismissal for misconduct rather than resignation. [Paragraph 21].

> "The principle that the employment contract continues to exist during the notice period means that the employee … was entitled to terminate the contract by way of the unilateral act of resignation in the middle of the notice period despite the fact that the respondent had accepted the first resignation. That right is not conditional on the view of the respondent." [Paragraph 22]

Thus, the applicant's second letter of resignation changed the employment relationship by terminating the employment contract with immediate effect, which removed the respondent's right to proceed with the disciplinary hearing [Paragraph 24]. The disciplinary hearing was thus declared null and void, and set aside.

The judgment is criticised by **T Rapuleng and T Mila, "I Resign with Immediate Effect!", *Without Prejudice,* Vol 18, Number 8, September 2018**. The authors argue that the judge misunderstood the legal principles relating to resignation.

> "It is not sufficient for the employee to resign; he or she must also observe the notice period as agreed in the contract of employment, unless the employer agrees to waive its right to the notice period." [Pages 16 – 17].

GROOTBOOM V NATIONAL PROSECUTING AUTHORITY & ANOTHER (2010) 31 ILJ 1875 (LC)

Case heard 30 September 2009, Judgment delivered 27 January 2010.

Applicant, a prosecutor at the NPA, was serving a suspension with pay and awaiting the continuation of a pre-dismissal hearing. He applied for leave to study overseas but the NPA was only prepared to grant the leave if it was without pay, and did not authorize his absence. Nevertheless, the applicant went overseas to pursue his studies, and was subsequently notified that, as he was absent without leave for a period of more than one month, he was deemed to have been dismissed for misconduct in terms the Public Service Act. Despite representations by the applicant, the Minister upheld the NPA's recommendation. Applicant sought review, primarily on the grounds that the NPA was biased or took the decision for an ulterior motive, and took into account irrelevant considerations.

Molahlehi J held that it was trite law that during a suspension, an employee remains under the authority of the employer. Applicant was thus obliged to obtain authorisation from the employer, but had been absent from the country for a year without authorisation [Paragraph 13]. Molahlehi J rejected an argument that the applicant had in fact been granted sabbatical leave [Paragraphs 16 – 18]. Molahlehi J considered conflicting caselaw concerning the relevant provision of the Public Service Act [paragraphs 34 – 47], before finding that:

> "I am accordingly in agreement with the decision in *De Villiers* that refusal by an employer to reinstate an employee whose employment has been deemed to have been terminated by operation of law constitutes administrative action which can be challenged before the Labour Court in terms of s 158(1)*(h)* of the LRA. The decision could also be challenged on the basis of legality." [Paragraph 47]

> "On the authorities referred to … the case of the applicant is unsustainable and therefore he has failed to make a case justifying interference with the decision of the respondents in refusing to reinstate him into his previous employment which had been terminated by operation of law. … Similarly, the applicant has also failed to substantiate the other grounds for review relating to bias, ulterior motive and bad faith." [Paragraphs 49 – 50].

The application was dismissed. An appeal to the Labour Appeal Court was unsuccessful, but the decision was overturned by the Constitutional Court in **Grootboom v National Prosecuting Authority & another (2014) 35 ILJ 121 (CC)**. The Constitutional Court held that the applicant had been absent because of his suspension, and therefore that he was absent with the permission of the employer. This meant that an essential requirement of section 17(5)*(a)*(i) of the Public Service Act had not been met.

NONGENA V ALI NO AND OTHERS (JR231/09) [2010] ZALC 281 (8 DECEMBER 2010)

Case heard 6 June 2010, Judgment delivered 8 December 2010.

Applicant had initially sought to review the first applicant commissioner's refusal to condone the late filing of applicant's unfair dismissal dispute. Molahlehi J noted that the matter had "progressively

grown to include several other applications like the Constitutional challenges to the limitation to the right of access to dispute resolution mechanism imposed by the time frames provided for in the Labour Relations Act [LRA] … and the Employment Equity Act [EEA]", and that the applicant also sought to challenge the constitutionality of the Promotion of Equality and Prevention of Unfair Discrimination Act. [Paragraph 1].

Molahlehi J dealt first with the constitutionality challenges. Regardign the challenge to the constitutionality of PEPUDA, Molahlehi J held that:

> "the jurisdiction of the court is only limited to deal with those matters related to employment or labour relations. Employment equity issues are excluded from the operations of PEPUDA. In other words discrimination disputes related to workplace are not covered by PEPUDA."

The court thus had no jurisdiction to deal with matters arising under the provisions of PEPUDA [Paragraph 6]. Regarding challenges to the LRA and the EEA, Molahlehi J noted that the challenge centred on "the contention that the sections limits the rights of access to the court or the CCMA in contravention of section 34 of the Constitution by prescribing the time limit within which an employee has to refer a dispute to either the court or the CCMA." [Paragraph 11]. Molahlehi J held that the objective of the LRA was to provide a mechanism for the effective and speedy resolution of disputes, and found that the practice of providing for time limits within which legal claims were to be instituted was a "well established phenomena in the South African Law." [Paragraphs 12 – 13]. Molahlehi J held that the applicant has failed to make out a case for declaring the impugned provisions unconstitutional. [Paragraph 20].

Regarding the issue of condonation, Molahlehi J held that:

> "[T]he applicant's application for condonation … stands to be dismissed because the period from the time that the applicant received the ruling of the commissioner to the time he filed this review application is excessive and the reasons for the lateness are unsatisfactory and unacceptable. The prospects of success are also nonexistent." [Paragraph 25].

Molahlehi J found that the reasons for the commissioner refusing condonation could not be said to be unreasonable.

