SUBMISSION AND RESEARCH REPORT ON THE JUDICIAL RECORDS OF NOMINEES FOR APPOINTMENT TO THE CONSTITUTIONAL COURT, THE HIGH COURT AND THE LAND CLAIMS COURT

APRIL 2020
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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. Such reports have been compiled 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.

4. In this submission, we will set out the methodology of our reports, and make some observations on the JSC’s interview process, based on the October 2019 interviews. We will also offer some thoughts on the criteria that may be applied in evaluating the candidates for the Constitutional Court in particular. We begin by repeating the overview of our work on judicial appointments, as presented in our October 2019 report.

THE DGRU’S WORK ON JUDICIAL APPOINTMENTS

5. The DGRU’s belief in the importance of the judiciary will be apparent from our vision and mission, as described in the previous section. Over the years, our focus on the judiciary has expanded beyond South Africa. We are recognised as a resource partner of the Southern African Chief Justices’ Forum, and are involved with the UNODC’s Global Judicial Integrity Network. We believe that these interactions have allowed us to develop a broader

1 The reports are available at http://www.dgru.uct.ac.za/reports-candidates-jsc-hearings and http://www.dgru.uct.ac.za/research-reports-0
2 See https://sacjforum.org/ and https://www.unodc.org/jii/ for more information about these organisations.
perspective on the appointment of judges, which we attempt to share with the JSC and other interested stakeholders as best as we can.

6. In South Africa, one of the major and most persistent issues that is raised regarding the appointment of judges concerns the transformation of the judiciary. The constitution requires that the judiciary be transformed. The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered by the JSC when it recommends appointment to the Bench. We submit that the transformation imperative does not relate only to numbers, but must also include an examination of issues such as the judicial philosophy and life experience of candidates, to ensure that those who are appointed as judges are committed to the social and economic transformation of South Africa.

7. The Constitution also requires the appointment of judges who are appropriately qualified and fit and proper. We believe that the following criteria are relevant to determining whether a candidate is fit and proper:
   - A commitment the Constitution’s underlying values of human dignity, freedom and equality;
   - Independence of mind – the courage and disposition to act independently, free from partisan political influence and private interests;
   - The disposition to act fairly, impartially and without fear, favour or prejudice;
   - High standards of ethics and honesty;
   - A judicial temperament, which includes qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.

8. To determine whether a candidate is appropriately qualified, we believe this includes a consideration of a candidate’s formal qualifications, experience and potential. Constitutional Court judges must be qualified not only in respect of the general body of law but they must be equipped to give meaning to constitutional values – indeed, it may well be argued that this applies to all judges.

9. Our research reports consist of summaries of judgements written by candidates who are to be interviewed by the JSC during the meeting in question, as well as other material such as summaries of academic articles or public speeches by the candidates. Further details of the methodology employed in compiling the reports are set out in the next section. We believe that one of the most effective ways of assessing a candidate’s suitability for judicial office is to scrutinise how they have dealt with issues they would come across were they to be appointed as judges.

10. To this end, our reports present a sample of judgements which we have summarised, in order to show why and how they have arrived at a particular decision. As we make clear, we do not try to advocate for the appointment or non-appointment of any individual candidate. We hope that the members of the JSC will be able to use this research to identify issues that might be relevant to the suitability of candidates for judicial office, and to ask questions to establish that suitability.
11. We also comment on aspects of the process by which the interviews are conducted. A fair, as well as transparent, interview process is, we submit, essential for the legitimacy of the appointment and to public confidence in the judiciary. Based on our observations of the JSC interviews over a long period of time, our intention is to offer constructive suggestions which we hope can assist the JSC in performing its crucial constitutional role as well as possible.

12. We will briefly mention some of our observations of what we think are particularly important issues in ensuring a fair interview process.

- Questions tracking publicly available criteria
  We suggest that the criteria provided in sections 174(1) and (2) of the Constitution are quite broad, and it would be valuable for the JSC to agree and publicise supplementary criteria that would amplify the criteria found in the Constitution. These criteria could allow for sufficient flexibility, and could be revisited by the JSC from time to time. We think that undertaking this exercise would be particularly important for two reasons: first, it may assist commissioners in focusing their questions on the specific criteria that are being sought. This may well assist with some of the other issues we identify below. Second, if these criteria are published, potential candidates a clearer sense of what the JSC is looking for, and whether they fulfil those criteria.

- Timing of interviews
  We have frequently observed significant inconsistencies in the length of interviews, with some candidates for the same position being interviewed for very different lengths of time. Of course, sometimes circumstances will dictate that one candidate may need to be interviewed for longer than another. But as a general principle, we think it is advisable out of fairness to the candidates and for the credibility of the process that candidates being interviewed for the same or a similar position should be interviewed for a broadly similar time. Interviews that take place long after they are scheduled to, and run late into the night, are likely to disadvantage both the candidates and the commissioners.

- Substantively even questioning of candidates.
  This issue is closely linked to the question of timing. We have on occasions noted instances where candidates who are from similar professional backgrounds and applying for the same position, are interviewed much more or less rigorously than the other. Again, it is certainly true that the JSC must have flexibility and be able to respond to different issues that may be unique to certain candidates. But the effect should be that all candidates are subject to rigorous but fair scrutiny, in order to ensure that suitable appointments are made to the judiciary.

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3 This process has been done before. For the supplementary criteria published in 2010, see https://constitutionallyspeaking.co.za/criteria-used-by-jsc-when-considering-judicial-appointments/
13. We observe and comment on these and other aspects of the process out of a hope that we will provide a reflection on the JSC’s process that may be informative and helpful. It is never our intention to criticise for the sake of it.

14. For the April 2011 interviews, the Office of the Chief Justice provided us with some funding to assist in the production of our report. Since then, however, we have been entirely self-funded, and our work is supported by donors who recognise its importance for constitutional governance in South Africa.

15. With that background in mind, we now turn to discuss the methodology followed in compiling this report.

**METHODOLOGY OF THE REPORT**

16. We have experimented with various structures and approaches to compiling these reports over the years. The format currently used is intended to present a more comprehensive overview of a candidate’s track record than earlier reports, which were limited to presenting simple summaries of judgments and academic articles candidates have written.

17. We do not attempt to summarise all of a candidate’s judgments. To do so would make the reports far too long, and we are conscious of feedback we have received which emphasises the value of keeping the reports as concise and accessible as possible. This is never an easy task, as selecting what material to include and what to leave out is seldom an exact science. We try to select judgments and other material that seem to the researchers to provide the most useful insights into candidates’ mindsets, outlook, jurisprudential approach and general attitudes and experience. We provide citations and links so that interested readers are able to follow up and read the complete judgments and articles we have summarised.

18. In order to make the summaries of judgments easier to navigate, we group them under the following thematic headings:
   - Private Law;
   - Commercial Law;
   - Civil and Political Rights;
   - Socio-Economic Rights;
   - Administrative Justice;
   - Constitutional and Statutory interpretation;
   - Environmental Law;
   - Labour Law;
   - Civil Procedure;
   - Criminal Justice;
   - Children’s’ Rights
   - Customary Law; and
   - Administration of Justice.
19. This is the full list we utilise, and it is possible that not all categories will be used in any particular report.

20. 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.

21. We generally do not include media reports on 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.

22. We obviously are not able to confirm the veracity or otherwise of media reports, and as with judgments, we aim simply to present the results of the research we undertake. We do not include material in order to implicitly advocate for or against candidates. It is our intention to provide an overview of key aspects of a candidate’s track record, which can guide members of the JSC in developing questions to ask candidates and which can assist other interested stakeholders in commenting on the suitability of particular candidates, should they wish to do so.

23. We do not provide our own analysis or criticism of the judgments summarised, but we do try to integrate academic comment on judgments into the report, where this is available. 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.

**COMMENTS ON THE OCTOBER 2019 INTERVIEWS**

24. Several issues we have highlighted in previous submissions on the JSC’s interview process emerged during the October 2019 interviews. We discuss these briefly.

**UNEVEN SCRUTINY OF CANDIDATES**

25. We have raised concerns about candidates being treated unequally in terms of the duration of interviews and the intensity of questioning to which similarly placed candidates have been subjected. The issue of the time allocated to interviews came to the fore starkly in the October 2019 round of interviews. One candidate was interviewed for around 3 minutes – the shortest ever interview in the time we have been observing the JSC interviews. Other interviews lasted for far longer.

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26. Whilst acknowledging that the candidate in the three minute had been interviewed by the JSC before, we think there is a real danger that such a perfunctory interview could create mistrust in the interview process, and might lead to the very unfortunate perception of decisions being predetermined before the interviews even take place. We believe that there is value in using the interview process to test candidates rigorously and fairly against clear and transparent criteria. Even if a candidate has been interviewed before, they will not have been evaluated against the same group of fellow candidates.

27. We would therefore urge the commission to conduct interviews that engage with candidate’s suitability for the position, in a focused and respectful manner. Such interviews need not be very long, but they should avoid giving the impression that appointment decisions are a foregone conclusion.

CRITERIA FOR APPOINTMENT

28. We have long argued that it is necessary for the JSC to identify and articulate further criteria to supplement those found in the Constitution. We believe that this is an important element of the transparency of the judicial appointment process, and it would also be of assistance in determining the scope of questioning that should be allowed to be asked during interviews.

29. In the October 2019 interviews, one of the candidates for the Electoral Court was asked a question about the recommendations of the Van Zyl Slabbert report on electoral reform. Another commissioner intervened and suggested that the question was not appropriate. The commissioner who originally asked the question maintained the question was relevant. Some debate among commissioners about whether questions are appropriate is clearly appropriate. But observing this exchange, it appeared that there was no shared frame of reference among the commissioners as to the basis on which the question could be said to be appropriate or inappropriate.

30. We would respectfully suggest that the exchange shows the value in the JSC working to develop criteria to supplement those found in the Constitution, and in ensuring that questions asked during the interviews are directed towards testing whether candidates meet such criteria.

CRITERIA FOR CONSTITUTIONAL COURT CANDIDATES

31. As the Constitutional Court is the highest court in the country, the appointment of candidates to this court is of particular importance. We have previously suggested some criteria that may be taken into account in selecting judges for the Constitutional Court, and we take the opportunity to repeat them. These criteria are:

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a. 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;

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

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

d. High standards of ethics and honesty;

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

f. 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.

32. 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.

ACKNOWLEDGEMENTS

33. The research team experienced some particularly challenging circumstances in preparing this report, with disruptions caused inter alia by the onset of the Covid – 19 pandemic, as well as ongoing loadshedding in South Africa. This impacted on our ability to complete the report on time, and meant that we were in some instances not able to research media coverage and academic commentary as fully as we would normally do. We are grateful for the efforts of the research team in these circumstances.

34. The research was conducted by Chris Oxtoby, DGRU senior researcher, and Anisa Mahmoudi, Liam Murphy and Simphiwe Sidhu, DGRU research assistants.

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

DGRU, MARCH 2020
JUSTICE NAMBITHA DAMBUZA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 31 October 1964

BProc, University of Natal (1987)

LLB, University of Natal (1989)

LLM, Tulane University (USA) (1991)

CAREER PATH

Justice, Supreme Court of Appeal (2015 - )

Acting Justice of Appeal, Supreme Court of Appeal (2014)

Acting Justice, Constitutional Court (October 2012 – March 2013)

Judge, Competition Appeal Court (2009 - )

Judge, Eastern Cape High Court (2005)


Member, International Association of Women Judges (2019)

Board Chairperson, Rules Board for the Courts of South Africa (2018 - )

Visiting professor. Rhodes University (2017 - )

Walter Sisulu University

   Chair, governing council (2015 – 2017)

   Member, governing council (2014 - )
Council member and facilitator, South African Judicial Education Institute (2014 - )

Part – time lecturer, Fort Hare University (Bhisho) (2002 – 2003)


Law Society of the Cape of Good Hope

  Council member (1996 – 1997)

  Ordinary member (1992 – 2004)

Regional secretary, Black Lawyers’ Association (1996 – 1999)

Board member, Diocesan School for Girls (2015 – 2018)

Trustee, Heatherbank Farmschool (2015 - )
SELECTED JUDGMENTS

CIVIL AND POLITICAL RIGHTS


Case heard 13 November 2018, Judgment delivered 4 December 2018.

Second respondent, the Jewish Board of Deputies, had complained that certain statements by the first appellant amounted to hate speech. The Commission and the Equality Court both took the view that the statements did amount to hate speech. [Paragraph 1]. The complaint related to comments critical of Israel, in relation to the Israel – Palestine conflict, made by the appellant in an online blog and in a speech delivered at a university. [Paragraphs 6 – 7].

Dambuza JA (Lewis, Wallis and Zondi JJA and Matojane AJA concurring) considered the reference to “Zionists” in the blog post, and found that “[n]othing in these definitions and explanations conveys identification on the basis of ethnicity or religion.” [Paragraph 24]. Furthermore, none of the other offending terms in the blog post “either on their own or within the statement, connote race or ethnicity.” [Paragraph 25].

“The terms may be irrational, offensive or ever insulting. Threatening or unsavoury words in the statement such as ‘bitter medicine’, and ‘perpetual suffering’ are only metaphorical. Even if ethnicity or religion was implied in the blog statement, neither the offensive words nor the blog statement could be considered advocacy of hatred or incitement of harm for the purpose of s 16 (2)(c) of the Constitution, particularly in the context in which they were made.” [Paragraph 26].

Regarding the statements in the speech, Dambuza JA held that the appellant’s explanation that his remarks “had nothing to do with Jews but were directed at supporters of the State of Israel” was supported by the transcript of the speech. “Nothing in the content of the speech shows that it was anything more than a political speech.” [Paragraph 29]. Dambuza JA concluded that:

“The fact that particular expression may be hurtful of people’s feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection. Public debate is noisy and there are many areas of dispute in our society that can provoke powerful emotions. The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Nothing that Mr Masuku wrote or said transgressed those boundaries, however hurtful or distasteful they may have seemed to members of the Jewish and wider community.” [Paragraph 31].

The appeal was upheld. The judgment has been described as correct and striking the correct balance in finding that freedom of speech “is a precious right and should not be given up simply when the exercise thereof causes offence to some.” [Serjeant at the Bar, “Curbing hate speech without limiting the right to speak”, News24 14 December 2018, available at

However, the judgment has also been widely criticised “because it casually overlooks the explicit and implicit threats of harm … in both his blog posting and his speech. This oversight undermines the entire legislative framework contained in Section 16 of the Constitution and Section 10 of the Equality Act.” [Ivor Heyman, “A tale of two judgments dealing with free speech and hate speech”, Mphela & Associates 6 February 2020, available at http://www.mphela.co.za/a-tale-of-two-judgments-dealing-with-free-speech-and-hate-speech.php]. It has also been criticised for “misguidedly applied sec. 16(2) of the Constitution instead of sec. 10 of the Equality Act”, “apparently [holding] the erroneous view that expression enjoying constitutional protection may not be limited,” and the finding that the offensive statements did not relate to the grounds of religion and culture is described as “questionable.” [ME Marais, “Hate speech in context: Commentary on the judgments of the Equality Court and the Supreme Court of Appeal in the Masuku dispute” Journal for Juridical Science 2019: 44(2): 101 – 118; 112]. The judgment has also been criticised for “ignor[ing]ed the applicable law contained in PEPUDA and wrongly deal[ing] with the case as if section 16(2) [of the Constitution] is the applicable provision that prohibits speech.” [Pierre de Vos, “Supreme Court of Appeal gets the law very wrong in a hate speech judgment”, Constitutionally Speaking 6 December 2018, available at https://constitutionallyspeaking.co.za/supreme-court-of-appeal-gets-the-law-very-wrong-in-a-hate-speech-judgment/]. The judgment has further been described as “notable for its very brief analysis of the law relating to freedom of expression and hate speech as well as extremely limited citations of prior authority. Unfortunately, the account of the law offered in the judgment is also flawed and transgresses a number of principles which have already been established with a significant pedigree.” [David Bilchitz, “Why incitement to harm against those with different political opinions is constitutionally impermissible”, 2019 TSAR 364, 367.

SOCIO-ECONOMIC RIGHTS

MALAN V CITY OF CAPE TOWN (CCT 143/13) [2014] ZACC 25

Case heard 20 February 2014, Judgment delivered 18 September 2014

The appellant, a state pensioner, leased a house from the City of Cape Town at a subsidised rental. She breached the agreement, causing the city to cancel it and apply successfully to the High Court for her eviction. She appealed to the Constitutional Court.

Writing for the majority, Majiedt AJ (Moseneko ACJ, Skweyiya ADCJ, Cameron, Jafta, Khampepe and Van der Westhuizen JJ concurring) held that a public authority, such as the City, was entitled to cancel such a lease on the basis of arrears alone, provided the lessee was given a proper opportunity to settle them. Further, the City could lawfully cancel the lease on the basis of so-called “illegal activities clauses”, due to criminal activity having been carried out on the property. The High Court had thus correctly found that was just and equitable to order eviction. The appeal was dismissed.

Dambuza AJ (Froneman and Madlanga JJ concurring) dissented:

“… [T]he agreement in this case was concluded long before the advent of democracy and was assimilated into the new constitutional dispensation. … Some of its terms, however, are still reminiscent of the
language and rigidity of the times during which it was concluded, some of which may not be consistent with the level of respect accorded to all members of the South African society today.” [Paragraph 4

Dambuza AJ held that the lease could not be viewed “as a pure exercise of private contractual power”, as it was an instrument through which the City fulfilled its obligation to provide housing to the appellant and similarly placed people. Any clauses that offended public policy were unenforceable. [Paragraph 21].

Dambuza AJ identified the test for determining the constitutionality of a contractual clause in the Barkhuizen case, and emphasised that under the constitution, fairness was “often central in the determination of whether a clause in a contract is against public policy.” [Paragraphs 23, 25]. Dambuza AJ cautioned that local authorities needed to be mindful that their main role in the present context was the provision of homes, and that “crime fighting and prevention must be done within the parameters of the rights and obligations arising from the leases concluded with tenants.” [Paragraph 27]

With regards to the clause that allowed termination on one month’s notice, Dambuza AJ held:

“...[I]nsofar as the City contended that this clause entitles it to terminate the agreement on notice, without cause, its application would be unfair and against public policy. In the context of its subject-matter, public housing, the application of the clause as contended can easily facilitate arbitrary evictions by public officials. The result would indeed be erosion of the lessees’ security of tenure.” [Paragraph 30]

Dambuza AJ found that lessees were not given an opportunity to protest against the City’s finding of a breach, nor to rectify the breach prior to cancellation [paragraph 35], and that arrear rentals had not been the real reason for the cancellation of the agreement. Rather, cancellation had been “an attempt at assisting the SAPS in its crime combatting endeavours.” [Paragraphs 37 - 38].

Regarding termination of the lease on the basis of the conviction of the occupants of the house for certain offences, Dambuza AJ held that summary cancellation was “at variance” with section 26(1) of the Constitution. [Paragraph 40]. The appellant had been entitled to notice, giving her the opportunity to rectify the breach.” [Paragraph 44].

Zondo J wrote a separate dissenting judgment, holding that the city failed to show that Ms Malan allowed the impugned activities and that there was any breach on that basis, and that even if this had been shown, the City would first have to have taken certain procedural steps before cancelling the lease, which it had failed to do.

CONSTITUTIONAL INTERPRETATION

MDODANA V PREMIER OF THE EASTERN CAPE AND OTHERS (CCT 85/13) [2014] ZACC 7

Case heard 13 November 2013, Judgment delivered 25 March 2014

The applicant, a subsistence farmer in the Eastern Cape, sought confirmation of a High Court order which declared unconstitutional and invalid certain provisions of the Pounds Ordinance 18 of 1938 passed by the Provincial Council of the Province of the Cape of Good Hope. In the High Court, he had sought an order for the return of his two goats which were impounded in terms of the Ordnance, and an order declaring the provisions in terms of which the livestock was impounded unconstitutional. The issues that remained before the Constitutional Court were the constitutionality of the provisions that provided for
impoundment of livestock, destruction of impounded livestock in certain circumstances, assessment of moneys payable by a livestock owner in trespass and other fees, and sales of impounded livestock.

Dambuza AJ (Moseneke ACJ, Skweyiya ADCJ, Cameron, Froneman, Jafta, Madlanga, Nkabinde and Zondo JJ and Mhlantla AJ concurring) dealt first with the jurisdiction of the Constitutional Court. Dambuza AJ held that where an order of constitutional invalidity related to legislation other than national or provincial acts, the Constitutional Court did not need to play a supervisory role, and the high courts and Supreme Court of Appeal were empowered to make effective orders of constitutional invalidity. [Paragraph 23]. In this case, the main issue was the status of the Ordinance and whether it was a provincial Act, in which case the declaration of invalidity needed to be confirmed by the Constitutional Court. [Paragraph 24]. Dambuza AJ held further that:

“It is my view that in circumstances as peculiar as in this case, where in one territory there is parallel legislation on the same subject, a conclusion that the Ordinance is a provincial Act would be inappropriate. In this case, contrary to the usual territorially-binding effect of a provincial Act, there are two sets of laws which regulate impoundment in the Eastern Cape Province. There is no indication ... of a specific exercise of power by the Eastern Cape Provincial Legislature that the High Court can be said to be trespassing on. The Ordinance we are confronted with in this case does not satisfy the “criteria” of a “provincial Act” as envisaged by the Constitution.” [Paragraph 36]

Dambuza AJ found that the provincial legislature could not be said to have “embraced” the Ordinance, nor could it be concluded that the substantive effect of the Ordinance was the same as a provincial Act. [Paragraph 37]. While accepting that the declaration of constitutional invalidity created an undesirable anomaly in that the Ordinance remained in effect in two other provinces, this was not “a proper basis for this Court to assume jurisdiction not sanctioned by the Constitution.” [Paragraph 38]. Dambuza AJ further rejected an argument that, absent confirmation by the Constitutional Court, rural stockholders would experience enduring hardship, since the High Court’s declaration of invalidity would remain effective in the Eastern Cape Province. [Paragraph 39].

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

LABOUR LAW

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS OBO MANI AND OTHERS v NATIONAL LOTTERIES BOARD 2014 (3) SA 544 (CC)

Case heard 19 November 2013, Judgment delivered 14 March 2014

The issue in this case was the fairness of the Lotteries Board's dismissal of employees for insubordination and disrepute because they had, inter alia, lodged a petition against their CEO. After a dispute had been referred to the CCMA the union, responding to a CCMA request, addressed a letter to the Board listing the employees' complaints against the CEO. The complaints were trenchant and the letter was leaked to the press. The employees then sent a 'Vote of No Confidence in the CEO' petition to the Board and urged the Board to request the CEO to resign. The Board charged unrepentant signatories with insubordination, disrepute and refusal to work. They were found guilty and dismissed. The dismissals were upheld in the Labour Court and the Supreme Court of Appeal.
The majority per Zondo J (Moseneke ACJ, Jafta J, Madlanga J, Mhlantla AJ and Nkabinde J concurring), held that the dismissals were automatically unfair and the employees entitled to reinstatement. The majority held that the petition urged the Board — without demanding dismissal or threatening work stoppage — to offer the CEO a severance package in return for his resignation. It was lodged in pursuit of and during the conciliation process, and this was part of collective bargaining, which is a lawful, core union activity.

The minority per Froneman J (Skweyiya ADCJ and Cameron J concurring), held that the dismissals were fair and should stand. The employees' conduct amounted to insubordination and disrepute.

Dambuza AJ wrote a separate judgment concurring with the majority but finding the dismissal substantively, rather than automatically, unfair [paragraph 208]. Dambuza AJ found that the charges of insubordination and disrespectful behaviour were unfounded, but that the dissemination of the letter could have the effect of bringing the name and integrity of the CEO and the Board into disrepute. Furthermore, disseminating the contents of the letter and seeking termination of the CEO’s contract were “a departure from the dispute-resolution procedures provided for under the Act.” [Paragraph 209].

Dambuza AJ accepted that the employees had “repudiate[ed]… the CEO’s authority.” [Paragraph 213]. However, this had to be understood in context, and the “full conduct” of employer and employee had to be taken into account to determine whether the threat constituted insubordination. [Paragraph 214].

“The threat was made after many attempts to alert the Board to the employees' complaints about the CEO. … I am not pronouncing on the veracity of the complaints. But the Board’s unwillingness to deal with the allegations and the consequent disrespect shown to the employees is a significant factor in the assessment of the employees' conduct.” [Paragraph 215]

Dambuza AJ criticised the conduct of the Board as “disrespectful” [paragraph 216] and “unacceptable” and “in breach if its duty to negotiate in good faith and, in fact, constituted an abuse of power.” [Paragraph 219]. Whilst the employees had “exceeded the parameters of the dispute-resolution processes”, they had shown a “clear desire to have their grievances resolved through discussions.” [Paragraph 221]. Dambuza AJ held that the threat to repudiate authority did not constitute insubordination or disrespectful conduct. [Paragraph 222].

Dambuza AJ held that the dissemination of the letter and the contents of the petition were not rights or conduct envisaged under the Labour Relations Act (LRA), and thus the dismissals were not automatically unfair. However, Dambuza AJ concluded that the dismissals were substantively unfair, and agreed that the dismissed employees should be reinstated and costs awarded in their favour. [Paragraphs 227 – 229]

CRIMINAL JUSTICE

MACINEZELA V S (550/2017) [2018] ZASCA 32; 2018 (2) SACR 573 (SCA) (26 MARCH 2018)


This was an appeal against a conviction and life sentence for rape. The main issue in the appeal was the admissibility of the evidence of the complainant, who was alleged to be “mentally unstable.” [Paragraph 1]. The appeal was based on two grounds. The first related to how the complainant’s mental condition was introduced into the proceedings, with the appellant arguing that he was not given an opportunity to the proposed amendment to the charge sheet. The second was whether the trial and appeal courts had failed
to properly consider whether the complainant was “mentally disabled” in terms of the Criminal Procedure Act (CPA). [Paragraph 7].

Dambuza JA (Navs, Majiedt and Mocumie JJA and Hughes AJA concurring) held that there was no indication from the record whether the magistrate had formed a view about the complainant’s mental capacity. The prosecutor’s application for an amendment of the charge sheet on account of the complainant’s mental condition “clearly called for vigilance in considering the proper approach to her evidence.” [Paragraph 15].

Dambuza JA held that in the circumstances of this case, the oath or affirmation could not be administered in the ordinary course, and at minimum, an inquiry in terms of section 164 of the CPA should have been conducted. The magistrate had not conducted an inquiry into whether the complainant could distinguish between truth and falsehood. This was fatal to the proceedings. [Paragraph 20]. The conviction and sentence were set aside. [Paragraph 22].

Dabuza JA commented that:

“This appeal and many other similar cases illustrate the injustice that can be suffered by both complainants and accused as a result of failure by courts to properly ascertain whether a witness is able to distinguish between truth and falsehood. In S v Nondzamba ... this court highlighted the sensitivity of our courts to victims of sexual violence and the courts' determination to ensure that such victims are afforded the full protection of the law. Such pronouncements are undermined when proper care is not taken to ensure that evidence led is admissible.” [Paragraph 21].

MENTYISI AND ANOTHER V S (CA77/2010) [2011] ZAECGH 85
Case heard 24 October 2011, Judgment delivered 1 November 2011

The two appellants appealed against a sentence of life imprisonment imposed against each of them pursuant to a conviction of murder, having acted with common purpose in killing the deceased. The deceased was the mother of the first appellant.

Dambuza J (Eksteen J and Mageza AJ concurring) held that the grounds of appeal advanced did not warrant interference with the sentence imposed. [Paragraph 10]. Dambuza J held that the absence of prior convictions was not per se a substantial or compelling circumstance, and nor was the youth of the offender. [Paragraph 12].

“It is so that youth has, in certain cases, been found to justify departure from a prescribed sentence. ... But even in that case [S v Meiring] the court highlighted that youth should be considered a factor compelling departure from the prescribed sentences only in those instances where the imposition of the prescribed sentence on a youth offender would result in such injustice as could not have been intended by the Legislature. ...Even where an offender is a juvenile, the court, in exercising its discretion, has to have regard to the purpose of the Minimum Sentences Act and in doing so it can impose the prescribed sentence of life imprisonment if the circumstances of the case justify it. In this case my view is that the appellants are not so young that their conduct could be mainly attributed to immaturity. They planned and executed the coldblooded murder of a parent and neighbour. The first appellant’s relationship to the murder victim is a particularly aggravating and repulsive feature of the offence of which the appellants were convicted. ...” [Paragraph 14]
Dambuza J held further that the trial court had been correct to reject the first appellant’s argument that a lighter sentence should be imposed due to her “limited” role in the offence, as her role was not accessory, but “was, in fact, crucial to the success of the intended crime”, and “[t]he murder was a direct consequence of her conduct …” [Paragraph 18].

The appeal was dismissed and the sentence imposed by the trial court confirmed.

**ADMINISTRATION OF JUSTICE**

**EASTERN CAPE SOCIETY OF ADVOCATES V JACOBS (2232/2011) [2012] ZAECPEHC 51**

Case heard 23 March 2012, Judgment delivered 20 August 2012

The applicant sought to have the respondent’s name struck off the roll of advocates, on two grounds. First, that the respondent had been convicted of theft, and second, as a result of investigations conducted by the applicant which, it argued, revealed the respondent’s involvement in a pyramid scheme. Criminal proceedings in which the respondent has been charged with fraud relating to that scheme were pending before the Regional Court.

Dambuza J found that respondent’s request for a postponement pending the outcome of a petition to the Supreme Court of Appeal was “a further attempt at delaying the hearing of the application.” [Paragraph 9]. Dambua J noted that the respondent was an unrehabilitated insolvent [paragraph 14], who had accepted money from clients and used a fellow advocate’s cheque account to run his practice. He had no book keeper, did not keep proper books of account, and had admitted that money paid to him was not administered correctly. [Paragraph 15]. Dambuza J found that the respondent’s conduct had been unprofessional, noting that “[t]he danger of advocates handling funds without safety nets such as those provided by the Attorney’s Act has been repeatedly highlighted by the courts.” [Paragraph 16].

Dambuza J found that the respondent’s disavowal of knowledge of the *De Freitas* judgment:

“reveals a serious lack of basic litigation and which is an indication that the respondent is not a fit and proper person to practice as an advocate. In fact I can only conclude, from the manner in which the respondent conducted his own case in this application, that he poses danger to members of the public who might turn to him for assistance with their legal affairs” [Paragraph 18]

Dambuza J held further that the common cause or undisputed facts showed gross unprofessional conduct by the respondent. [Paragraph 19]

“I am satisfied that the conviction of theft and dismissal of the respondent’s appeal, sufficiently proves misconduct on the part of the respondent. But even if I were to disregard the conviction, the underlying common cause facts relating to the manner in which the respondent dealt with funds received by him … shows a total disregard of basic rules of practice, a conduct which placed his clients at great risk regarding their legal affairs. In fact it is evident that he should not have been accepting funds if he was unable to run a bank account.” [Paragraph 22]

Dambuza J held that the appropriate sanction was for the respondent to be struck off the roll of advocates:
“[T]he respondent’s conduct show a serious lack of appreciation of basic rules of practice. He conducted his practice in a manner that placed his clients at great risk of financial loss whilst he had no security in place to reimburse or compensate them in case of loss. He engaged in acts of blatant criminal conduct. His conduct brought the legal profession into disrepute. I am of the view that members of the public need to be protected from him and that this can only be achieved by his removal from the realm of legal practitioners.” [Paragraph 25]
BIOGRAPHICAL DETAILS

Born: 10 July 1960.

BComm, University of KwaZulu – Natal (1982)

LLB (cum laude), University of KwaZulu – Natal (1984)

LLM, University of Cambridge (1988)

Post – graduate Diploma in Tax Law, University of Cape Town (1992)

CAREER PATH

Acting Judge

        Gauteng High Court, Johannesburg Local Division (2012, 2014, 2015, 2018)

        Land Claims Court (2017)

        Labour Court (2012)

Independent Regulatory Board for Auditors Disciplinary Committee

        Chairperson (2011 - )

        Vice chairperson (2006 – 2011)

Director of litigation, Legal Resources Centre (2004 – 2006)

Advocate, Johannesburg Bar (2001 onwards, appointed senior counsel 2011)

Chairperson, UN Housing and Property Claims Commission (2000 – 2007)


        Head of Public Interest Law Department (1988)

        Director / Partner (1992)


Member, Minister of Justice’s Reference Group on Land Justice (2019 - )
Member, Higher Education Parents Dialogue (2016)


Member, African National Congress (approximately 1992 – 1995)

SELECTED JUDGMENTS

COMMERCIAL LAW

FIRST NATIONAL BANK, A DIVISION OF FIRST RAND BANK LTD V FRANSCH (17347/2011) [2012]
ZAGPJHC 277 (29 NOVEMBER 2012)

Case heard 3 - 4 October 2012, Judgment delivered 29 November 2012

This case dealt with the issue of a bank’s right to foreclose on a mortgage bond where the loan had been subject to a debt rearrangement under the National Credit Act (NCA), and the bond holder had defaulted on their obligations in terms of the rearrangement.

Dodson AJ first considered the defendant’s argument that the rearrangement order would first have to be rescinded. [Paragraph 28]. Dodson AJ rejected this argument, holding that a rearrangement order only amended the repayment terms of the credit transaction, and did not prohibit legal proceedings against the consumer. [Paragraph 31].