> "The period of 89 (eighty) days [sic] delay is clearly regarded as been excessive. As concerning the prospects of success the commissioner say that there exist no prospects of success because the applicant resigned. This finding cannot be faulted for unreasonableness if regard is had to the evidence which the applicant has put forward in support of his case." [Paragraph 28].

The applications were dismissed.

JUDGE ANDRE VAN NIEKERK

BIOGRAPHICAL INFORMATION AND QUAIFICATIONS

Born: 27 June 1957

BA, University of the Witwatersrand (1977)

LLB, University of the Witwatersrand (1979)

Certificate in Industrial Relations, University of the Witwatersrand (1987)

LLM (distinction), University of Leicester, United Kingdom (1992)

MA, Applied Ethics for Professionals (distinction) (2009)

CAREER PATH

Acting Judge, High Court (2014, 2016)

Judge, Labour Court (2009 -)

Acting Judge, Labour Court (1999, 2001, 2003, 2004, 2005, 2007, 2008)

Partner, Perrott Van Niekerk Woodhouse Matyolo Inc (1998 – 2008)

Legal Advisor, Anglo American Corporation of SA (1986 – 1998)

Associate, Webber Wentzel Attorneys (1984 – 1986)

Articled Clerk, Seligson Pollack (1983 – 1984)

Articled Clerk, Soller Winer (1982 – 1983)

Member of drafting team, Labour Relations and Basic Conditions of Employment Amendment Bills (2001)

Founder member, National Committee member, President, Life member; South African Society for Labour Law (1997 -)

Member, Meeting of Experts on Workers' Privacy, International Labour Organisation (1997)

Rules Board of Labour Appeal Court and Labour Court (1996)

Member, task team drafting Labour Relations Act (1994)

Member, Rules Board, Industrial Court (1992)

SELECTED JUDGMENTS

LABOUR LAW

NATIONAL UNION OF FOOD BEVERAGE WINE SPIRITS & ALLIED WORKERS & OTHERS V UNIVERSAL PRODUCT NETWORK (PTY) LTD: IN RE UNIVERSAL PRODUCT NETWORK (PTY) LTD V NATIONAL UNION OF FOOD BEVERAGE WINE SPIRITS & ALLIED WORKERS & OTHERS (2016) 37 ILJ 476 (LC)

Case heard 6 – 9 November 2015, Judgment delivered 10 November 2015.

This was an application to anticipate the return day of a rule nisi which had declared that a strike by the respondents was an unprotected strike. The union had made demands regarding terms and conditions of employment. The employer alleged that striking employees and not complied with picketing rules, and that during the strike, banners had been displayed criticising the employer's holding company, Woolworths, for doing business with Israel, and that Palestinian flags were waved. IT was also alleged that members of the EFF had become involved in the strike [Paragraph 19].

Having found that the interim application ought to have been treated as one for final relief [paragraph 13], Van Niekerk J considered the sufficiency of the strike notice, and held that the test was whether the notice placed the employer in a position reasonably to know which demands a union and its members intended to pursue through strike action. [Paragraph 33]. On the facts of the case, Van Niekerk J held that the employer had always been fully aware of the purpose of the strike [paragraph 36].

Regarding the acts of violence invoked by the employer to have the strike declared unprotected, Van Niekerk J held:

> "[I]t is regrettable that acts of wanton and gratuitous violence appear inevitably to accompany strike action, whether protected or unprotected. Strike related misconduct is a scourge and a serious impediment to the peaceful exercise of the right to strike and picket. More than that, it is a denial of the rights of those at whom violence is directed, typically those who elect to continue working and suppliers of those employers who are the target of strike action, and poses serious risks to investment and other drivers of economic growth. ... What is more concerning is that those institutions whose function it is to uphold order (in most instances, the SA Police Service) appear content to remain spectators of wanton acts of violence, intimidation and sabotage, adopting the view that they will intervene if and only if the court order is granted. Why this court should be called upon routinely to authorise and direct the SAPS to execute its statutory functions in relation to strike related violence is incomprehensible." [Paragraph 37].

Van Niekerk J held that whilst the court could, in appropriate circumstances, declare an initially protected strike unprotected due to violence which seriously undermined the fundamental values of the Constitution, "this is not a conclusion that ought lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights". [Paragraph 38]. It was held that the facts did not support a finding that the strike was not directed at matters of mutual interest between employer and employees, or that any political demands have been made by the union. [Paragraph 42]. The rule nisi was discharged.

The judgment is critiqued by **S van Eck and T Kujinga, "The role of the labour court in collective bargaining : altering the protected status of strikes on grounds of violence in *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd* (2016) 37 ILJ 476 (LC)", *PER/PELJ* 2017 (20).** The authors assert that the judgment was well-reasoned, however it reached the "questionable conclusion that it has the power to declare protected strikes unprotected on the grounds of violence." [Page 2]. The authors contend that although the decision can be commended for cautioning against the abuse of interdicts in the intricate balance of collective bargaining, and for seeking alternative judicial remedy against strike-related violence, it was "disappointing" that "the court considered the possibility of the alteration of the protected status of a strike which would invariably have swung the scales in favour of the employer." [Page 14].

BOMBARDIER TRANSPORTATION (PTY) LTD V MTIYA NO & OTHERS (2010) 31 ILJ 2065 (LC)

Case heard 11 March 2010, Judgment delivered 11 March 2010.

This was an application to have the certificate of outcome issued by the first respondent commissioner reviewed and set aside, for failing to dal with a challenge to the jurisdiction of the CCMA prior to issuing the certificate.