Defendant argued that the plaintiff was obliged to give prior written notice before commencing proceedings. Dodson AJ applied the Supreme Court of Appeal judgment in Collett v FirstRand Bank Ltd, and held that the debt review process had been completed when the rearrangement order was made. Hence, there was no need or obligation for the debt review process to be terminated by written notice. [Paragraph 44]. Dodson AJ rejected an argument by the defendant that further debt relief should be ordered in terms of section 85 of the NCA. [Paragraphs 51 – 55].

Dodson AJ then considered whether the right to housing precluded relief being granted. After considering the Constitutional Court judgments in Jaftha v Schoeman and Gundwana v Steko Development, Dodson AJ found that “one is dealing here with neither a trifling debt nor an indigent defendant” [paragraph 58], and that as the defendant had been in default of his obligations when the initial summons was issued, the commencement of proceedings had not been breach of section 88(3) of the NCA, nor did it amount to an abuse of court process in terms of the Jaftha decision. [Paragraph 67].

Judgment was granted for the plaintiff, and the immovable property declared executable.
Applicant, a citizen of the Democratic Republic of Congo, sought to review a decision of the Refugee Appeal Board (RAB) which upheld the rejection of applicant’s claim for refugee status by a Refugee Status Determination Officer. Applicant claimed to have been forcefully conscripted into the DRC army, to have deserted, and to have been captured by rebels. [Paragraphs 2 – 10]. Applicant asserted that he feared for his life if he returned to the DRC, as he would be punished for desertion. [Paragraph 26]. The RAB determined that applicant would be safe if he returned to the DRC. [Paragraph 40].

Dodson AJ found that the RAB had acted in a procedurally unfair manner in placing the burden of proof on the applicant, and making “no reference to the required inquisitorial and facilitative approach.” [Paragraph 48]. Dodson AJ then found that, before relying on new country of origin information, the RAB should have obtained a response from the applicant to the information, but had failed to do so. [Paragraphs 53 – 54]. Dodson AJ found that the RAB had failed to consider section 3(a) of the Refugees Act, relating to fear of persecution and disruption of public order, as a basis for refugee status. [Paragraphs 57 - 58].

On the question of whether it would have been safe for the applicant to return home, Dodson AJ held that the RAB had made “no attempt to conduct any rational analysis of the country of origin information as against the provisions of section 3(b) and the applicant's particular circumstances. The RAB jumped to a conclusion.” [Paragraph 69].

The decision of the RAB thus stood to be reviewed and set aside. [Paragraph 73]. Dodson AJ found that the applicant qualified for refugee status. [Paragraph 91]. Dodson AJ held that there had in addition been “serious delays in the decision-making process”, and that:

“[t]he RAB also displayed incompetence. The quality of its written decision is poor. It is internally contradictory, unclear, indicative of a lack of understanding of the governing legislation and lacking in reasoned analysis of the information available to it. This should not be the case when the RAB is meant to represent the apex of the administrative decision-making process.” [Paragraph 93]. An order of substitution was granted, declaring that the applicant qualified as a refugee. [Paragraph 98].
SOCIO – ECONOMIC RIGHTS


This was an appeal against the Magistrates’ court’s dismissal of eviction applications brought under the Extension of Security of Tenure Act (ESTA). Respondents had occupied cottages on a farm in terms of their employment, which was lawfully terminated [paragraph 6].

Dodson AJ (Canca AJ concurring) considered the requirements for termination of the right of residence under ESTA [paragraph 21 ff], and dealt with the question of whether the termination of the rights of residence was just and equitable. [Paragraph 32]. Dodson AJ held that, “[g]iven the particular hardships for the respondents that would flow from an eviction”, there ought to have been an effective opportunity to make representations before the decision was taken to terminate their right of residence. Appellants had failed to provide sufficient information to allow the court to assess whether there had been an effective opportunity to make representations. The appellant failed to prove that a fair procedure had been followed in terminating the right of residence. [Paragraph 45].

Dodson AJ concluded that whilst “the magistrate’s reasoning was flawed in several respects”, the order dismissing the application had been correctly made. [Paragraph 72]. The court further encouraged “the parties, along with the municipality and the Department of Rural Development and Land Reform, actively continue to seek a long term solution to the problem of the respondents’ accommodation as well as the problem relating to sanitation.” [Paragraph 74]. The appeal was dismissed.

ADMINISTRATIVE JUSTICE


Case heard 22 May 2018, Judgment delivered 31 May 2018.

This was an urgent application to restrain the first respondent from proceeding with a tender process for the construction of civil engineering infrastructure and low cost housing in Soweto. The tender related to essentially the same work which had been the subject of an earlier tender in 2015. Applicant was part of a joint venture which submitted a bid for the 2015 tender, but was unsuccessful. Applicant sought to interdict the new tender from being processed, pending judicial review of the City’s decision not to proceed with the 2015 tender. [Paragraphs 1 – 3].

Dodson AJ dismissed points in limine regarding the applicant’s standing [paragraphs 65 – 76] and non-joinder of other unsuccessful parties to the initial bid [paragraphs 77 – 89]. Dodson AJ then turned to consider whether the applicant had show a prima facie right. Dodson AJ found that applicant had never been given the opportunity to respond to allegations of fraud and invalidity in relation to its tax clearance certificates. It was a well established principle that “before a public authority takes a decision on the basis of which the affected party was unaware, that authority must inform the party
of that information and the affected party must be given the opportunity to be heard in relation to
that information.” [Paragraphs 94 – 95]. Dodson AJ found further that the city’s decision making
regarding the withdrawal of one of the joint venture members was, on the face of it, “dealt with in a
similarly procedurally unfair manner”, and that the minutes of a committee meeting demonstrated
that the applicant had “a number of further potential grounds for a review of the City’s decision-
making.” [Paragraphs 97 – 98]. The applicant established that it had a prima facie right [paragraph
115].

Dodson AJ found that the applicant faced irreparable financial hard if the relief was not granted, since
the award of a new tender would render the review of the earlier tender moot [paragraphs 116 –
118]. Dodson AJ held that the balance of convenience favoured the applicant. The delay for the City
in resolving who would carry out the project work was primarily caused by the City’s own conduct in
dealing with the initial tender, and in delaying providing the record in the review proceedings.
[Paragraphs 119 – 125]. Dodson AJ found that there was no other satisfactory remedy [paragraphs
126 – 129], and that the matter was urgent [paragraphs 130 – 135]. On urgency, Dodson AJ found that
one of the decisive factors was:

“that each of the parties makes serious allegations of corruption or fraud against the other. The City’s
allegation in this regard is, at this stage, a flimsy one. The applicant, by contrast, has put up sufficient
evidence to raise real concerns ... If interdictory relief is not granted because the matter is found not
to be urgent and the review proceedings are allowed to become moot, there is a risk that the alleged
malfeasance will never receive judicial scrutiny. Moreover, in a society that has been brought to its
knees by corruption, allegations of corrupt activity that have a reasonable measure of substantiation
lend weight to an argument that the matter should be heard on an urgent basis.” [Paragraph 134].

The application succeeded.

AIRPORTS COMPANY SOUTH AFRICA LIMITED V AIRPORT BOOKSHOPS (PTY) LTD T/A EXCLUSIVE
BOOKS (31580/2014) [2015] ZAGPJHC 154; 2016 (1) SA 473 (GJ); [2015] 3 ALL SA 561 (GJ) (3 JULY
2015)


This was an application to evict the respondent from a shop in the international departures terminal
of OR Tambo airport, applicant having selected a new tenant following a competitive tender process.
Respondent claimed to be entitled to remain until the determination of its judicial review of the tender
process. [Paragraphs 1 – 2]. The parties had entered into an extension agreement which was renewed
on a month by month basis. [Paragraph 4]. Applicant argued that this gave them the right to terminate
the lease on one month’s notice. [Paragraph 15]. Respondent argued that the extension agreement
included a tacit term that that neither party could terminate the agreement until the completion of a
valid and lawful tender process to identify a new tenant. [Paragraph 25].

Dodson AJ considered the law relating to tacit terms [paragraphs 26 – 40]. Dodson AJ analysed the
facts to determine whether the tacit term could be implied, and examined whether section 217 of the
Constitution, relating to procurement, was applicable. [Paragraphs 41 – 51]. At issue was whether the
phrase “contracts for goods or services” in section 217(1) of the Constitution applied only to the
acquisition of goods and services, or whether it also extended to the disposal of goods, such as (in this case) the sale or letting of state-owned immovable property. [Paragraph 56]. Dodson AJ held that:

“Whilst the letting of the shop involves the disposal by way of letting of a state asset, the effect of the contract is to provide a service for those members of the public making use of the departures area at the airport. Absent a private bookstore operator … ACSA would be expected to provide a similar service itself. In my view that falls within the concept of “contracting for goods and services”, particularly on the purposive approach that I am bound to adopt in the interpretation of the Constitution.” [Paragraph 63].

Dodson AJ held that the constitutional and statutory framework for contracting by an organ of state applied to the extension agreement. [Paragraphs 65 – 67]. On the balance of probabilities, the tacit term contended for by the respondents was necessary [paragraph 74], and was capable of clear and precise formulation [paragraphs 76 – 81]. Dodson AJ held that the only way the respondent could resist eviction was if it was entitled and able to show that applicant had failed to comply with the lawfulness requirement of the tacit term. [Paragraph 86]. Whether the lawfulness point could be raised depended on whether respondent was entitled to bring a collateral challenge to the validity of the tender process. [Paragraph 87].

Dodson AJ held that the respondent was entitled to bring such a challenge [paragraph 101], and analysed the grounds of the challenge [paragraphs 107 ff]. Dodson AJ held that the ground that the respondent’s bid had been rejected due to failure to provide a tax clearance certificate was arbitrary and not rationally connected to the available information. [Paragraph 114]. Furthermore, relevant information regarding minimum rental turnover was not considered. [Paragraph 124]. Furthermore, information to which the successful bidder was privy had not been disclosed to the respondent, which distorted the competitive bidding process [paragraphs 134 – 135].

Applicant thus failed to show that it had completed a lawful tender process. [Paragraph 137]. The application was dismissed. An appeal to the SCA was dismissed by a 4 – 1 majority in Airports Company South Africa Soc Limited v Airports Bookshops (Pty) Limited t/a Exclusive Books (945/2015) [2016] ZASCA 129; [2016] 4 All SA 665 (SCA); 2017 (3) SA 128 (SCA) (27 September 2016).

LABOUR LAW


Case heard 12 July 2010, Judgment delivered 8 August 2012

This was an application to review and set aside an arbitration award which had found the dismissal of the three shop stewards to be unfair, and ordering their reinstatement. The shop stewards who had been dismissed for failing to honour a picketing agreement. At issue was whether the dismissals were substantively fair. [Paragraph 37].

Dodson AJ considered the factual background and the award given by the arbitrator, and then analysed the reasonableness of the decision in terms of the code of Good Practice for dismissal in the
Labour Relations Act. [Note: this section of the judgment repeats paragraph references, so these are not given].

Dodson AJ considered whether a rule or standard regulating conduct in the workplace had been contravened. Dodson AJ held that the arbitrator had failed “to conduct any weighing up whatsoever of the competing evidence and contentions advanced”, and erred in finding that there was no evidence that the shop stewards had done nothing when strikers had acted violently. Dodson AJ found that:

“Having regard to the detailed evidence that was given about the various incidents of violence that took place, a reasonable decision-maker could hardly have concluded on this basis that there was a continuous and on-going effort by the shop stewards to dissuade their members from unlawful action.”

Dodson AJ held further that there was “no logical path setting out the first respondent’s reasoning” in finding that the picketing crowd was uncontrollably angry due to the non-payment of wages. Dodson AJ found that the arbitrator’s finding that, since the police had been unable to control the strikers the shop stewards could not have been expected to, was “an uncritical and unexamined acceptance of a contention advanced by the respondents.”

Dodson AJ concluded that the award stood to be reviewed and set aside. On the appropriate remedy, Dodson AJ considered the Constitutional Court judgment in *Sidumo*, and found that in the circumstances it was appropriate for the court to substitute its decision for that of the arbitrator. The arbitration award was set aside, and substituted with an order that the dismissal was fair.

**DU PREEZ V L.S. PRESSINGS CC AND ANOTHER (J861/11) [2012] ZALCJHB 74; (2013) 34 ILJ 634 (LC) (26 JULY 2012)**

Case heard 10 July 2012, Judgment delivered 26 July 2012.

This was an application for the joinder of the second respondent to the proceedings. Applicant had been dismissed by the first respondent “on the alleged basis that it was going into liquidation” [paragraph 4], and obtained a default arbitration award from the CCMA declaring the dismissal to be previously and substantively unfair. [Paragraph 5]. First respondent did not honour the award, and in the course of trying to enforce the award, applicant discovered that the second respondent was carrying on the work of the first respondent. [Paragraph 6]. Applicant argued that there had been a transfer of business from the first to the second respondent, and sought to join the second respondent as a party to proceedings. [Paragraphs 8, 10].

Dodson AJ held that “[u]nfortunately, whilst I have great sympathy for the predicament in which the applicant finds himself, there are two fundamental difficulties with the joinder”. [Paragraph 11]. The first was that there were no proceedings in the Labour Court between the applicant and first respondent to which the second respondent could be joined. First respondent’s default arbitration award was not an order of the Labour Court, but an award that could be enforced by the Labour Court as if it was such an order. [Paragraphs 12 – 14].
Second, the proceedings before the CCMA were complete and the commissioner was functus officio, which precluded joinder. Dodson AJ found that:

“The effect of joining the second respondent to the proceedings in which there is already a default award, without any prior rescission of the award, and of seeking to hold the second respondent liable on the basis of the award, would be to allow judgment to be taken and enforced against the second respondent without its ever having been heard.” [Paragraph 18].

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

CIVIL PROCEDURE

KGOMO AND ANOTHER V STANDARD BANK OF SOUTH AFRICA AND OTHERS (47272/12) [2015]
ZAGPPHC 1126; 2016 (2) SA 184 (GP) (15 JUNE 2015)


This was an application for rescission of a default judgment, following the applicants’ default on their mortgage loan. Applicants argued that the default judgment had been wrongly granted as the bank had failed to comply with the National Credit Act (NCA) by not giving notice before commencing legal proceedings. Dodson AJ noted that the case was “unusual in that the parties rely on seemingly conflicting judgments of the Constitutional Court in seeking and resisting rescission respectively.” [Paragraph 1].

Dodson AJ analysed the Constitutional Court decisions in Sebola v Standard Bank, where it was held that sending notification with the correct address via the post office did not constitute sufficient compliance with the delivery of notice requirement [paragraphs 16 – 22]; Ferris v FirstRand Bank Ltd, which held that the bank was entitled to enforce a loan without further notice where a debt restructuring order had been breached [paragraphs 23 – 28] and Kubyana v Standard Bank, where the Sebola judgment was qualified but affirmed [paragraphs 29 – 33].

The applicants relief on the Sebola decision to argue the rescission should be granted. The bank relief on the Ferris decision to defend the granting of default judgment. Dodson AJ held that the Constitutional Court authority in Sebola and Kubyana required strict compliance with the notice provisions of the NCA [paragraphs 38 – 41]. Dodson AJ held that it was not necessary to reconcile the Sebola judgment with an apparently contradictory dictum in the Ferris judgment, since the Ferris dictum was obiter dictum, and this case was distinguishable from Ferris as the cases dealt with notice under different sections of the act. [Paragraphs 49 – 52].

Strict compliance with the applicable notice provision was therefore required, and on the facts of the case the applicants were entitled to rescission of the default judgment [paragraphs 54 – 58].
The article examines the circumstances leading up to and during the passing of the Act, the impact of the Act and “the efforts during the constitutional era to address its pernicious legacy.” [Page 29].

The article notes that “[w]ide – scale dispossession of land from the indigenous community of South Africa was, of course, not a phenomenon which only began in 1913.” [Page 29]. The effect of the Act is described as being “to outlaw at least two of the forms of tenancy which had been practised on such a wide scale by African farmers – rental tenancy and share cropping”, leading to displacement “on a massive scale.” The article also discusses Sol Plaatjie’s efforts to lobby against the Act. [Page 30].

The article further discusses the impact of the Native Trust and Land Act [pages 30 – 31], and argues that the two Acts “directly and indirectly, formed the basis for a massive and intensified campaign of forced removals by the apartheid government during the period from 1960 to 1983, when more than 3.4 million people were forcibly removed.” [Page 31].

The article then considers the constitutional era reform process:

“The call to afford property rights constitutional protection was met with a corresponding demand to address the fate of those whose property rights had been trampled on during the colonial and apartheid eras. Understandably there were demands to remedy dispossession going back to the earliest stages of colonisation. However, the constitution-making process was one of compromise.” [Page 31].