Van Niekerk J identified two approaches which had emerged in the caselaw regarding the status of certificates of outcome issued in spite of jurisdictional challenges, and discussed difficulties with both. [Paragraphs 6 – 11]. Van Niekerk J then identified a third approach, which could address the identified problems, and

> "which may have the additional benefit of a greater degree of flexibility in the management of the conciliation process, thus promoting the statutory goal of expeditious and efficient dispute resolution." [Paragraph 12].

Van Niekerk J held that many jurisdictional issues raised were not jurisdictional questions in the true sense. The only true jurisdictional questions likely to arise at the conciliation phase were whether the referring party referred the dispute within the prescribed time-limit; whether the parties fell within the registered scope of a bargaining council that had jurisdiction to the exclusion of the CCMA; and potentially whether the dispute concerned an employment related matter at all. Questions about whether an applicant was an employee, or had been dismissed, did not need to be considered at the conciliation phase. [Paragraph 13].

> "[A] certificate of outcome is no more than a document issued by a commissioner stating that, on a particular date, a dispute referred to the CCMA for conciliation remained unresolved. It does not confer jurisdiction on the CCMA to do anything that the CCMA is not empowered to do, nor does it preclude the CCMA from exercising any of its statutory powers. In short, a certificate of outcome has nothing to do with jurisdiction. If a party wishes to challenge the CCMA's jurisdiction to deal with an unfair dismissal dispute, it may do so, whether or not a certificate of outcome has been issued." [Paragraph 14]

Van Niekerk J held that it could never be a reviewable irregularity for a conciliating commissioner to defer a challenge to the CCMA's jurisdiction until the arbitration phase of the statutory dispute settlement process. {Paragraphs 16 – 17]. The application was dismissed.

The judgment is discussed by **A Govindjee and A Van Der Walt, ""True" jurisdictional questions and the irrelevance of a certificate of outcome: *Bombardier Transportation (Pty) Ltd v Mtiya NO* [2010] 8 BLLR 840 (LC)", *Obiter,* Vol 31, Issue 2, January 2010, 486.** The authors suggest that a "significant benefit" of the approach in *Bombardier* is that "the emphasis in conciliation may now be squarely placed on "trying to settle" – without a commissioner having to worry about complex jurisdictional issues being raised at that stage and the corresponding rigours of having to address such matters on the day of conciliation." [Page 492]. The authors argue that the "precise difference in the treatment of "true" jurisdictional challenges and other questions which are not considered as true jurisdictional issues" needs to be interrogated. The authors comment that aspects of the judgment create uncertainty, which is unfortunate, "as it diminishes the impact of the distinction between "true" and "false" jurisdictional challenges itself." The authors also comment that "[t]he Judge also seemed to have a loose understanding of the three "true" jurisdictional issues". [Page 494]. Finally, the authors suggest that the Labour Appeal Court has previously viewed issues about the existence of an employment relationship and whether a dismissal took place as jurisdictional issues, and that the *Bombadier* judgment conflicts with this authority [Pages 494 – 495].

DISCOVERY HEALTH LTD V COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS (2008) 29 ILJ 1480 (LC)

Case heard 11 March 2008, 28 March 2008.

The issue in this was whether a foreign national who worked for another person without a work permit issued under the Immigration Act, was an 'employee' as defined by the Labour Relations Act. Applicant denied that the CCM had jurisdiction over an unfair dismissal dispute as, it argued, "only an 'employee' as defined by s 213 of the Labour Relations Act (LRA) may claim the protections that the Act affords. … [T]he statutory definition contemplates that an 'employee' is a party to a valid contract of employment. Since the contract of employment concluded with Lanzetta [the affected employee] (a foreign national not in possession of a valid work permit) was tainted with illegality, Lanzetta's contract was not valid and he was therefore not an 'employee' as defined in the LRA." [Paragraph 3]. The commissioner ruled that the CCMA did have jurisdiction.

Van Niekerk J identified the key issues as whether the contract of employment was invalid because Lanzetta did not have a permit issued under the Immigration Act that entitled him to work for the applicant. If the contract was invalid, the question that would follow was whether that conclusion is of any consequence. "What this enquiry raises is the question whether the definition of 'employee' in … the LRA is necessarily underpinned by a common-law contract of employment." [Paragraph 19].

Van Niekerk J considered the validity of the contract, and held:

> "[T]he right to fair labour practices is a fundamental right. There is no clear indication from the terms of s 38(1) of the Immigration Act (or any of the Act's other provisions) that the statute intends to limit that right, or accomplish more than to penalize persons who employ others on unauthorized terms. … [T]he Act does not penalize the conduct of any person who accepts or performs work that is not authorized. The Act does not explicitly proscribe contracts concluded with those who are engaged to render work in circumstances where their engagement is unauthorized, nor does it provide that contracts are not enforceable in those circumstances." [Paragraph 30].

Van Niekerk J held that there were sound policy reasons for construing section 38(1) of the Immigration Act so that it did not limit the right to fair labour practices [paragraph 31], and that the impugned was valid, and remained so until terminated by the applicant. "Lanzetta was therefore an 'employee' as defined in the LRA, and the CCMA had jurisdiction to determine the unfair dismissal dispute referred to it." [Paragraph 33]

> "There will no doubt be those who contend that my conclusion necessarily entails both that the CCMA condones illegality when it assumes jurisdiction in a dispute referred to that body by a foreign national not in possession of a valid work permit, and that to assume jurisdiction would give legal sanction to a position that the legislature has specifically sought to prevent. The answer to this proposition… is that assuming jurisdiction may well expose any illegality that exists and thereby deter it." [Paragraph 34].

The application to review the commissioner's ruling was dismissed.

D. J. Meyer, Migrant Workers and Occupational Health and Safety Protection in South Africa, 21 *S. Afr. Mercantile L.J.* 831 (2009) describes the judgment as a "purposive interpretation [that] is in line with the constitutional imperative to protect fundamental rights, such as the right to fair labour practices." [Page 835]. The decision is also described as showing "a judicial readiness to extend fundamental rights to migrants." [Page 846].

SELECTED ARTICLES

"The Labour Courts , Fairness and the Rule of Law" (2015) 36 *ILJ* 2451

This article responds to earlier articles by Justices Wallis and Froneman regarding the rule of law and its implementation by the Labour Court. The article begins by discussing how the Labour Court measures up to the requirement of accessibility, and endorses criticism of excessive formality in arbitration proceedings:

> "But there is a deeper, more systemic problem. I have previously expressed the view that what is primarily at fault are dysfunctional workplace processes where byzantine disciplinary processes are pursued for their own sake and a statutory dispute resolution process that permits a matter to be referred to arbitration with little more than a statement of the reason for dismissal. What inevitably follows is a process where a referring party is encouraged to pursue a claim regardless of its merits and without ever having to articulate with any precision the real cause of complaint. There is no risk that attaches to this strategy — the onus remains on the employer party to justify a dismissal, and a case can be developed as the proceedings unfold. Further, costs orders are rarely if ever issued, even in cases that entirely lack merit. The result, of course, is that the statutory dispute resolution system is perceived and treated as an extension of the workplace disciplinary process." [Page 2454]

The article then considers the question of fairness and the role of the courts. It is argued that the structure of the LRA "is one that acknowledges and accommodates uncertainty", and that there are instances in the LRA where agreement could not be reached, and issues were left to the courts "to provide meaning in due course." [Page 2456]. The author comments that "fairness, I suggest, involves more than a mechanical application of a formula or an established set of rules and principles to a given set of facts; it is not something to be read off the machine." [Page 2457].

> "The benefit of a substantive conception of the rule of law … is that it forces us to consider more critically the assumptions that we make about the environment in which we operate and how substantive justice might be advanced. The LRA attempted to forge a transition from apartheid to a rights based, cooperative industrial relations system. What has become apparent since … is the growing inadequacy of traditional institutional actors — the state, trade unions and employers' organisations. The world of work has changed significantly since 1994. The corporatist premises on which the Act was consciously based have unravelled — the major trade union federation has splintered, minority unions have emerged as a significant force in a number of sectors, organised business is less organised and effective than it ever was and the National Economic Development and Labour Council (NEDLAC), the jewel in the tripartite crown, shines with less lustre, if any at all." [Pages 2457 – 2458].

JUDGE BULELWA PAKATI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 18 March 1961

Diploma Juris, University of Transkei (1986)

BJuris, University of Transkei (1988)

LLB, University of Transkei (1990)

CAREER PATH

Judge, Northern Cape High Court (2012 -)

Regional Magistrate (2004 – 2012)

Senior Magistrate (2002 – 2004)

Magistrate, Head of Office, Maclear (2000 – 2002)

Magistrate (1991 – 2000)

Member and Provincial Co-coordinator, Northern Cape, SAIAWJ (2012 -)

Member, SAWLA (2011)

Member, ARMSA (2004 – 2010)

Member, JOASA (2003 – 2007)

Member, BLA (1990 – 1991)

Member of school governing body : St Cyprian's Gramamr School (2015 -) and Kwaggasrand High School (2007)

SELECTED JUDGMENTS

PRIVATE LAW

MALAN V MINISTER OF DEFENCE (691/2011) [2014] ZANCHC 10 (5 SEPTEMBER 2014)

Case heard 13 May 2014, Judgment delivered 5 September 2014

Plaintiff, a Warrant Officer in the Human Resources division of the SANDF, sued for damages following his arrest and detention by the Military Police. It was alleged that during the course of his detention, plaintiff was assaulted, and insulted by a senior SANDF officer. During the course of the trial the unlawfulness of the arrest and detention was conceded by the defendant.

Pakati J held:

> "... [I]t is clear that Gen Mpaxa was aware that she was violating the plaintiff's right to privacy. She later admitted that she was fully aware of the doctor-patient privilege and conceded that she should have respected it. ... The mere entrance by Gen Mpaxa and Maj Kgokong in the examination room as described and conceded to, was unlawful and constituted an infringement of the plaintiff's right to privacy and impugned his dignity. ..." [Paragraphs 31 - 32]
>
> "The mere entrance by Gen Mpaxa and Maj Kgokong in the examination room as described and conceded to, was unlawful and constituted an infringement of the plaintiff's right to privacy and impugned his dignity." [Paragraph 41]

The plaintiff's claim succeeded.

MEREMENTSI V VISSER (CA&R 3/2011) [2013] ZANCHC 9 (26 MARCH 2013)

Case heard: 21 November 2011 and 11 February 2013; Judgment delivered 26 March 2013.

Appellant sued the respondent for damages for failing to sign transfer documents to transfer immovable property to the appellant. Respondent admitted not signing the documents, but claimed not to be at fault. The magistrate at first instance found for the respondent.