The article discusses the Restitution of Land Rights Act of 1994, and challenges experienced in the land restitution process [pages 31 – 32].

“Soon after the commencement of the restitution process a view was taken that the settlement of claims in preference to their adjudication through the Land Claims Court would speed up the process. The court’s powers of scrutiny over land claim settlements were largely removed and the commission took upon itself the role of attempting to finalise claims in this way. This policy is what the government terms the ‘willing seller – willing buyer’ policy. Unfortunately this may have been a costly mistake as the statistical evidence suggests that the price of land acquired through the restitution process has proven excessive. ... Realisation of the flawed nature of the existing approach has been signaled by recent government announcements that it is abandoning the ‘willing seller–willing buyer’ policy.” [Page 32].

The article concludes that:

“The legacy of the Natives Land Act has proven to be a pernicious and enduring one. Remedies to address that legacy effectively have proven elusive. But the sheer scale of the injustice done demands that the endeavor to find just solutions must continue.” [Page 32].
MEDIA COVERAGE


“I suppose that my sense of social justice probably comes from growing up in a fairly liberal family. Although I wouldn’t, as a child, have perceived of myself as having a sense of social justice. ... [H]aving a sense of social justice I think, certainly in my case, was something that really emerged at university. And it was at university that I became far more aware than in the context of school or my childhood, of the inequalities in South African society. And also of the brutality of the apartheid state.” [Page 1].

“[The Constitutional Court has] proved to be a highly successful court, it’s proved a willingness to be innovative, it’s proved a willingness to be open to listen to cases that are brought by poor and disempowered people, it hasn’t developed a jurisdiction which has the effect of excluding people who lack resources. So, it’s also, and also very importantly it’s made the development of its socio-economic rights jurisprudence a very important part of its work. And it’s gone about it in a careful and creative way.” [Page 19].
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)
Judge of the High Court (North Gauteng) (2011 to date)
Acting Judge, North Gauteng High Court (2010 – 2011)

Trustee, Legal Resources Centre (2000 to date)
Pretoria Child and Welfare Society (2001 to date)
Laudium Care Services for the Aged (2000 to date)
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 been sold to a third party, or inherited by a third party 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.


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]

ESKOM HOLDINGS SOC LIMITED V NATIONAL ENERGY REGULATOR OF SOUTH AFRICA AND OTHERS (74870/2019) [2020] ZAGPPHC 2 (10 FEBRUARY 2020)

Case heard 15 January 2020, Judgment delivered 10 February 2020

This was an urgent application to allow the applicant to, inter alia, increase various standard electrical tariffs, pending a review of the first respondent’s decision in respect of an application for electricity tariff increases [paragraphs 1 – 2]. Applicant argued that the difference in the increase applied for and that granted would result in a shortfall in its revenue of R102 billion over the three financial years in question. [Paragraph 7]. The only issue in this stage of the application related to how respondent had dealt with an annual government equity injection of R23 billion per year in calculating respondent’s annual allowable revenue. [Paragraph 8].

Kollapen J considered the requirements for the granting of an interdict. On the question of whether the applicant had shown irreparable harm, Kollapen J found that even if the applicant’s version, that it would face dire consequences if interim relief were not granted, were accepted, it was “not clear what the political response to that situation may be.” [Paragraph 62]. The financial health and survival of the applicant was ultimately:
“a matter that falls squarely within the remit of the political sphere of government, influenced by the prevailing economic realities as well as the legitimate demands of the developmental state. It cannot be that a tariff determination for effectively a single year should be elevated to determining the survival or the demise of a significant state owned entity and nor is it desirable to leave that determination to a Court.” [Paragraph 63].

Kollapen J held further that considering the “myriad of considerations that must ultimately be brought to bear on the operations and the future of Eskom”, it could be said that there was well-grounded apprehension of irreparable harm if the interim relief were not granted. [Paragraph 64].

On the issue of the balance of convenience, Kollapen J noted that if the relief sought were granted, an effective electricity increase of close to 17% in the coming financial year, as opposed to the 8.1% the respondent had approved, would result. Kollapen J found that separation of powers considerations militated “strongly against the Court responding to such an invitation to set a tariff”, and that the court was in any event “also not equipped to make the kind of determinations” required of it. [Paragraphs 69 – 70]. The balance of convenience thus did not favour the granting of the interdict [paragraph 73]. The application was thus dismissed.

**NATIONAL COUNCIL OF THE SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS V MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS [2019] 4 ALL SA 193 (GP)**

This was an application to have decisions of the first respondent, setting the annual export quotas for lion bones and skeletons, reviewed and declared unlawful and unconstitutional.

Kollapen J dealt first with an argument regarding mootness, holding that even though the impugned export quotas had already been given effect to, in that permits had been issued and the process of exporting bones had been completed, issues raised by the litigation remained alive and it was in the public interest for the court to deal with them. [Paragraphs 40 - 42].

Kollapen J then found that the setting of the quotas constituted administrative action, as it was an action carried out in terms of statue, and which had a direct, external legal effect. [Paragraphs 44 – 50]. Kollapen J found further that the applicant had not been excluded from the consultation process prior to the setting of the quotas. [Paragraphs 51 – 56]. Kollapen J then considered the question of whether welfare considerations relating to Lions in captivity were relevant to the determination of the quotas. [Paragraph 57 ff]. Kollapen J referred to the right to have the environment protected in section 24 of the Constitution, and to the Constitutional Court’s judgment in National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development, which “speaks to the kind of custodial care we are enjoined to show to the environment for the benefit of this and future generations.” [Paragraph 65].

Kollapen J held that the Minister had erred in in concluding that since she did not have the welfare mandate for lions in captivity, she was not obliged to consider welfare issues relating to lions in captivity (if relevant) when determining the quota. [Paragraph 67]. Kollapen J suggested that it was in any event doubtful that the question of welfare fell entirely outside the Minister’s remit. [Paragraph 68]. Kollapen J held further that considering the connection between the welfare interests of animals and conservation, as reflected in judgments of the Supreme Court of Appeal and the Constitutional
Court, it was “inconceivable that the State respondents could have ignored welfare considerations of lions in captivity in setting the annual export quota.” [Paragraph 74]. The application was granted, and the quotas were declared to be unlawful and constitutionally invalid.

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 recordings of the deliberations. The appeal was upheld. 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 held 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 ... 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 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, in respect of maintenance obligations 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.

“... 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 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

RODRIGUES V NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2019 (2) SACR 251 (GJ)


This was an application for a permanent stay of prosecution. Applicant was a former security policeman charged with the murder of anti-apartheid activist Ahmed Timol (“Timol), who died in police custody in 1971. Following a second inquest into Timol’s death in 2017, applicant was charged, in 2018, with his murder.

Kollapen J (Moshidi and Opperman JJ concurring) began by setting out background information on the life and death of Timol, including the two inquests held in 1972 and 2017, and discussed the TRC process. [Paragraphs 10 – 23]. Kollapen J found that there had been “what can only be described as
JUDGE JODY KOLLAPEN

high-level executive interference in investigating and prosecuting TRC crimes and other crimes of the past in the period from 2003 until about 2017.” [Paragraph 23].

Kollapen J identified the factors to be taken into account in determining a permanent stay of prosecution, namely the length of the delay; the reasons given by the government to justify the delay; the accused’s assertion of a right to a speedy trial; and prejudice to the accused. [Paragraph 37].

On the question of the delay of some 47 years since Timol’s death in 1971, Kollapen J found that the time period from 1971 – 1994 should not count towards the delay due to the prevailing political circumstances [paragraphs 42 – 45]. To the extent that the period between 1994 – 2002, which was characterised by the establishment of the TRC and the opportunity to apply for amnesty, constituted a delay, it:

“was a delay of the kind that was regarded as necessary and important to allow a new society to come to terms with its past, to allow victims and perpetrators to take advantage of the opportunities created by the TRC Act, and to provide a mechanism — flawed, but the product of an historical compromise — to seek and find closure.” [Paragraph 52].

Kollapen J then considered the period between 2003 – 2017, where the applicant located claims of political interference in the prosecution. [Paragraph 55 ff]. Kollapen J found that political interference had resulted in TRC cases not receiving the necessary attention [paragraph 55], and that the NPA “had a duty to assert its authority and independence and resist political interference.” [Paragraph 60]. Kollapen J criticised the manner in which the NPA had disclosed the acts of political interference, finding that “[t]he suggestion that it was deliberately withheld from this court is difficult to refute”. [Paragraph 68].

Kollapen J held that the 2003 - 2017 delay constituted “a substantial period of time”, and that the delay could not be justified by political interference. [Paragraph 74]. Based on the Constitutional Court judgment in Bothma v Els, Kollapen J identified the test to be applied as whether the delay would inevitably and irremediably taint the overall substantive fairness of the trial. [Paragraph 77]. Relying on South African and foreign case law, Kollapen J held that the applicant’s old age and infirmity were not grounds that could be relief on as a form of prejudice. Whilst the delay had caused some degree of prejudice, it could not be said to have tainted the fairness of the trial. [Paragraphs 88 – 89].

Kollapen J dismissed the unreasonable delay challenge [paragraphs 97 – 99] and held that there were no grounds to suggest the prosecution had been advanced for an improper purpose [Paragraphs 100 – 105]. The application was dismissed, with no party seeking an order for costs [106].
SELECTED PUBLICATIONS


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]


“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.”

Date of Birth: 7 May 1958

Bachelor of Arts, Social Sciences, University of Limpopo (1982)

Bachelor of Arts, Honours, Comparative African Government, University of Limpopo (1984)

Master of Arts, Development Studies, University of Limpopo (1987)

LLM, University of Limpopo (1990)

Honorary Doctorate, VUT

Judge, Equality Court (2019 – )

Judge, Gauteng High Court, Johannesburg Local Division (2010 - )


University of Limpopo

   Deputy Registrar (1998 – 2001)

   Deputy Dean (1995 – 1997)

   Lecturer, Development Studies (1985 – 1997)


Member and subsequent Chairperson, National Water Tribunal (2003 – 2010)

Deputy Chairperson, Townships Board (Limpopo Board) (1997 – 2010)

Chairperson, Valuation Board (Makhado Municipality), (2006 – 2009)


Chairperson, Disciplinary Tribunal (University of Limpopo), (1996 – 1999)

Member, Black Lawyers Association (Polokwane branch) (1996 – 2010)

Member, Methodist Church of Southern Africa (1967 – )
SELECTED JUDGMENTS
CIVIL AND POLITICAL RIGHTS

MAPODILE V MINISTER OF CORRECTIONAL SERVICES AND OTHERS 2016 (2) SACR 413 (GJ) (24 JUNE 2016)

An urgent application was brought by a gay prison inmate, seeking an order for respondents to accommodate him in a single cell or in the same cell as inmates of the same sexual orientation.

Whilst respondent had asked for a postponement to investigate the unwillingness of prison authorities to move the applicant, Mabesele J refused due to the harassment applicant was experiencing. [Paragraph 11].

Mabesele J held that gay and lesbian people have been a part of South African society for some time, noting that:

“They are not associated with a particular race as perceived by some members of our society. African people, particularly Basotho, guided by their forefathers, had been using the word ‘tarasi’ for many years to describe gay or lesbian. There had not been any controversy around the issue of homosexuality in the community of Basotho. They always discouraged homophobia and had accorded respect to gays and lesbians.” [Paragraphs 12 - 13]

Mabesele J found further that:

“[T]he era before democracy which preferred Christianity from other religions promoted stereotype societal behaviour which denied gays and lesbians freedom of expression which includes freedom to express feelings. Their integrity was not accepted. They were subjected to emotional torture to say the least and were forced to subordinate themselves to the societal norms and values and cultural practices which only recognised heterosexuality and widely accepted definition of ‘man’, ‘women’ and ‘spouse’ as explained in the bible.” [paragraph 14].

Mabesele J considered the regulations passed under the Correctional Services Act, and noted that Chapter II thereof addressed the human dignity of inmates. [Paragraph 24]. Mabesele J found that “The regulations protect inter alia the dignity and privacy of certain categories of prisoner except gay people.” [Paragraph 25]. Mabesele J held that various categories of prisoners had their rights to dignity, privacy and healthcare protected “due to their peculiar status”, and as it was “beyond debate that gays, too, have their own peculiar status”, gay people were therefore entitled to the same protection. [Paragraph 30 – 31].
The order was granted.

SOCIO-ECONOMIC RIGHTS

QUITSWA V MNGOMEZULU NO AND OTHERS (0000664/2018) [2018] ZAGPJHC 6 (19 JANUARY 2018)

This was an urgent application by the mother of two children, whose deceased ex-husband’s estate was responsible for the education and maintenance of the children. Since the death of the deceased, the school fees of the children had remained unpaid, resulting in the school withholding their academic results. This had occurred despite a letter from the second respondent (an attorney appointed by the Master to wind up the estate) to the third respondent (the school) that the estate had enough money to pay all the outstanding fees, and that payment would be made as soon as all the correct steps had been followed. [Paragraphs 8 – 9]. The first respondent, the executrix, was alleged to have acted unreasonably and unfairly by failing to cooperate with the second respondent to open a trust account on behalf of the minor children in order to release the required funds. [Paragraph 11].

A report prepared by a social worker provided details of the harm suffered by the children as a result of the withholding of school reports and the uncertainty around whether they would return to school the following academic year. Their behaviour was adversely affected as a result, and their academic performance compromised. [Paragraph 12].

Mabesele J identified the main issue as being the right to education. “Education is not a privilege but a right. This is evident in Section 29(1)(a) and (b) of the Constitution.” [Paragraph 14]. Mabesele J held further that “depriving the learners of their end of year examination results due to non-payment of fees is to deprive them of their constitutional right to basic education … Therefore any public or private school that withholds the results of a learner due to non-payment of fees violates this right.” [Paragraph 18].

Mabesele J held further that “the conduct of the Third Respondent [had an adverse impact] on the emotions of the minor children and their mother … It is regrettable that children should lose confidence in them and be tortured psychologically before their receive what they rightly deserve. That torture violates a right to freedom of freedom and security of the person.” [Paragraph 19].

The First Respondent (executrix) was directed to cooperate with Second Respondent in opening a trust account on behalf of the deceased’s minor children. Mabesele J further ordered that: “The First
Respondent should pay the costs of this application. ... The Third Respondent should pay the costs of this application on the scale as between attorney and client.” [Paragraph 21].


Case heard 19 January 2017, Judgment delivered 19 January 2017

Applicant, a prison inmate who was a law a student at the University of South Africa, applied for a bursary from the NSFAS in 2015 and received no response. As a result, he abandoned his studies for that academic year. In 2016, a new application was submitted, again receiving no response. Despite this, he secured funding for his registration fee for the 2017 academic year. Applicant claimed he was entitled to tertiary level education and since he could not afford to pay for his fees himself, that the government was obliged to secure the funds in order for him to pursue his education. He relied on s29(1) of the Constitution in support of his claim. The respondent, however, argued that this right to education was limited in terms of s36(1) of the Constitution and that they, thus, had no such obligation to provide those funds.

Mabesele J affirmed the importance of education, describing it as “an instrument for development” and equating it to “the air that one breathes.” [Paragraph 15]. Mabesele J further referenced books he had written to emphasise the importance of education, including a passage stating that:

“The intention of every human being created in the image of Almighty God is to be educated in order to transmit part of his knowledge to his fellow brothers and sisters, and to uplift the standard of living in his own community.” [Paragraph 16].

Mabesele J discussed the impact of apartheid education policies [paragraphs 20 – 23], and then turned to consider the provisions of section 29(1) of the Constitution, which “put to rest the aforesaid dragon laws and policies.” [Paragraph 25]. Mabesele J cited Constitutional Court authority for finding that the right to basic education was immediately realisable [paragraph 26]. However, the right to further education contained an internal limitation requiring that it be progressively realised rather than immediately realisable as in the case of basic education.

“...[S]ection 29(1)(b), to my understanding, is intended to enhance one’s knowledge and equip one with necessary skill for one to become self-dependent and contribute meaningfully to the socio-economic development of the country, whereas section 29(1)(a) is intended to eradicate illiteracy and promote literacy to enable everyone to understand the society in which they live and to fit well in that
modern society. Therefore, it should follow that section 29(1)(a) must take preference and be protected. Therefore, the applicant’s argument cannot stand.” [paragraph 32].

Mabesele J held that the Minister had not obligation to provide the applicant with funds to further his education. The application was dismissed.