Pakati J held:

> "... [I]t is clear that the magistrate was, unfortunately, out of her depth. She failed to focus on the law, both statutory and the common law principles. She did not consider the fact that the alleged subsequent oral and unilateral attempt to change a valid written agreement offends against the parol evidence rule. The magistrate lost sight of the fact that a matter admitted by a party need not be proved by the opponent. The judgment is also full of contradictions." [Paragraph 23]
>
> "The Magistrate further misdirected herself when she found that the plaintiff led hearsay evidence to prove that the defendant defaulted in signing the documentation to effect transfer. It is a rule of evidence that no evidence need be adduced to prove an admitted fact. The defendant ... admitted in his plea that he failed or refused to sign the transfer documentation. At that stage the purchase price had already been paid by the plaintiff, which means that the

plaintiff complied with all the terms of the agreement. The defendant also could not change the purchase price unilaterally." [Paragraph 29]

"The court a quo further committed a misdirection in having stated that the plaintiff failed to comply with the terms of the agreement in that he paid the R16 000-00 to the defendant's "guardian" instead of the municipality. The place where and to whom the purchase price was to be paid is not an essentialia of a contract of sale of immovable property. …" [Paragraph 30]

"… [T]he defendant breached the contract by not signing the transfer documents and the plaintiff was impoverished as he had to buy the property at a price much higher than the agreed price. Had the defendant performed in terms of the contract no enrichment problem would have arisen. The defendant's enrichment was at the plaintiff's expense. It must be borne in mind that the property fetched the higher price because of the improvements that the plaintiff had effected. He therefore paid twice for the improvements and was therefore impoverished. …" [Paragraph 35]

Williams J dissented, finding that the plaintiff had failed to prove damages, and that as the claim had not been based on enrichment, all references to enrichment in the main judgment were erroneous. Kgomo JP wrote a separate judgment concurring in the judgment of Pakati J. The appeal was upheld.

COMMERCIAL LAW

DU TOIT V ROODT AND OTHERS (458/2011) [2011] ZANCHC 32 (11 NOVEMBER 2011)

Case heard 12 August 2011, Judgment delivered 11 November 2011

Applicant and first respondent were directors of the second respondent (Saamwerk Soutwerke Ltd). First respondent owned 12% of the shares in Saamwerk, and held a 26% interest in the third respondent, Kalkpoort CC. Applicant was the majority shareholder in Saamwerk, and a majority member in Kalkpoort. An association agreement was entered into between applicant and first respondent, but their relationship soured.

On the return day of a *rule nisi*, Pakati AJ held:

"In his answering affidavit Roodt failed to respond to material allegations made by Du Toit … A respondent's answering affidavit is required to deal pertinently with the allegations contained in an applicant's founding affidavit. If a respondent fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit the Court will, for the purposes of the application, accept the applicant's allegations as correct. …" [Paragraph 19]

"Both Du Toit and Roodt, as directors of the company, have to exercise their powers and carry out their duties *bona fide* and for the benefit of the company. Apart from the duties imposed on a director in terms of the Act, 61 of 1973 (now repealed by Act 71 of 2008), a director is at common law subject to fiduciary duty requiring him to exercise his powers *bona fide* and for the benefit of the company and to display reasonable skill in carrying out his office. …"

Pakati J held that the "overwhelming evidence" was that Roodt was "busy destroying the good name and reputation of Saamwerk Ltd and Kalkpoort CC", and that he had breached his duty as a director. He had shown now interest in the prosperity of Saamwrk or Kalkpoort [Paragraphs 21, 23]

> "Roodt acted in bad faith by consulting outsiders and soliciting their help to prejudice the businesses in their good name and goodwill. Roodt has essentially made bare denials. I am satisfied that the applicant ... has established a proper case for a final interdict." [Paragraph 25]

CRIMINAL JUSTICE

S V LITSILI (K/S 6/11) [2011] ZANCHC 33 (17 NOVEMBER 2011)

The accused with charged with one count of murder, one count of rape alternatively sexual acts with a corpse, and one count of theft. The victim was the mother of the accused.

Pakati AJ noted that it was common cause that the deceased had been murdered. The issue to be determined was the identity of the perpetrator [Paragraph 25].

"The accused could not explain how deceased's blood landed on his shoes and the blue jeans he wore ... He could also not explain his shoe print similar on the blood-soaked or liquid-smeared bedroom floor. He said that when he left his shoes they were clean. This implies that someone wore his shoes and his blue jeans, killed his mother, raped her and walked around the house. He stated that it was possible that the perpetrator spilt blood on his clothing and shoes to set him up. The accused's explanation is not only false but it is also laughable." [Paragraph 30]

"I am satisfied that the perpetrator who killed and had sexual intercourse with the deceased is the accused. This explains how the deceased's blood came onto his blue jeans and shoes. The accused was unable to give an acceptable explanation ..." [Paragraph 37]

"Notably large amount of force was used ... The severity of the head injuries sustained by the deceased was to the extent that the deceased could not have survived because of blood found in the airspaces. It is not possible that the accused left the deceased alive as he wants the court to believe. What is clear is that the accused continued to assault the deceased after her heart had stopped beating. This is evident from the medical evidence ... The sexual act was also committed post mortem. The deceased was an elderly woman of 61 years and defenceless. The accused wanted this court to believe that she was armed with a spade when he disarmed her ...the assault on her was vicious and gruesome resulting in injuries ... which led to her death. ..." [Paragraph 40]

"The manner in which the deceased met her demise with specific reference to the injuries found during the post-mortem examination and her cause of death, satisfy me that the only reasonable inference that can be drawn is that the accused assaulted the deceased with the direct intention to kill her." [Paragraph 41]

KHAULI & ANOTHER V S [2011] JOL 26779 (GNP)

Judgment delivered: 10 December 2010

Appellant and another accused had been convicted of robbery and murder and sentenced to 15 years and life imprisonment in respect of each count. Immediately after sentence, on 30 August 2002, an application for leave to appeal was dismissed by the trial judge.