CONSTITUTIONAL AND STATUTORY INTERPRETATION

EKURHULENI METROPOLITAN MUNICIPALITY V ERGO MINING (PTY) LTD & ANOTHER (A5041/2016) [2017] ZAGPJHC 263 (29 AUGUST 2017)

Case heard 20 & 21 June 2017, Judgment delivered 29 August 2017

This was an appeal against the granting of an order which interdicted and restrained the appellant and second respondent from terminating the electricity supply to the metallurgical plant of the first respondent, pending the outcome of the main application. In the main application, the first respondent sought a declaratory order that the appellant did not supply electricity to the first respondent, and that it was the second respondent (Eskom) that did. [Paragraph 3]. The appeal concerned the interpretation of s102(2) of the Systems Act, which provided that a municipality may not implement its credit control and debt collection measures where there was a dispute between the municipality and person liable to the municipality for the services rendered. [Paragraph 4]. The words “dispute” and “specific amount” in that section were of particular significance. First respondent refused to pay any amounts due on the basis that the electricity consumed came from the second respondent. In response, the appellant threatened to disconnect the electricity supply to the first respondent’s plant, which prompted first respondent to approach the court for the interdictory order, invoking s102(2). [Paragraph 9].

When determining the interpretation of s102(2), Mabesele J (Adams J and Sardiwalla AJ concurring) noted that the court was “mindful of the fact that interpretation is the process of attributing meaning to the words used in a document” [paragraph 26], and found that the word “dispute” should “be interpreted as being a dispute relating to an account issue, with reference to a ‘specific amount’ of consumption of electricity and the tariff at which the electricity was charged”. [Paragraph 29]. Thus, any dispute outside of this definition fell outside of the scope of the section in question. The dispute between the parties fell outside the ambit of s 102(2), and the court a quo had erred in deciding otherwise. [Paragraph 30].
Regarding the issue of whether the first respondent was entitled to an interdict at common law, Mabesele J held that no prima facie right had established to justify the interdict. [Paragraph 34]. Furthermore, to grant an interdict “would hamper the appellant in the execution of its constitutional mandate that is has to the effect of restricting its financial resources, thus restricting its responsibilities to improve socio-economic development in its area.” [Paragraph 36]. The court find that the interdictory relief should not have been granted. The appeal therefore succeeded.

CRIMINAL JUSTICE

NGOBENI V S (A309/16) [2017] ZAGPJHC 205 (3 JULY 2017)

Case heard 21 April 2017, Judgment delivered 30 June 2017

The appellant, a police officer in the employ of SAPS at the time, was convicted of murder and sentenced to 12 years imprisonment. The appellant had shot and killed a student during a search of a vehicle in which the deceased had been a passenger. The appeal was against both conviction and sentence.

Mabesele J (Mogoatlheng J and Van Veenendaal AJ concurring) analysed the facts, and found that:

“Evidence is clear that the deceased and his fellow students did not pose a threat to either the police officers or security officers from the time that the officers drove behind them until they stopped at the filling station.” [paragraph 26]. The appellant’s version was that after instructing the deceased to alight from the vehicle, the deceased had turned his body in such manner that the appellant thought the deceased was producing a firearm. As a result, the appellant alleged that he shot the deceased to protect himself.

“Despite the appellant appreciating the deceased’s cooperation he nevertheless shot the deceased. There is no evidence that the deceased ever threatened or attempted to threaten the appellant when he got out of the vehicle. Therefore, the appellant’s version that he shot the deceased on reasonable suspension that the deceased was attempting to pull out a firearm from his waist, as he got out of the vehicle, thus threatening his life, was correctly rejected by the trial court.” [Paragraph 30]

Mabesele J found that the trial court had correctly held that the state proved the intent in the form of dolus eventualis, and that the appeal against conviction must fail. [Paragraph 32].
Regarding sentence, the trial court had imposed a sentence of 12 years imprisonment, with four years suspended, thereby effectively imposing an eight-year sentence. Upon weighing the personal circumstances of the appellant together with the aggravating circumstances, Mabesele J held that the aggravating circumstances “outweigh, by far, the personal circumstances of the appellant. Therefore, the sentence imposed by the trial court as compared to that which this court would have imposed, had it been that court, is disturbingly inappropriate. Therefore, it stands to reason that this court is at large to impose sentence afresh.” [Paragraph 42]. Mabesele J found that a sentence of 18 years in prison was appropriate “for this horrific crime.” [Paragraph 45].

**MEDIA COVERAGE**


“In 2010, Judge Mabesele rendered voluntary service in the casualty department of Sebokeng hospital, during the general strike by public servants, thereby ensuring that medical staff received necessary support in the performance of emergency duties. Judge Mabesele donated a substantial number of law books to the University of Venda and the newly established Department of Law at the Vaal University of Technology. Through his effort and persuasion, other legal practitioners donated more law books to Vaal University of Technology.”
JUSTICE RAMMAKA MATHOPO

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS


B. Proc, University of the North (1985)

CAREER PATH

Acting Justice, Constitutional Court (no dates)

Justice of Appeal, Supreme Court of Appeal (2015 - )

Acting Justice of Appeal, Supreme Court of Appeal (2013 – 2014)

Judge, Gauteng High Court, Johannesburg Local Division (2006 – 2015)

Acting Judge of the High Court, North and South Gauteng Divisions (2005)

Director, Mathopo Attorneys (1989 – 2006)


Member, Gauteng Law Council (2003 – 2005)

Member, Law Society (1989 – 2005)

Member, Black Lawyers’ Association (1986 – 2005)

Member, Rhema South (1992 - )
MOHAMED’S LEISURE HOLDINGS (PTY) LTD V SOUTHERN SUN HOTEL INTERESTS (PTY) LTD (183/17) [2017] ZASCA 176; 2018 (2) SA 314 (SCA) (1 DECEMBER 2017)

Case heard 21 November 2017, Judgment delivered 1 December 2017

Applicant had sought to evict respondent from certain immovable property. The high court had refused on the basis that the implementation of the cancellation clause would have been manifestly unreasonable, unfair, and have offended public policy. It concluded that the common law principle of pacta sunt servanda should be developed by importing or infusing the principles of ubuntu and fairness into the law of contract. [Paragraph 1].

Mathopo JA (Shongwe AP, Willis JA and Meyer and Ploos van Amstel AJJA concurring) considered a range of case law on the issue, and found that as the terms of the contract were not on their face inconsistent with public policy; the relative position of the parties was of bargaining equality; and timeously performance had not been impossible, it was not against public policy to apply the principle of pacta sunt servanda in this case. [Paragraph 28]. There was no complaint that the impugned clause was objectively unconscionable. [Paragraph 29].

Mathopo JA held further that:

“The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party’s relative power is an issue. There is no evidence that the respondent’s constitutional rights to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question.” [Paragraph 30].

The appeal was upheld.

PAIXAO AND ANOTHER V ROAD ACCIDENT FUND (05692/10) [2011] ZAGPJHC 68

Case heard 19 May 2011, Judgment delivered 01 July 2011

The first plaintiff was in a relationship with the deceased, Mr Gomes, and they lived together unmarried. The plaintiff also lived with her daughter from a previous union, and there was no formal adoption of the daughter by Gomes. Upon Gomes’ death, the plaintiff claimed for loss of support.

Mathopo J had to determine whether it would be appropriate to allow the applicants to claim for loss of support given that she was not married to the deceased. The issues were whether the deceased was under a duty to support the plaintiff while she was still alive, and whether that duty was enforceable against third parties. [Paragraph 9].
Mathopo J held that the Constitutional Court had left the position of heterosexual unmarried life partners open in the Satchwell case. [Paragraph 20]. Mathopo J found that the fact that first plaintiff’s evidence that Gomes had promised to take care of her and her child was unchallenged, was not necessarily sufficient to discharge the onus of proof. [Paragraph 27]. Mathopo J held that:

“The mere fact that the parties motivated by love and support for each other made certain promises cannot be extended to a legal obligation either on the basis of a contract or otherwise. ...” [Paragraph 28]

Mathopo J held that even if there had been an agreement, a mere contractual right to support on its own was insufficient to give rise to a claim for loss of support. [Paragraph 30]. Mathopo J held that the promise made by the deceased “was not only vague, but one akin to an offer made within a family in circumstances which negative an intention to be legally bound.” [Paragraph 31].

Mathopo J consequently concluded that the plaintiffs had failed to discharge the onus, and their actions were dismissed with costs.

This decision was overturned on appeal by the SCA in Paixao and Another v Road Accident Fund 2012 (6) SA 377 (SCA), holding that the dependant’s action ought now to be extended to heterosexual permanent life partnerships where the partners agree to reciprocal duties of support.

ADMINISTRATIVE JUSTICE

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER V SOUTH AFRICAN RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION AND OTHERS (693/15) [2016] ZASCA 196; [2017] 1 ALL SA 331 (SCA); 2017 (3) SA 95 (SCA) (2 DECEMBER 2016)

Case heard 13 September 2016, Judgment delivered 2 December 2016.

This case dealt with a challenge to the constitutionality of a policy to regulate the appointment of insolvency practitioners, which had the objective of promoting “fairness, transparency and the achievement of equality for person previously disadvantaged by unfair discrimination”, and was intended to provide the basis for the transformation of the insolvency industry. [Paragraphs 1, 11]. The policy provided that every Master’s List of insolvency practitioners had to be divided into various categories in terms of race and gender, with a division between senior and junior practitioners. [Paragraph 12]. Practitioners would then be appointed consecutively in terms of a ratio, from the list. [Paragraph 13]. In declaring the policy unconstitutional, the high court found that the policy turned the Master into a “rubberstamp”, constituted and unlawful fettering of discretion, and that there was insufficient evidence to support the argument that the policy was likely to transform the industry. [Paragraph 20].

Mathopo JA (Mpati P, Wallis, Swain and van der Merwe JJA concurring) held that remedial measures had to operate “in a progressive manner” to assist those who had previously been deprived of the chance to practise in the insolvency profession. They must however not “encroach, in an unjustifiable manner, upon the human dignity of those affected by them.” [Paragraph 32]. Mathopo JA held that the clause of the policy relating to allocations contained “none of the flexibility and all of the rigidity that the Constitutional Court has said is impermissible”, and required the Master “to make an appointment in accordance with a rigid quota.” [Paragraphs 33 – 34].

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Mathopo JA held further that the prescribed appointment process was arbitrary and capricious, as it had “been formulated with no reference to its impact when applied in reality.” Both white men and practitioners of every race and gender born after 27 April 1994 would have their “turn” to be allocated come around “but rarely. The prejudice to young Black men and women who have recently completed their studies, are well qualified and wishing to enter practice as an insolvency practitioner, is obvious. There is no evidence either that this was considered by the Minister when formulating the policy.” [Paragraph 36]. There was also no allowance for a practitioner to refuse and appointment and what steps the Master would take in those circumstances. [Paragraphs 36 – 37].

Mathopo JA held that the policy was thus unconstitutional, and proceeded to making findings regarding the other grounds on which the policy was challenged, holding that the Mater’s powers were not improperly fettered [paragraphs 39 – 45], and that the policy was irrational. [Paragraphs 46 – 50].

The appeal was dismissed. Wallis JA (Mpati P, Swain and Mathopo JA concurring) wrote a separate concurring judgment finding that the publication of the policy had infringed the principle of legality.

DEMOCRATIC ALLIANCE V ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS (19577/09) [2013] ZAGPPHC 242; [2013] 4 ALL SA 610 (GNP)

Case heard 24 July 2013, Judgment delivered 16 August 2013

The then Acting National Director of Public Prosecutions (ANDPP), Mr Mpshe, had withdrawn criminal charges against Mr Jacob Zuma (the third respondent). Subsequent to a High Court application for the release of records upon which the ANDPP claimed to have based his decision, the Supreme Court of Appeal ruled that a telephonic recording and transcript, as well as any internal memoranda, reports or minutes of meetings dealing with the contents of the recordings and or transcript, except “the written representations made on behalf of the third respondent and any consequent memorandum or report prepared in response thereto or oral representations if the production thereof would breach any confidentiality attaching the representations (the reduced record), be released”. A reduced record was produced, and this application was to compel the ANDPP to release the complete said records as per the order of the SCA, after he failed to produce the records within the period set in the SCA order, and after the applicant requested the records. The applicant also sought to have the first respondent held in contempt of the SCA order for failing to produce the complete said reports. The third respondent (Zuma) argued that the disputed material did not form part of the qualified record, and that the production of transcripts and written and oral representations was protected by confidentiality. [Paragraph 12].

Mathopo J held that “[i]t should have been obvious to the third respondent” that “more was required to clarify his position instead of taking refuge on a point of law”, and that no cogent explanation had been put up as to why he was entitled to confidentiality. [Paragraph 22]. Mathopo J further rejected an argument that Mpshe had breached the confidentiality or privilege of the third respondent by releasing the transcripts during his public address. [Paragraph 24]. Mathopo J found that it was “desirable that the transcripts be produced to test and properly contextualise whether the decision of Mpshe was based on rational grounds or not.” [Paragraph 25]. Mathopo J thus found that a proper construction of the SCA order, confidentiality did not extend to the transcripts. [Paragraphs 26 -27].
Mathopo J held further that it would be inappropriate for the court “to have its powers limited by the ipse dixit of one party. A substantial prejudice will occur if reliance is placed on the value judgment of the first respondent. To permit the first respondent to be final arbiter and determine which documents must be produced is illogical.” The third respondent had failed to show that the representations were confidential. In the absence of any concerns being raised by the third respondent, first respondent had “no right to independently edit the record. It must produce everything. To the extent that the third respondent claims confidentiality, he must set out the relevant facts why he is entitled to confidentiality. ... In my view none has been shown to exist.” [Paragraph 29].

Mathopo J further rejected an argument that the transcripts formed an inextricable part of the entire representation, as well as an argument that producing the transcripts would infringe the third respondent’s right to a fair trial. [Paragraphs 30 – 31]. Mathopo J held that the first respondent, as an organ of state, had a duty to prosecute without fear, favour or prejudice. It was also a constitutional body with a public interest duty, whose officials were required to act with transparency and accountability. In this context, it had a duty to explain the dropping of the charges. The documents sought would “assist in enquiring into the rationality of the decision”, and it could not be said that all documents submitted were covered by privilege. [Paragraph 40]. Mathopo J concluded that the SCA order had not envisaged a blanket prohibition on disclosure, but on excluded matter the third respondent may have considered confidential or privileged. In the absence of any specific identification of protected material by the third respondent, he could not rely on the SCA order. [Paragraph 41].

Regarding the question of contempt, Mathopo J found that the first respondent had been required to afford the third respondent an opportunity to indicate objections, and thus had not been deliberately or wilfully non-complaint with the order. The contempt application was therefore dismissed. An order was made for the First Respondent to comply with the order of the Supreme Court of Appeal within five days. The order was upheld by the SCA in Zuma v DA (836/2013) [2014] ZASCA 101 (28 August 2014).

CIVIL PROCEDURE

AMRICH 159 PROPERTY HOLDING CC v VAN WESEMabeeck 2010 (1) SA 117 (GSJ)
Case heard 29 June 2009, Judgment delivered August 21, 2009

The applicant creditor made an ex parte application for the arrest of the respondent debtor tanquam suspectus de fuga. The respondent was then arrested and detailed. An application to dismiss the order for arrest was dismissed. This case dealt with the confirmation of the rule nisi originally granted for the arrest and detention of the respondent.

Mathopo J held that there were not sufficient grounds for arrest, the respondent having made arrangements to depart from South Africa long before the summons was served on him. [Paragraph 14]. Mathopo J held that a distinction had to be drawn between an intention to evade or delay payment of a debt, and an innocent departure. [Paragraph 16]. Mathopo J found that the applicant had failed to prove that the respondent had made arrangements to depart with the intention of evading or delaying payment of his debts, and that the respondent lacked the intention to depart from South Africa permanently and evading or delaying payment of his debts. [Paragraph 18].

Mathopo J held that a further reason why the application fell to be dismissed was the constitutionality of the arrest [paragraph 19], noting that no other country at the time utilised arrest as a prerequisite for
exercising civil jurisdiction. [Paragraph 26]. Mathopo J found that there was no post – 1994 authority justifying the arrest of an individual pending the provision of security:

“To order the arrest of the respondent on the basis that he is unable to give security, would in my view offend his right to dignity, equality and freedom of movement as enshrined in the Bill of Rights. The continued arrest in such circumstances would be tantamount to coercing security or payment, especially where it is manifestly clear that his liability has still not been established and is disputed.” [Paragraph 28]

Mathopo J commented that a creditor in the position of the applicant wished to protect its position regarding a person leaving the countries, it had to use other remedies which did not violate the personal freedom of the debtor. [Paragraph 33]. To the extent that the common law was at odds with the Constitution, it needed to be developed, as an arrest in such circumstances “cannot pass the limitations test in s 36, as it is contrary to the spirit, purport and objects of the Bill of Rights.” However, since the parties had not argued the constitutionality point extensively, Mathopo J declined to make an express finding on the issue. [Paragraph 35].

The application was dismissed. The decision was later endorsed by the Constitutional Court in Malachi v Cape Dance Academy International (Pty) Ltd and Others 2010 (6) SA 1 (CC), with the court holding that arrest tanquam suspectus de fuga does not constitute just cause for infringing on the constitutional right to freedom and security of person and amounts to unlawful deprivation of liberty.

CRIMINAL JUSTICE

TSHABALALA V S; NTULI V S (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC) (11 DECEMBER 2019)

Case heard 22 August 2019, Judgment delivered 11 December 2019

The issues for determination in this case were whether the doctrine of common purpose applied to the common law crime of rape, and if not, whether there was any rational basis for a distinction between the common law crime of rape and other crimes to which the doctrine applied. Appellants argued that under the common law, the crime of rape was an instrumentality office which could only be committed by a male using his own genitalia, and not by an individual who was present and by his conduct promoted, encouraged or facilitated the commission of the offence. The appellants had been convicted by the High Court. [Paragraphs 2 – 3].

Mathopo AJ (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Theron J and Victor AJ concurring) noted conflicting case law among different divisions of the high court on the application of the common purpose doctrine to the crime of rape [Paragraphs 22 – 29]. In light of these divergent decisions and uncertainty as to the law, the Court had jurisdiction as it was an arguable point of law. [Paragraph 30]. Mathopo AJ held further that “[g]iven the scourge of rape in this country, in particular group rape, a resolution of this issue will have an impact beyond the present litigation and will not only affect the immediate parties, but it will give decisive direction to cases of a similar nature and is therefore a matter of general public importance.” The court therefore had jurisdiction to hear the case. [Paragraphs 31 – 32].

On the merits, Mathopo AJ discussed the submissions of the parties and the doctrine of common purpose. Mathopo AJ held that it could not be suggested that the rapes in question were “unexpected, sudden or
independent acts of one or more of the perpetrators which the others neither expected nor were aware of even after it happened.” Nor was it probable that the accused were unaware of what was happening or about to happen. Mathopo AJ held further that:

“It is necessary that the relationship between rape and power must be considered when analysing whether the doctrine applies to the common law crime of rape. To characterise it simply as an act of a man inserting his genitalia into a female’s genitalia without her consent is unsustainable. In instances of group rape, as in this case, the mere presence of a group of men results in power and dominance being exerted over women victims.” [Paragraph 51].

Mathopo AJ held further that the appellants had shown a “cavalier attitude” that demonstrated callousness. To jettison the common purpose doctrine “would do a grave injustice to direct and indirect victims of gender-based violence. This would give power to men or perpetrators who have raped women with impunity in the knowledge that the doctrine would not apply to them.” [Paragraph 52].

Mathopo AJ rejected the instrumentality argument for perpetuating gender equality and promoting discrimination. There was no reason why the use of one’s body should be determinative in the case of rape, but not in other offences. [Paragraphs 53 - 54]. Mathopo AJ further rejected an argument based on the absence of causation, holding that:

“The object and purpose of the doctrine is to overcome an otherwise unjust result which offends the legal convictions of the community, by removing the element of causation from criminal liability and replacing it, in appropriate circumstances, with imputing the deed ... which caused the death (or other crime) to all the co-perpetrators. By parity of reasoning, there is no reason why the doctrine cannot apply with equal force to the common law crime of rape. ... The applicants knowingly and with the requisite intention participated in the activities of the group and fully associated themselves with its criminal designs. It is disingenuous to now contend that because they did not physically penetrate the complainants they should not be found guilty on the basis of the doctrine.” [Paragraphs 56 – 57].

Mathopo AJ concluded that the doctrine of common purpose applied to the crime of rape, and dismissed the appeal. Khampepe J and Victor AJ wrote separate concurring judgments.

PRINSLOO V S (534/13) [2014] ZASCA 96 (15 JULY 2014)

Case heard 29 May 2014, Judgment delivered 15 July 2014

The accused, a white male, had been convicted by the Magistrate’s Court for two counts of crimen injuria and assault for an altercation over parking that occurred at the University of Free State. The accused physically assaulted the complainant and uttered racially offensive words to her. The accused had also said to the complainant that she did not have a driver’s licence because she was black. The counts were taken together for sentencing and the accused was sentenced to a fine of R6 000 or twelve months imprisonment, conditionally suspended for five years. The accused appealed unsuccessfully to the high court against his conviction only, and then to the SCA.

Mathopo AJA (Bosielo and Saldulker JJA concurring) held:
“In a direct response to a question about how [the complainant] felt when the words in the aforesaid paragraphs were used, she responded that she felt naked, worthless, belittled, dirty and that she felt like something had been taken away from her. ... What incensed and humiliated her most was the fact that the appellant uttered those words in the presence of her two daughters and other members of the public.” [Paragraph 6]

Mathopo AJA rejected an argument that the magistrate had misdirected herself by failing to specifically mention that she had considered the credibility of the witnesses. Mathopo AJ held that although the magistrate had not explicitly state that she had considered credibility, it was clear from the judgment as a whole that this had been considered, and a proper assessment of the evidence had been made by weighing the strengths and weakness of the state’s case in relation to the appellant, including the probabilities and improbabilities of both versions. [Paragraph 14]. Mathopo AJA further rejected a challenge to the evidence of the complainant’s daughter, on the basis that the alleged discrepancies were not material. [Paragraph 15].

Mathopo AJA found that several aspects of the evidence were destructive of the credibility and reliability of the appellant [paragraph 17], and that the magistrate had “delivered a well-reasoned judgment which accounted for all the proven facts.” [Paragraph 19]. Regarding the conduct of the accused, Mathopo AJA found:

“... I have no doubt that the appellant behaved in a high-handed and cantankerous manner, and further that he uttered the words attributed to him. The word kaffir is racially abusive and offensive and was used in its injurious sense. This was an unlawful aggression upon the dignity of the complainants. ... It is trite that in this country, its use is not only prohibited but is actionable as well. In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. The appellant cannot claim that he did not know that the use of such word is offensive and injurious to the dignity of the complainants. ... [S]uch conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms.” [Paragraph 20]

The appeal was dismissed.

TOFIE V THE STATE (104/2014) [2014] ZASCA 159 (1 OCTOBER 2014)

Case heard 11 September 2014, Judgment delivered 1 October 2014.

The appellant was convicted of raping a 15 year old girl, and sentenced to an effective 20 years imprisonment by the Regional Court. An appeal to the Western Cape High Court had resulted in the sentence being increased to life imprisonment. The accused then appealed to the SCA against both conviction and sentence.

Mathopo AJA (Lewis JA and Gorven AJA concurring) found that the statement of the complainant had been “riddled with inconsistencies”, but that both the trial court and the appeal court had been satisfied that the discrepancies were not material, and the evidence understandable and acceptable in the circumstances. [Paragraph 11].
Mathopo AJA noted that the complainant was a single witness regarding the rapes, and as such her evidence had to be approached “with the necessary caution.” [Paragraph 16]. Mathopo AJA held that the courts below had been wrong to find the complainant’s evidence to be true and reliable, “notwithstanding the glaring contradictions if not blatant lies, in her evidence.” [Paragraph 17]. Mathopo AJA accepted that the appellant had also been an unsatisfactory witness [paragraph 18], but noted that there was no obligation on the accused to prove his innocence. [Paragraph 19]. In this case, the unreliability of the evidence as to rape was such that the State had not proved its case beyond a reasonable doubt. [Paragraph 22].

The appeal was upheld and the convictions and sentences were set aside.
JUSTICE MAHUBE MOLEMELA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 18 March 1965

BA, University of Fort Hare (1986)

B Proc, University of Fort Hare (1992)

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

LLB, University of the Free State (2000)

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


CAREER PATH

Justice of Appeal, Supreme Court of Appeal (2018 - )

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

Acting Justice, Constitutional Court (January – May 2015)

Judge President, Free State Division of the High Court (2015 – 2018)

Judge of Appeal, Labour Appeal Court (2014 – )

Acting Judge, Competition Appeal Court (2012 – 2014)

Acting Judge, Labour Appeal Court (2012 – 2014)

Judge, Free State Division of the High Court (2008 – 2018)

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

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

Director, Smith Tabatha Buchanan Boyes (2005 – 2007)

Director, Claude Reid Inc (2003 – 2004)


Admitted as a Notary (1996)

Admitted as a Conveyancer (1996)


Prosecutor, Thaba Nchu Magistrates Court (1987)

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

Member, Black Lawyers Association (1997 – 1999)


Central University of Technology

Chancellor (2016 – )


Member, Catholic Women’s League (2016)

Council Member, St Rose Parish Church Council (2004)
Respondent, a professional racehorse trainer, had instituted proceedings under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), claiming that the applicant had discriminated against him on racial grounds. The Equality Court upheld a special plea of res judicata in the form of issue estoppel. The high court overturned that decision and remitted the case to be heard before another magistrate. [Paragraphs 1 – 2]. The respondent had in 2008 brought a claim against the applicant in the Equality Court, complaining of unfair discrimination. A second claim in 2013 was dismissed by the Equality Court for lack of jurisdiction. [Paragraphs 5 – 8].

Molemela JA (Majiedt, Wallis, Saldulker JJA and Weiner AJA concurring) found that new evidence had been placed before the Equality Court which had not been adduced in the 2008 case. This related particularly to anger management treatment undertaken by the respondent, which he wished to use to show that applicant’s reasons for its decision to refuse him stabling facilities were a sham. Molemela JA noted that it was not for the SCA to determine whether the evidence did so, but the respondent was entitled to seek to use the evidence in this way. [Paragraphs 22 - 23]. The Equality Court had therefore erred in making the finding of issue estoppel. Since no evidence had been led on the merits of the most recent claim, the high court had been correct to remit the case to the equality court. [Paragraph 24].

Molemela JA then turned to consider whether remarks by the high court had shown “a lack of judicial restraint”, and noted that while judges may have to express critical views about litigants and witnesses, this required circumspection, “and must be supported by all the facts.”

“[G]iven its unfortunate history of structured racism, South Africa is still a racially charged society. ... These cases [in which accusations of racism were made] attest to the far-reaching consequences that a mere accusation of racism may bring. Courts must therefore be alive to the sensitivity of disputes involving racial connotations. Circumspection is required not only in relation to the order that is ultimately made but also in relation to remarks made en passant. ...” [Paragraph 25].

“[G]iven that the allegations of racism had not been tested by cross-examination and that Gold Circle had countered the allegations of its lack of transformation by presenting names of black people who had allegedly benefitted from transformation policies of Gold Circle, there was simply no basis for the court a quo to have made remarks from which it could be implied that Gold Circle is racist. The court a quo seems to have made findings pertaining to the very nub of the case based on unproved facts. This is contrary to established legal principles which dictate that inferences be drawn only if they are justified by proven facts. Moreover, since there were disputes of facts on that very aspect, it was impermissible for the court a quo to make the remarks it made on the basis of averments made by just one party. “[Paragraph 26].
Molemela JA found that the high court had also been unjustified in commenting on the magistrate’s readiness to proceed with the matter. There was no reason why the magistrate should be precluded from presiding over the new hearing of the matter. [Paragraph 27].

The appeal was dismissed, save for the matter being remitted to the Equality Court for a new hearing before any presiding officer. [Paragraph 29].


Case heard 16 February 2017, Judgment delivered 27 March 2017

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

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

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

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

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

‘I disagree with the conclusion that ‘mulcting the appellant with costs may discourage those who may legitimately wish to challenge the respondent’s policy on other grounds. This may have an unintended chilling effect on access to justice’. No other grounds were raised by the appellant as a basis for challenging the respondent’s policy. The concern raised is not based on any evidence and amounts to unjustified speculation.’ [Paragraph 37]
An appeal on costs was upheld by the Constitutional Court in Harrielall v University of KwaZulu-Natal (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (31 October 2017). The court held that the Biowatch principle should have been applied in determining costs, and criticised the High Court and the SCA for departing from the Biowatch principle [paragraphs 10 – 11]. No order as to costs was accordingly made.

CRIMINAL JUSTICE


Case heard 19 August 2019, Judgment delivered 13 November 2019

Appellant was charged with a cyber attack on a mobile telephone network. The trial began in 2005, and appellant was convicted in 2015, and sentenced to a fine or 12 months’ imprisonment on one count, and three years’ imprisonment on another. An appeal to the high court was dismissed in 2017. In 2018, the high court granted leave to appeal. [Paragraphs 1 – 4]. This raised an issue in that the Superior Courts Act of 2013 had come into effect while the trial was ongoing. Prior to this, the high court hearing an appeal from a lower court was empowered to grant leave to appeal further to the SCA if it dismissed the appeal. Following the introduction of the Act, the high court was no longer competent to grant such leave. [Paragraphs 5 – 6]. The issue to be determined was which system of appeal applied to this case. [Paragraph 8].

Leach and Mokgohloa JJA (Saldulker JA concurring) held that proceedings were no longer “pending” in terms of the Superior Courts Act once judgment had been given, and any subsequent step, such an appeal, did not constitute a pending proceeding. The high court accordingly did not have jurisdiction to grant special leave to appeal to the SCA. There were no grounds to grant special leave to appeal to the SCA. [Paragraph 38].

Molemela JA agreed with the findings on conviction, but dissented on sentence, holding that the sentence was “far too severe and has been vitiated by several instances of material misdirection.” [Paragraphs 46 – 47]. Molemela JA found that the trial court had not considered the cumulative effect of the sentences imposed [paragraph 48]; had failed to consider “the offender’s particular crime and its seriousness, as opposed to following a rigid approach that the maximum sentence set out in the penalty clause is in itself indicative of the seriousness of that crime” [paragraph 49]; had taken into account “the fallacious consideration of the maximum sentence as being inadequate” in imposing sentence [paragraphs 50 – 51]; and had paid “insufficient regard” to the “inordinate delay” in finalising the trial. Molemela JA disagreed with the majority’s reasoning that the appellant had “really only himself to blame” for the delays, finding that this paid insufficient regard to the constitutional right to a trial without unreasonable delay. [Paragraphs 52 -53].

Molemela JA held further that:

“While a plea of guilty may, in appropriate circumstances, be regarded as indicative of remorse, this court has acknowledged that a lack of remorse is not an aggravating factor. I am not aware of any judgment of this court that has held to the contrary. An offender cannot be penalised simply because they wish to challenge allegations made by the State against them.” [Paragraph 59].
Molemela JA expressed concern over “unjustified and startling remarks” made by the trial court in determining sentence, [Paragraphs 61 – 62]. Whilst the trial court’s incorrect approach to sentencing “should not detract from the seriousness of the offence” [paragraph 67], the trial court had not exercised its sentencing discretion judicially, and Molemela JA would have granted special leave to appeal, and suspended the sentence of 3 years; imprisonment. [Paragraphs 68 -69].

Mbatha JA wrote a separate dissenting judgment, concurring in the order proposed by Molemela JA.

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

*Case heard 3 May 2017, Judgment delivered 1 June 2017*

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

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

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

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

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

*Case heard 4 August 2014, Judgment delivered 8 August 2014*

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

Molemela J (Wright AJ concurring) held:

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

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

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

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

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

**Judgment delivered 7 November 2013**

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

Molemela J (Lekale J concurring) held:

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

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

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

“...It cannot be denied that members of the community have, at various forums, verbally expressed their
frustrations about what they perceive as the state’s shortcomings in addressing the problem of the
presence of illegal immigrants in this country. The community expects the state to deal decisively with the
matter. The judiciary, as one of the arms of the state, needs to do its part. It can only do so by imposing
appropriate sentences that are dictated to by the facts of each case. I agree that any sentence that is
imposed must, of necessity, be coupled with an order of deportation. Such orders, coupled with effective
use of state resources to curb entry of illegal immigrants into the country will significantly reduce the
prevalence of this offence.” [Paragraphs 15]
The conviction on both counts was upheld and the sentence was set aside and replaced with a fine of R600.00 or one month’s imprisonment, wholly suspended for two years on condition that the accused was not again convicted of contravention of section 49(1)(a) of the Immigration Act or any offence with an element of dishonesty committed during the period of suspension.