Pakati AJ (Webster and Ranchod JJ concurring) held:

> "On 5 February, 2007, the appellant brought another application for leave to appeal before Shongwe DJP (as he then was). Leave to appeal was only granted on sentence." [Paragraph 3]
>
> "The question is whether Shongwe DJP was competent to entertain the appellant's second application after leave had been refused by the trial court against both conviction and sentence." [Paragraph 4]
>
> "... The application for leave to appeal entertained by Shongwe AJA (sic) was clearly contrary to the express provisions of [Section 316(8)(a)(ii) of the Criminal Procedure Act]. It was improperly before him as he had no power, with respect, to entertain it. ..." [Paragraph 5]
>
> "It is clear that Shongwe DJP was not made aware that the appellant had already exhausted his appeal remedies in the High Court. The application was not supposed to have been entertained because the High Court was *officio*. The appellant's remedy was to seek leave to appeal from the President of the Supreme Court of Appeal by way of petition. This Court, sitting as a court of appeal, may therefore not entertain the appeal. ...' [Paragraph 6]
>
> "In my view, there is no appeal before us to uphold or dismiss. In my view, the proper order is to strike the matter from the roll." [Paragraph 8]

MEDIA COVERAGE

Recounted difficulties with colleagues during a previous JSC interview:

> "A bad experience on the issue of Afrikaans was recounted by another candidate for judicial appointment. She told the JSC she felt she had not been welcome when she had acted as a judge in the Northern Cape High Court, because she did not speak Afrikaans ... Magistrate Bulelwa Pakati, being interviewed for the North Gauteng High Court, said that when she arrived at the Northern Cape court, a colleague had said to her that she would 'not make it in the Northern Cape' if she did not understand Afrikaans. Later, she sat in an appeal with the same colleague. According to Pakati, the judge wrote a judgment in Afrikaans and said to her. 'Take this judgment. It's written in Afrikaans. Go and struggle with your dictionary and see whether you concur or not.' She said when Judge President Fran[s] Kgomo went on long leave, that 'was a period that was worse for me. Because I felt that the other judges were not collegial to me.'"

- Legalbrief, no date given, available at http://legalbrief.co.za/diary/legalbrief-today/story/why-theres-no-rush-for-posts-on-johannesburg-bench/print/

Article describing "startling revelations" in October 2017 interview for the position of Northern Cape DJP:

> "[Former Judge President] Kgomo, who had sat on the commission until his retirement, had written to the JSC regarding Pakati's candidature.
>
> In that letter he went into detail about Pakati's shortcomings, describing her as someone who "can be very moody and aloof" and who has been "shown to make elementary but far-reaching mistakes" in her judgments.
>
> Pakati said she was "shocked" by Kgomo's letter since the allegations were untrue.
>
> She said she had always considered herself to have a good relationship with her former boss – and that he was her "mentor". ...
>
> Later, as commissioners ... interrogated Pakati on the possible motivation behind Kgomo's letter, she revealed the severe divisions within the Northern Cape High Court — which, she said, appeared to be of Kgomo's making.
>
> Pakati said she had not applied for the deputy judge president position earlier this year because Kgomo had indicated he "had hunted" Phatshoane.
>
> "I did not apply in April because I knew that JP [Kgomo] said this is the person he wanted, so I knew it was useless," said Pakati."

- Niren Tolsi, "The dark world of judicial politics", *City Press* 8 October 2017 (https://www.news24.com/SouthAfrica/News/the-dark-world-of-judicial-politics-20171008-2)

JUDGE VIOLET PHATSHOANE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 20 November 1972

BProc, University of the North (1995)

LLB, University of the Free State (1996)

LLM, University of the Free State (1999)

CAREER PATH

Acting Deputy Judge President, Labour Court (January – December 2018)

Acting Deputy Judge President, Northern Cape High Court (July – December 2017)

Acting Judge of Appeal, Labour Appeal Court (2016 – 2017)

Acting Judge, Labour Court (2016)

Judge of the High Court, Northern Cape Division (2011 -)

Acting Judge, Northern Cape High Court (2010 – 2011)

Enrolled as notary and conveyancer of the High Court (2009)

Part time lecturer, University of the Free State (2006 – 2009)

Part time arbitrator, conciliator, CCMA (1999 – 2004)

Admitted as Attorney of the High Court (1999)

Chairperson, Phatshoane Honey Inc attorneys (2002 - 2011)

Director, Naude's Attorneys (2000 – 2002)

Professional Assistant, Naude's Attorneys (1999 – 2000)

Candidate Attorney, Naude's Attorneys (1997 - 1999)

Researcher, Supreme Court of Appeal (1996)

Member, International Association of Women Judges (2011 onwards; Vice chairperson, programmes 2012 – 2014)

Member of Council, Sol Plaatje University (2014 -)

SELECTED JUDGMENTS

PRIVATE LAW

FREEPAK BK V DURAAN AND ANOTHER (729/2013) [2013] ZANCHC 42 (18 OCTOBER 2013)

Case heard: 16 August 2013; Judgment delivered 18 October 2013.

Applicant sought to enforce a restraint of trade agreement that would interdict the respondents from being involved in a business in the Northern Cape that was involved in selling similar products (packing material) to the applicant.

Phatshoane J held:

> "The Duraans make it plain that they intend to open a business which sells similar products as that of the applicant. They do not dispute that they had personal contact with the applicant's clients or that these clients had their contact details. In their own words Van Der Walt rarely visited the branch and was seldom involved in the business. This goes to show how well they were acquainted with the applicant's clients. They also do not say why is it necessary for them to open the same business as the applicant except that they have been involved in the packaging business for 15 years; there is nothing secretive or special about this industry; and that they have been out of employment since February 2013." [Paragraph 23]

> "In its current form the restraint clause impedes the Duraans' involvement in any business which sells similar products as the applicant in the whole of South Africa. It does not define the territory within which the restriction is to apply. Nevertheless, the applicant seeks an order in terms of which the restraint is to operate only in the Northern Cape. Similarly the period of five years over which the prohibition is to endure is out of kilter with what would be reasonable in the circumstances of this case." [Paragraph 27]

The order was granted, with the period of operation of the restraint of trade limited to two years.

LABOUR LAW

NOOSI V EXXARO MATLA COAL (JA62/2015) [2017] ZALAC 3 (10 JANUARY 2017)

Case heard 25 August 2016; Judgment delivered 10 January 2017

This was an appeal against the Labour Court's refusal to condone a late filing of a review record, and dismissal of the review.

On the condonation issue, Phatshoane AJA (Landman JA and Savage AJA concurring) held that the delay, of eight weeks and four days outside the six-week period provided for in s 145 of the LRA, was "inordinate", particularly considering that one of the primary purposes of the LRA was the effective and expeditious resolution of labour disputes. [Paragraph 29]

> "In my view, failure to deal with labour disputes promptly and effectively may render the purpose of the LRA manifestly nugatory. Mr Noosi did not provide a plausible explanation for the wanton delay. He failed to provide the dates in respect of which he interacted with his union representatives and those in respect of which he instructed his attorneys of record to assist him. This would have enabled the Court to assess the legitimacy of the explanation proffered for the delay. The remissness on the part of the union officials to file the review application in time ought to squarely be imputed to him." [Paragraph 31]

The appeal was dismissed with costs.

MBS TRANSPORT CC V COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS BHEKA MANAGEMENT SERVICES (PTY) LTD V KEKANA & OTHERS (2016) 37 ILJ 684 (LC)

Case heard 8 – 10 September 2015, Judgment delivered 6 November 2015.

These were unopposed applications to stay writs of execution of arbitration awards made by the CCMA, pending review. In issue was whether the Labour Court had the jurisdiction to stay such writs, and if not, what parties could do to vindicate their rights pending review.

Phatshoane AJ held that, in general, the court had a wide discretion to stay the writs of execution of its own orders:

> "The certification of an award by the Director of the CCMA … does not convert the award into an order of the Labour Court. If this was the position it follows that the powers of the court to review the award would have been stymied because the decisions of this court are not subject to any review. What is clear from the language of s 143 is that the award of the CCMA may be enforced *as if it were* an order of the Labour Court provided a writ has been issued in respect thereof." [Paragraph 9]

Phatshoane AJ held that the CCMA had not been statutorily assigned the authority to issue writs. To the extent that the Practice Manual might suggest that, once an award was certified, it could be executed upon delivery to the sheriff, without a writ having been issued by the court, the stipulation "must be ultra vires". [Paragraph 13]

> "An application to set aside a writ can only be made to the court that issued the writ. Concomitantly, logic dictates that the application to stay the writ should similarly be made to the court that issued the writ. The CCMA is a creature of statute and is not clothed with the jurisdiction to set aside or stay its own writs. This creates an anomalous situation in that the Labour Court has jurisdiction only in respect of such matters as are specifically assigned to it by the LRA and other statutes. …" [Paragraph 15]

> "A stay of a writ issued by the CCMA or by the Magistrates' Court falls outside the ambit of this court's powers. Seen in this context, the litigants are non-suited to set aside the writs issued by the CCMA which are the subject of impending review proceedings before the Labour Court. Put differently, they are without any form of relief afforded to them. Clearly, this legal conundrum could not have been contemplated or intended by the legislature. To

> my mind, clarification of the practical effect of s 143 is not a judicial task but a legislative competence in view of the fact that it may necessitate some public debate and possible amendments to the existing statutory scheme." [Paragraph 16]

However, Phatshoane AJ found that as the CCMA had lacked jurisdiction to issue the writs, the writs could be set aside as a nullity.

The judgment has been criticised by Suemeya Hanif, "Fishing without a hook", *ENSAfrica* 2 March 2016, available at https://www.ensafrica.com/news/fishing-without-a-hook?Id=2127&STitle=employment%20ENSight).

The author points out that the Court found that the CCMA did not have statutory authority to issue writs, and argues that this is incorrect, and that the clear wording of section 143(1) of the LRA "indicates an intention to create a statutorily created mechanism, not for orders of the CCMA to become orders of the Labour Court in respect of which a writ has been issued, but for orders of the CCMA to be enforced as if they are orders of the Labour Court in respect of which a writ has been issued."

It is also argued that if the court's conclusion is accepted that the proper course to follow is for litigants to approach the Labour Court to issue writs of execution in satisfaction of the arbitration awards, then the words "in respect of which a writ has been issued" in section 143(1) becomes superfluous. Furthermore, the author argues that this interpretation of the amendment is "inconsistent with the memorandum of objects on the Labour Relations Amendment Bill, 2012, which states that the amendments to section 143 of the LRA seek "to streamline the mechanism for enforcing arbitration awards of the commission and to make these more effective and accessible [by removing] the need for the current practice in terms of which parties have a writ issued by the Labour Court". In essence, the court's findings in this case are contrary to what the amendments aim to achieve."

CRIMINAL JUSTICE

P V S (CA&R812017) [2018] ZANCHC 41 (13 APRIL 2018)

Case heard 6 November 2017, Judgment delivered 13 April 2018.