CUSTOMARY LAW


Case heard 16 September 2013, Judgment delivered 24 October 2013

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

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

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

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

The appeal was dismissed with costs.
JUDGE DHAYA PILLAY

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born : 5 January 1958

BProc, UNISA (1982)

LLM, University of Natal (Durban) (1993)

Certificate in Constitutional Law, University of Natal (Durban) (1994)

LLB, UNISA (2002)

CAREER PATH

Judge, Independent Electoral Commission (2018 - )

Acting Justice of Appeal, Supreme Court of Appeal (January – June 2018)

Judge, KwaZulu – Natal High Court (2010 - )

Acting Judge, KwaZulu – Natal High Court (2003, 2005)


Yunus Mahomed and Associates


Professional Assistant (1985 – 1987)


MC Moodliar and Co

Professional assistant (1983 – 1984)

Articled clerk (1979 – 1982)

Independent Mediation Services of South Africa Panels

Dispute Resolution Systems Design (1996)

Labour Relations Act training (1995)

Trainer (1995)

Mediator (1994)

Arbitrator (1992)

Academic


Honorary Research Fellow, University of KwaZulu – Natal (2013 – 2016)

Visiting fellow, Pembroke College, Oxford University; Oxford Human Rights Hub (2014)

Adjunct Professor, Seattle University School of Law (2004, 2006)

Member and executive member, Durban branch, NADEL (1984 – 1987)

Member, Democratic Lawyers’ association (1979 – 1984)

HANEKOM V ZUMA (D6316/2019) [2019] ZAKZDHC 16 (6 SEPTEMBER 2019)

Case heard 23 August 2019, Judgment delivered 6 September 2019

Applicant sought to interdict respondent from publishing a statement on applicant’s twitter account to the effect that applicant was “a known enemy agent.” Applicant contended that the tweet implied that he was an apartheid spy, and was defamatory [Paragraphs 1 – 2].

Pillay J identified the core issue in dispute as being the meaning of the tweet in context. [Paragraphs 11 - 12]. After setting out the political context in which the litigation took place, as set out in the parties’ affidavits [paragraphs 14 - 27], Pillay J described the dispute as part of a “larger conflict” internal to the ANC following the recall of the respondent as President, with the litigation serving as “a proxy for the internal conflict within the ANC.” [Paragraphs 28 - 29]. Pillay J described the litigation as a “conflict aggravator” [paragraph 33], and noted that “neither litigant seems inclined to engage bilaterally or within the political structures of the ANC to find a negotiated solution.” [Paragraph 34].

Pillay J analysed the meaning of the phrase “known enemy agent”, and found that “to the reasonable reader, the historical connection to apartheid spies is the most obvious.” [Paragraph 43]. Pillay J found that the respondent had no evidence to justify the assertion, other than the applicant’s admission that he had met with members of the EFF and ANC members who “also wanted Mr Zuma removed as head of State”. [Paragraph 45]. Pillay J found that:

“[N]othing from Mr Hanekom’s admission lays a basis for Mr Zuma to label him as a ‘known enemy agent’ or apartheid spy. Dishonesty and duplicity embedded in the phrase makes it automatically defamatory. That Mr Zuma links his tweet to Mr Hanekom’s admission and role in removing him as President is odd. The decision to remove Mr Zuma as President was that of the NEC. …” [Paragraph 46]. Pillay J held further that reference in the tweet to respondent’s testimony before the Zondo Commission of Inquiry meant that:

“Reasonable readers would interpret the link in the tweet to the Commission to mean that Mr Hanekom is part of that plan in which apartheid spies and agents conspired with two big countries to ‘deal with Zuma’. In other words, Mr Hanekom’s plans to have him removed from leadership in the ANC, dovetails with the apartheid agents’ plans.” [Paragraph 51]. This interpretation was supported by the contents of the respondent’s answering affidavit. [Paragraphs 52 – 54]. Pillay J found that the tweet was defamatory and false.

Pillay J then undertook an analysis of “a few material inconsistencies, misconceptions and distortions” which, due to the “public interest nature” of the case, “could be peddled as truths” if left unchecked. [Paragraphs 55 – 81]. Pillay J found that a reasonable reader would infer that the respondent’s tweet implied that the applicant was an apartheid spy. Respondent was ordered to apologise, remove the tweet and pay damages, the determination of which was referred to oral evidence. [Paragraphs 85 – 86].
COMMERCIAL LAW

STANDARD BANK OF SOUTH AFRICA LTD v DLAMINI 2013 (1) SA 219 (KZD)

Case heard 6 August 2012; 14 August 2012, Judgment delivered 23 October 2012

The case concerned the purchase of a motor vehicle by Mr Dlamini, through a dealership acting as an agent for Standard Bank. Mr Dlamini returned the vehicle after 4 days due to the serious defects and demanded a refund of his deposit. The bank issued summons against Mr Dlamini, contending that he had not elected to cancel the agreement in the prescribed manner. The main issue was whether Mr Dlamini understood the material terms of the credit agreement, and whether the bank had taken reasonable steps to ensure that he understood.

Pillay J held that Mr Dlamini was “functionally illiterate”, did not understand English, and had completed schooling until standard one only. He was “unsophisticated”, and had struggled to engage with documents while testifying. [Paragraph 23].

“His illiteracy, lack of sophistication and general discomfort at being in a courtroom rather than deliberate mendacity caused him to lapse into the easy option of simply denying everything.” [Paragraph 24]

Pillay J noted that the Constitution recognised past injustices, and committed to “to healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens.” [Paragraph 28]. The purposes of the National Credit Act (NCA) included “promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers”. [Paragraph 34].

On the cancellation procedure employed by the bank, Pillay J held that it:

“... makes credit transactions unduly onerous and a veritable trap for poor, illiterate and disadvantaged people who intuitively would return defective goods to a supplier and ask for a refund.” [Paragraph 44]

Pillay J held that the Bank should have had better measures in place “to ensure that its historically disadvantaged customers are aware of their rights and responsibilities.” The NCA placed an onus on credit providers to inform consumers about their rights and responsibilities. [Paragraph 49].

The rescission of the credit agreement was held to be valid, and Standard Bank was ordered to pay the costs of the action.

CIVIL AND POLITICAL RIGHTS

MAKWICKANA v ETHEKWINI MUNICIPALITY AND OTHERS 2015 (3) SA 165 (KZD)

Case heard 26 November 2014, Judgment delivered 17 February 2015

The Durban Metropolitan Police conducted raids and impounded the goods of street traders found without trading permits. One such trader, Mr Makwickana, challenged the constitutionality of certain provisions of the municipal bylaws regulating informal trading.

Pillay J held that the requirement that nobody other than a permit holder could trade on the street “inconvenienced the applicant and other street traders seriously”, as they were unable to leave their stock unattended. [Paragraph 11]. Whilst provisions of the bylaws relating to impoundment may be necessary in respect of some contraventions, not all infringements harmed the public to the extent that impoundment was required.
“Section 35(1) [of the bylaw] is overbroad in that it permits impoundment for all contraventions without differentiating between serious absolute contraventions and less serious, formal non-compliances, such as trading without producing proof of a permit, that do not pose a threat to the public” [Paragraph 81]

Pillay J held that the prejudice of removing a street traders’ property without a hearing was compounded by the power to sell, destroy or dispose of foodstuffs or perishable goods. [Paragraph 82]. Pillay J noted that the “luxury of litigation” was not an option for every street trader whose property was impounded [paragraph 85], and found that the right of access to courts was “theoretical and illusory for street traders generally.” [Paragraph 88]. Pillay J thus found that s 35 of the bylaw limited the right of access to courts under s 34 of the Constitution, and proceeded to consider the issue of deprivation of property in terms of s 25 of the Constitution. Pillay J found that the deprivation of property was so invasive that it impacted on the welfare “of the street traders and their large families. For most, the impounded goods were their only assets. Deprivation also impacted “on their identity and dignity as people with property, however little that is.” [Paragraph 98]. Pillay J held further that the arbitrary deprivation of street traders’ property also impaired their right to trade. [Paragraph 102].

Pillay J then turned to deal with the argument that Mr Makwickana’s right to equality was infringed on the basis of race and socio-economic status. Pillay J held that whilst the bylaw was facially neutral:

“... apartheid layered poverty over race. The degree of coincidence or intersectionality of race with socioeconomic status results in the greatest impact being on Africans. As the population group with the largest component of poor people the impact is deeper and more expansive than on any other race group. Race and socioeconomic status are cemented together tightly, though not inextricably.” [Paragraph 116] The effect of the bylaw was to discriminate directly and indirectly “against poor and mainly African people.” [Paragtraph 125].

Pillay J held that s 35 of the bylaw constituted discrimination under s 9(3) of the Constitution, and could not be saved by the limitations clause. Pillay J held that the removal and impounding of the applicant’s goods was unlawful; awarded compensation of R775 for the value of the goods, plus interest at the prescribed rate; and declared sections 35 and 39 of the Informal Trading Bylaw to be unconstitutional and invalid. [Paragraph 149].

CONSTITUTIONAL AND STATUTORY INTERPRETATION


Applicant, a judge of the high court, was involved in a motor vehicle accident which resulted in his conviction for driving whilst under the influence of alcohol. A complaint was lodged with the Judicial Service Commission. The Judicial Conduct Committee recommended to the JSC that a Judicial Conduct Tribunal be established to investigate the applicant’s conduct further. Applicant challenged numerous provisions of the JSC Act as being unconstitutional.

Pillay J dismissed a point in limine that Parliament should have been joined to proceedings. [Paragraphs 12 – 17]. A second point in limine, that the challenge lacked a factual basis, was upheld in respect of provisions not relating to the impeachment proceedings against the applicant. [Paragraph 25]. Pillay J then examined the constitutional scheme regulating the removal of judges from office. [Paragraphs 30 – 45]. Pillay J held that “[t]extually and contextually” the Constitution authorised the JSC Act, and Parliament had exercised its original jurisdiction in passing the Act. No question of the JSC delegating its authority to Parliament arose. [Paragraph 52].
Pillay J then surveyed international best practice on the governance of the judiciary [paragraphs 53 – 57], and found that this supported the finding that “[e]xclusion of the legislature and the executive from determining and participating the complaints process, as contended for by the applicant, is the antithesis of dialogue and counterproductive to constitutional values in South Africa and other democracies.” [Paragraph 57].

Pillay J found that there was nothing which suggested that “the JSC Act was foisted on the judiciary.” [paragraph 59], and that in considering the validity of the Act, the potential for abuse of power had no bearing on constitutionality. [Paragraph 73]. The applicant’s complaint that non-JSC members were appointed to the JCC and Tribunal was rejected as unjustified. [Paragraph 77].

Pillay J held that:

“[C]onstitutional interpretation is not only about parsing the words. Both textual and contextual interpretations matter. Contextually, the JSC Act reinforces dialogical constitutionalism. It sets objective ground rules for engagement by the three actors representing the three arms of government. A certain, predictable, consistent, transparent and accountable process fortifies the separation of powers and preserves the independence of the judiciary. Without it, the JSC would have to first persuade the other two arms that it adopted a fair procedure in deciding to remove a judge and therefore they should accept its decision to remove the judge.” [Paragraph 81].

The JSC Act was held to be consistent with the Constitution. [Paragraph 84]. Pillay J rejected an argument that no costs order be made, on the basis that the applicant had not raised a genuine constitutional dispute. [Paragraph 103]. Pillay J concluded that:

“I would be failing in my duty if I did not take this opportunity to emphasise that it is in the interests of justice that the matter of the complaint against the applicant should be dealt with and concluded without any further delay. The events that gave rise to the complaint occurred in 2007. Nine years later, the matter has not been finalised. It is in the interests of justice that this matter be brought to finality.” [Paragraph 104].

CRIMINAL JUSTICE

S v MABASO 2014 (1) SACR 299 (KZP)

Case heard 6 February 2013, Judgment delivered 10 May 2013

This was an appeal against the sentence imposed by the high court, where the accused was sentenced to life imprisonment for the two counts of rape and to 15 years imprisonment for robbery with aggravating circumstances. On appeal, the main issue was whether the trial court’s reliance on provisions of the Criminal Law Amendment Act were appropriate given the nature of the notification to the appellant that those provisions were to be applied. For the majority, Koen J (Ploos van Amstel J concurring) held that it was not to be assumed that, because an accused had been represented, the provisions of the Act had been pertinently brought to his attention and that the accused must from the outset know what the implications and consequences of the charges were. As there had been no indication in the charge-sheet or at the beginning of proceedings that the state might seek to invoke the provisions of the Act in respect of the count of robbery with aggravating circumstances, the court a quo had erred in proceeding on the premise that the prescribed minimum sentence should follow. The majority imposed an effective sentence of 20 year’s imprisonment.
Pillay J dissented, holding that whilst sentencing could not amount to “inflexible rubber-stamping”, it could not undermine the legislative intent to impose tougher sentences. [Paragraph 25]. Pillay J held:

“In this case the complainant was raped because she was female. Rape is inherently and automatically sex and gender discrimination. Gender and sex are the recognised grounds of discrimination because of the prevalence of rape by men of women.” [Paragraph 35]

Pillay J noted further the propensity of rape victims to become suicidal, and that “[f]ew crimes are as dignity- and soul- destroying as rape is.” [Paragraph 36]. Whilst the appellant and complainant were entitled to the rights to human dignity, equality and freedom, “once the appellant has infringed these rights of the complainant he cannot expect to enjoy them to the same extent as she is entitled to or in the same way he did before his conviction. His rights must yield in favour of her rights.” [Paragraph 40].

Pillay J held that the appellant had had a fair trial, and would have sentenced the appellant to 25 years imprisonment on the two counts of rape, and 8 years imprisonment on the count of assault, to run concurrently [Paragraph 64]

NDWANDWE V THE STATE (AR99/12) [2012] ZAKZPHC 47
Case heard 28 June 2012, Judgment delivered 6 August 2012

This was an appeal against conviction and sentence in a rape case. The proceedings in the trial court were marred with many irregularities. The main question on appeal was whether those irregularities were sufficiently serious to allow the appeal.

Pillay J (Mbatha J concurring) dealt first with the trial court’s failure to apply s 170A of the Criminal Procedure Act (CPA), which allowed a witness under eighteen to give evidence through an intermediary. Pillay J noted that the Constitutional Court had held that this procedure ought to be followed in all matters involving child complainants in sexual offence cases. [Paragraph 4]. This “should have been fresh in the minds of the learned magistrate and prosecutor … when this trial commenced”, but neither section 170A nor the judgment had featured during proceedings. [Paragraphs 4 – 5].

On the failure by the trial court to apply s 153(5) of the CPA [allowing for in camera proceedings when witnesses under eighteen testify], Pillay J held that the magistrate had “muddled the requirements” for in camera proceedings, and “aggravated their mental stress and suffering already accompanying the daunting atmosphere of a court by exposing them to not only the accused but also his family to the exclusion of their own.” [Paragraph 7]

Pillay J held that child witnesses had been sworn in without the presiding officer first determining their competence to testify. [Paragraph 14]. Pillay J noted that:

“… [T]he proceedings were conducted by an all-male team of magistrate, prosecutor and defence attorney. It is not clear from the record whether the interpreter was also a male. If he was, this would have aggravated the child witnesses’ ability in communicating effectively. … Rape victims, adults and children alike have great difficulty in expressing their experiences dispassionately and coherently. The role of the interpreter to communicate empathetically in such cases is vital.” [Paragraph 17]

The conviction and sentence were set aside, and it was ordered that the prosecution serve the judgment on the magistrate and prosecutor involved in the trial.
This article discusses the debate over the link between administrative law and labour law. It begins by looking at the history of labour legislation in South Africa.

“In 1979 amendments to the Labour Relations Act ... introduced an unfair labour practice jurisdiction to the Industrial Court ... Until the amendment, administrative law principles had no application to private contracts of employment ... The erstwhile Industrial Court seized the opportunity ... to apply principles of natural justice to hold that employers had an obligation to give employees a hearing”. (Page 413)

“Inspired by the developments in the private sector and the prevailing trend at the time of creating political space for democratic values by challenging state authority through the courts, a spate of cases in the public service ensued. Administrative law principles were tweaked and twisted to secure gains for public employees.”

The author notes that that constitutional entrenchment of a fair labour practice clause is unique, and that it is also unusual to constitutionalise the right to administrative action. “Not many constitutions have it probably because it is regarded as superfluous as the very purpose of a constitution is to regulate the exercise of power by the state or other public authority”. (Page 414)

The author then examines labour law under the constitution, beginning with an examination of the purpose of labour laws, arguing that this is “to give effect to and regulate the fundamental rights to fair labour practices” in the Constitution. To do so, rights and procedures are codified in detail. Labour laws “represent a delicate balance between what each of the social partners considered acceptable to meet the socio-economic challenges of the new democracy.” (Page 415)

“Labour rights and protections have been accessed from the Constitution directly. The right is available to ‘everyone’ ... Thus where the LRA has excluded certain categories of workers ... or disputes ... the Constitutional Court has extended the constitutional right to them”.

The author notes criticisms of these cases, on the basis that they “encourage parallel jurisprudence; one under the Constitution and the other under the LRA.” (page 416). The author then deals with conflict between labour law and administrative law in relation to decisions of the CCMA.

“The reference to ‘award’ in the definition of ‘decision’ cannot be a reference to labour arbitration awards issued by the CCMA and bargaining councils. Nor can acts and omissions of any person or body performing any functions in terms of the LRA be regulated by PAJA. I say so because their exclusion from the application of PAJA is implicit from sections 145 and 158(1)(g) of the LRA which already provide for the review of such awards and functions. If PAJA did apply there would be a duplication of legislation.”