The accused was convicted of rape and assault with intent to do grievous bodily harm in the Regional Court, and sentenced to 15 years' imprisonment for the rape, and 3 years' imprisonment for assault, the sentences to run concurrently. The complainant was his 13 year old stepdaughter. This was an appeal against conviction and sentence. The grounds of appeal focused primarily on alleged contradictions between the evidence of the complainant and other state witnesses.

Phatshoane ADJP (Lever AJ concurring) held that:

> "The only incriminating evidence against the appellant on the Count of rape, the alleged insertion of his finger into the complainant's private part, is that of the complainant. It is so

> that the child's vulnerability and susceptibility to manipulation deserves sharp scrutiny and should be considered with great care. The complainant is a single witness whose evidence has to be approached with caution." [Paragraph 15]

Phatshoane ADJP found that a number of issues impacted negatively on the complainant's credibility [paragraph 15], and found that the magistrate's findings had been based largely on whether the complainant had reported the incidents. However, the facts and contents of a complaint in a sexual misconduct case could be used

> "only to show that the evidence of a complainant who testifies that the act complained of took place without her consent, is consistent. It is relevant solely to her credibility. The complaint cannot be used as creating a probability in favour of the State's case." [Paragraph 19]

The evidence of a report could not serve as corroboration. Phatshoane ADJP found that the complainant's evidence was not sufficient to sustain the rape conviction, which was set aside [Paragraph 20]. The assault was held not to be sufficiently severe to justify a conviction or assault with intent to do grievous bodily harm, and was replaced with a conviction for common assault. [Paragraph 21]. The accused was sentenced to 12 months' imprisonment, wholly suspended for 5 years [Paragraph 24].

SCHALKWYK V S (CA&R 119/14) [2015] ZANCHC 5 (27 FEBRUARY 2015)

Case heard: 11 December 2014; Judgment delivered 27 February 2015

Appellant was convicted in the magistrates' court on one count of murder and one count of obstructing the course of justice. On appeal, the issue was whether the state had proved beyond a reasonable doubt that the appellant had murdered the deceased, with intention n the form of dolus eventualis.

Phatshoane J (Tlaletsi AJP concurring) dismissed the appeal:

> "The appellant was convicted of an attempt to defeat or obstruct the course of justice … The appeal before us does not lie against that conviction because he did not succeed in obtaining leave to appeal against it. Therefore it cannot avail him to argue that the witnesses were untruthful that he urged them to subvert the truth. In any event, the evidence of the two State witnesses remained unshaken that the appellant was angry when he hit the deceased with the hay-bale hook. … [T]hese witnesses also gave evidence favourable to the appellant on certain aspects. Out of exasperation over the deceased's misconduct during the weekend of 12/13 February and the morning of 14 February 2011 the appellant struck him with the hay hook. The Acting Regional Court Magistrate's rejection of the accidental death is justifiable on the facts." [Paragraph 28]

> "Regard being had to the nature of the weapon used the possibility of the consequences that ensued would have been apparent to any person of normal intelligence. On the facts, the only reasonable and inexorable inference to be drawn is that when he gave vent to his

> ire it was immaterial to the appellant whether the consequences would flow from his action; put differently, he proceeded nevertheless or persisted with his conduct indifferent to the fatal consequence of his action." [Paragraph 35]

On appeal, in **Van Schalkwyk v S (680/2015) [2016] ZASCA 49; 2016 (2) SACR 334 (SCA) (31 March 2016)**, a majority of the SCA overturned the murder conviction and substituted a conviction or culpable homicide. Lewis JA (Tshiqi JA and Plasket AJA concurring) held that the state had failed to prove actual foresight of the possibility of death.

> "As the regional magistrate said, 'by striking the deceased with the hook on the left side of the chest the accused ought to have foreseen that death may occur. The accused reconciled himself with the eventuality'. The test, as noted by the full bench, was incorrectly stated by the magistrate. But it appeared not to worry the full bench since it found on the facts that the appellant had had actual foresight of the death of the deceased. No such finding was made by the magistrate, however, and it is far from clear to me how the full bench reached that conclusion." [Paragraph 39]

Baartman AJA and Willis JA dissented, and would have upheld the conviction for murder.

MEDIA COVERAGE

It was reported that during the sentencing stage of the trial of former ANC Northern Cape chairperson, John Block, and others in the so-called Trifecta case, Block sought a special entry and to make a complaint to the JSC over allegations that Judge Phatshoane had been influenced by her Judge President in convicting the accused:

"Earlier sentencing procedures were disrupted because of an urgent application after Block reported Phatsoane to the Judicial Services Commission. He claims she bowed to pressure to convict him in the Trifecta trial.

According to Block's legal representative, Advocate Salie Joubert SC, a judge, who is known to the defence, overheard a telephonic conversation between the presiding officer (Phatsoane) and Northern Cape High Court Judge President Frans Kgomo, indicating that she should "convict the bastards". …

"Mjila conveyed that he had received information from a reliable source where this particular judge was in the presence of the Judge President (Kgomo) when Phatsoane advised him that she had no grounds to convict Block." …

Joubert added that it was decided that this information should be disclosed to the Judicial Services Commission as the "life of his client was at stake".

"While my client was considering an application for recusal, it is clear that Phatsoane had succumbed to pressure to convict the accused. Block has no reason to doubt the validity of this information.""

- Sandi Kwon Hoo, "It's not over yet, says ANC's John Block", *IOL*, available at http://www.iol.co.za/news/crime-courts/its-not-over-yet-says-ancs-john-block-7116795

It was later reported that the Constitutional Court had dismissed an application by John Block for leave to appeal against his conviction and sentence: https://www.businesslive.co.za/bd/national/2018-11-20-constitutional-court-orders-john-block-to-go-to-jail/