“If PAJA applies to labour law decisions the rigidity of section 6(2) of PAJA will clash with the flexibility of the grounds of review in sections 145 and 158(1)(g) of the LRA.” (Page 419)

The author argues further that the standard of review of CCMA and bargaining council decisions “would widen and become more complicated if consideration were also to be given to PAJA”, and further blur the distinction between appeal and review. (Page 420)
The article goes on to suggest that PAJA and the LRA also conflict in respect of review of purely administrative or ministerial acts, particularly in relation to the registration of organisations.

“Promoting freedom of association and collective bargaining are not set as objectives of PAJA. They could be easily missed if the PAJA grounds of review were to apply to the registration of organisations.” It is argued further that, in this respect, PAJA and the LRA also conflict regarding their procedures and remedies.

The author argues that proceedings to challenge action by a public employer against its employee may be brought under either PAJA or the LRA, with resulting duplication of processes, cost and inefficiency.

“The LRA’s objective of effective dispute resolution could therefore be defeated by its own provisions. The labour courts are established as courts of law and equity ... The High Court which has powers arising from PAJA, is not a court of equity. Labour disputes should be heard in the labour courts.” (Page 424)

The author goes on to discuss possible conflicts with other statutory systems.

“Overlapping legislation is disastrous for public administration in general and dispute resolution in particular. ... Under the current dispensation public employees are more privileged than private employees. ... The objective of equality between public and private employees is thwarted.” (Page 425)


The article begins with a historical analysis of the concept of equity in labour jurisprudence, starting with an analysis of the 1979 amendments to the previous Labour Relations Act. The article then deals with changes brought by the new constitutional dispensation, starting with a consideration of judicial interpretation under the new constitution.

“The intention of the Constitutional Assembly was to place some matters exclusively within the control of the judiciary. ... Section 39 of the Constitution structures judicial discretion precisely. Whereas in the pre-constitutional era adjudicators had to strain the interpretation of the law for egalitarian effect, our Constitution now directs that the interpretation must be based on values. Such values must also be those that underlie an open and democratic society based on human dignity, equality and freedom. The concept of values embraces equity as one of many universally desired ideals. ... Adjudication is dynamic and adjudicators fulfil a transformative role. The Constitution therefore provides the legal basis for the judiciary to make law in certain circumstances.” (Page 57)

The author goes on to discuss how the courts have developed jurisprudence on judicial interpretation:

“A ‘narrow, artificial rigid or pedantic’ interpretation should yield in favour of an interpretation that is ‘purposive’ having regard to ‘contemporary norms, aspirations, expectations and sensitivities of the population as expressed in the Constitution’. ... Judicial interpretation, however, must begin with an interpretation of the express language of the written text. Otherwise the law may come to have whatever meaning one wants it to have. Adjudicators have a duty to develop jurisprudence based on principle.” (Page 58).

The author considers what are argued to be inappropriate uses of the concept of equity in reported CCMA decisions.

“Dissent amongst adjudicators is predictable. Controversy and dissenting judgments are a reminder of our plurality and a demonstration of our democracy in action. They attract public participation to the discourse about rights. This reinforces the dialogue that is constitutionally structured, on the one hand, by the
interpretation clause insofar as it extends a law-making function to adjudicators and which, on the other hand, is limited by the principle of the separation of powers. This tension triggers the dialogue.”

The article concludes by discussing cases to illustrate these observations about judicial interpretation.
JUDGE BASHIER VALLY

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 23 May 1959

B COM, University of Witwatersrand (1982)

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

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

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

LLB, University of Witwatersrand (1996)

CAREER PATH

Judge of Appeal, Competition Appeal Court (2018 - )

Acting Judge of Appeal, Competition Appeal Court (2016 – 2018)

Judge, Gauteng High Court (2012 - )

Acting Judge, Gauteng High Court (October – December 2010)

Advocate (1996 – 2012)


Junior Lecturer, Department of Sociology, University of Witwatersrand (1989 – 1990)
Organizer, Negotiator & Educator, Commercial, Catering and Allied Workers Union of South Africa (1985 – 1986)

Member, Arbitration Panel, Education Labour Relations Council (2000 – 2009)

Essential Services Commission

  Chairperson (2000 – 2006)

  Member (1999 – 2006)

Senior Commission Trainer of Commissioners, CCMA (1996 – 2002)

Independent Mediation Services of SA

  Member Panel (1991 – 1996)

  Member of Board of Trustees (1993 -1995)

  Trainer of Mediators and Arbitrators (1993 – 1996)

Advocates for Transformation

  Member (2003 – 2012)

  Treasurer (2010 – 2012)

  Member Access to Justice Committee (2009)

Member, Black Advocates Forum (1996 – 2003)
This matter concerned whether a ‘commercial and master channel distribution agreement’ between the South African Broadcasting Corporation (SOC) Ltd and MultiChoice (Pty) Ltd constituted a merger under section 12 of the Competition Act. The Competition Tribunal found that there was no transfer of productive capacity in the transaction, as the SABC did not transfer market share or business to MultiChoice. The main judgment of the CAC, delivered by Davis JP and Boqwana AJA, held that the information before the court could not provide a sufficient basis to conclude that a merger had taken place. However, it found that the Competition Tribunal should have more generously exercised its inquisitorial powers to extract vital information considering the notable public interest in this matter concerning the national broadcaster. The majority therefore referred the case back to the Tribunal.

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

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

“There is no doubt MultiChoice is given extensive say over the material that is distributed through the entertainment channel as that channel is part of its bouquet of channels and is made available only to its subscribers. It is also possible to conceive of the entertainment channel as being a separate business that is born out of the agreement and that it involves a combination of the assets of the SABC with that of MultiChoice. There is also no doubt that the SABC is considerably constricted in its ability to re-use that material on its own channels.” [paragraph 43]

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

“Turning my focus then to whether MultiChoice has increased its market share at the expense of the SABC, it is obvious that MultiChoice wishes to attract the customers of the SABC who have yet to join the ranks of its five million (5m) subscribers. It can, therefore, be accepted that by virtue of it offering
the exclusive archival material of the SABC on its bouquet the attraction of its services increases. But, whether this will translate, or has translated, into an actual transfer of customers from the SABC to MultiChoice is something that cannot be, or has not been, established from the facts revealed thus far.” [Paragraph 46]

Vally J emphasised the importance of the SABC’s position on the issue of encryption. [Paragraph 48].

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

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

Vally J distinguished between the standard of proof on a balance of probability, which was certain and final, and the proof required to show a prima facie case, which “is one that is tentative.” The Tribunal had erred by conflating the two tests, an error “significant enough to constitute a misdirection warranting interference by this Court. It resulted in the Tribunal incorrectly refusing the alternative relief. An error refusing relief (main or alternative) when relief is due constitutes a material misdirection.” [paragraph 52]

CIVIL AND POLITICAL RIGHTS


During a SADC ordinary summit of heads of state, the then first lady of Zimbabwe, Grace Mugabe, was alleged to have assaulted three South African women in a Sandton hotel. One of the victims, Ms Engels, laid a criminal charge. Grace Mugabe left the country two days after the alleged assault. Following a note verbale from the Zimbabwean Embassy, the Minister purported to bestow diplomatic immunities on Grace Mugabe. [Paragraphs 1 – 6]. Applicants sought to have the decision set aside. At issue was whether Grace Mugabe enjoyed diplomatic immunity for the alleged unlawful act by virtue of being a spouse of a head of state, and if not, whether the Minister’s decision to grant or confer immunity was constitutional and lawful. [Paragraph 13].
Vally J undertook a detailed analysis of the position of diplomatic immunity under customary international law. [Paragraphs 16 – 19]. Vally J considered the question of whether immunity \textit{rationae personae} extended to the spouse of a head of state. After considering a wide range of cases from foreign jurisdictions, Vally J concluded that the evidence was “too contradictory to support the definitive finding ... that immunity \textit{rationae personae} is extended to the family members of a head of a foreign state.” There was thus no customary international law norm to the effect that the spouse of a head of state was entitled to immunity from prosecution for the offence that Grace Mugabe was alleged to have committed. [Paragraphs 35 – 36].

Vally J then turned to consider the Foreign States Immunities Act (FSI), and noted that the Act provided an exception from immunity in proceedings relating to the death or injury of any person. [Paragraph 39]. Thus, as even President Mugabe would not have enjoyed immunity, there was no derivative immunity which his spouse could enjoy. [Paragraph 40]. Vally J found further that the issue was not moot. [Paragraph 40].

The application succeeded. The Minister’s decision to recognise immunity was found to be inconsistent with the Constitution, reviewed and set aside.

\textbf{ADMINISTRATIVE JUSTICE}


\textit{Case heard 5 – 7 November 2018, Judgment delivered 28 February 2019}

Applicant sought to review and set aside two decisions by the MEC. The first was to dismiss an appeal by the applicant against a decision by the second respondent HOD to authorise the development of various phases of a residential development. The second was to overturn the HOD’s decision to refuse an application for an amendment to the development. [Paragraph 1].

Vally J rejected an argument that the HOD had been functus officio and not empowered to make the first decision. [Paragraph 22] An argument that the HOD had not been authorised to grant the exemption underlying the first decision was rejected, as it had only been raised in heads of argument. [Paragraph 23]. The applicant further challenged the first decision on the grounds that it was irrational and/or unreasonable, and had failed to take relevant considerations into account. Vally J found that the decision could not be said to be irrational, and the fact that the Department had opposed the initial application did not detract from the rationality of the decision. [Paragraph 29].

Vally J then considered the challenge that the appeal decision was unreasonable, and considered English and South African case law on reasonableness and its relationship with rationality. [Paragraphs 30 - 38] Vally J noted that Constitutional Court case law emphasised the importance of conceptually differentiating” between reasonableness and rationality as grounds of review. [Paragraph 37]. Vally J found that the applicant had failed to put forward any facts distinct from those advanced under the rationality challenge. Vally J found that the MEC had not acted unreasonably in refusing the appeal. [Paragraph 40].
On the second decision, Vally J found that there had been no public participation process, and the MEC had provided no substantive reasons for upholding the appeal. [Paragraphs 41 – 42]. This rendered the decision irrational. [Paragraph 43].

The challenge to the appeal decision was thus dismissed, while the amendment decision was reviewed and set aside. First respondent was ordered to pay fifty percent of the costs of the applicant.

CIVIL PROCEDURE

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

Case heard 4 May 2017, Judgment delivered 9 May 2017

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

Vally J held that while the power to appoint and dismiss Ministers and Deputy Ministers was wide-ranging, it was “not as unfettered as its predecessor, the royal prerogative”. The executive power conferred on the office of the President was circumscribed by rationality and by the provisions of the Constitution. [Paragraph 18]. Vally J then considered an argument by the President that rule 53 did not apply to an application to review an executive decision. Vally J noted that rule 53 had been promulgated at a time when executive decisions were not subject to review, but that situation had changed with the enactment of the Constitution.

“It is true that rule 53 has not been amended to cater for this, but to decide on its applicability to a review of executive decisions it is necessary to subject it to a purpose interpretation.” [Paragraph 21]

Vally J held that there was “no logical reason” not to utilise rule 53 in an application to review and set aside an executive decision, since the judicial exercise undertaken by the court in such a review was no different to that conducted in review applications covered under the rule. Vally J held that rule 53 should be covered unless it could be shown “that its application in a particular case would result in a failure of justice.” [Paragraph 29]
Vally J thus held that the provisions of rule 53 applied to an application to review or set aside an executive decision, and it should be utilised in the main application, since the President had not contended that this would result in a failure of justice. [Paragraphs 30 – 31]. Vally J further rejected an argument that the decisions are subject to the doctrine of legality and therefore the applicant was entitled to the reasons for the decisions, but not to the record, as “it goes against the grain of all the authorities cited”. [Paragraph 33] Vally J held further that as the President had not indicated what documents or records exist, and which of those he objected to disclosing, the court had not choice but to order the release of the record as sought in the notice of motion. [Paragraph 35].

The application was granted. Appeals to the Supreme Court of Appeal (The President of the Republic of South Africa v Democratic Alliance [2018] ZASCA 79) and the Constitutional Court (President of the Republic of South Africa v Democratic Alliance and Others (CCT159/18) [2019] ZACC 35; 2019 (11) BCLR 1403 (CC) ; 2020 (1) SA 428 (CC) (18 September 2019), by majority decision) were dismissed, as the dispute had become moot.

CRIMINAL JUSTICE


The appellant was convicted on one count of rape (and acquitted on another), and sentenced to 15 years’ imprisonment. The complainants were seven and eight years old respectively. [Paragraphs 1 – 2]. The appeal was against conviction and sentence.

Vally J (van der Linde and Keightly JJ concurring) found that there were two aspects of the trial court’s handling of the case which raised concerns. The first related to the decision to allow the naming of the two complainants and their mothers. Vally J characterised this as a failure to protect their wellbeing and dignity. [Paragraph 8]. Vally J noted that in criminal proceedings dealing with a sexual offence against a child, the court was obliged to protect a child complainant without undermining the accused’s fair trial rights. “This protection must surely mean that the identity of the child should be protected, for that would serve the best interests of the child. Identifying the child compromises the future of the child and places him/her at risk of being ridiculed or pitied and this diminishes the dignity of the child as well as that of his/her parents.” [Paragraph 10].

The second related to questions put by the appellant’s attorney during cross examination. Vally J considered the transcript of the cross examination of BK, one of the complainants:

“It is clear from this exchange that BK found the cross-examination as well as the intervention from the magistrate very distressing. She continued to cry during the adjournment and informed her parents that she did not want to continue any longer. This was conveyed to the court and the matter had to be adjourned for about two months. ... On resumption of the proceedings, the cross-examination of BK continued. Once again, the theme of how she was raped was pursued. It seems none of the main role players ... had reflected on the experience of the child at the previous sitting. They merely continued as if nothing significant had occurred.” [Paragraphs 12 – 13].
Vally J held that the questioning by the appellant’s attorney “certainly crossed the line of common decency”, and that the attorney had “conducted himself in a manner contrary to his ethical duty as an officer of the court.” “To ask a child questions about the details of a man’s anatomy, or to query her knowledge about intricate sexual matters is to show grave disrespect to the child. In my judgment it is generally wrong for a child to be subjected to such crude cross-examination. There was nothing to be gained by asking the child questions which only made the child re-live her ordeal: there was no probative value to the questions as none of them addressed any matter that was in issue …” [Paragraph 15].

Vally J emphasised the need for legal representatives to “avoid becoming overzealous” in pursuit of their client’s case, and held that the questions quoted “should never have been allowed or asked.” “It is this kind of questioning that deters many rape victims from reporting their ordeal to the authorities and from seeking justice. The result is an undermining of the public interest in seeing all sexual assaults reported and prosecuted. The magistrate should not have allowed them …” [Paragraph 16].

On the merits of the appeal, Vally J found that the state had proved beyond a reasonable doubt that the accused had raped BK, and the appellant had been correctly convicted. [Paragraph 25]. On sentence, Vally J found that the trial court had committed a “significant misdirection” in finding that the rape of BK was “not serious” due to the absence of “significant physical harm.” [Paragraph 31].

The appeal against conviction was dismissed, and the sentence replaced with one of 18 years’ imprisonment.
MR PUME CANCA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 19 March 1957

BA (Political Science), University of Fort Hare (1979)

LLB, University of Cape Town (1984)

CAREER PATH

  Land Claims Court
  Gauteng High Court, Pretoria
  Gauteng High Court, Johannesburg
  Western Cape High Court

Company Secretary, Legal & Compliance Manager, Cricket South Africa (2011 – 2013)

Full-time executor (2009 – 2011)

General Legal Consultant (2009)

Partner, Jan S De Villiers Attorneys (2005 – 2008)

Partner, Canca Inc. (1996 – 2005)


Intern, Hughes Hubbard & Reed LLP (February 1995 – June 1995)


Legal Associate, Legal Resources Centre (1986 – 1987)


This case dealt with an application for an order compelling the 1st and 2nd respondents, a mother and her minor son, to be subjected to DNA tests for the purpose of determining whether the applicant’s deceased’s son was the biological father of the minor child. The purpose of such tests was to determine the death benefit payout of the applicant’s late son.

Canca AJ held that the relief sought by the applicant should be granted on the basis that it would resolve the issue of whether the minor child or the estate was entitled to the death benefit:

“If there is a reasonable possibility that the estate might be entitled to the benefits, it is the applicant’s duty as executrix to pursue the issue. ... It is in the minor child’s interest that the issue of his paternity be resolved as the uncertainty of his disputed paternity will follow him for the rest of his life. He is fast approaching the age where knowing and being accepted by the paternal side of his family will be important to his emotional well-being both as a pubescent and later as an adult. If it turns out that SD was indeed his father, then he will get the chance to interact with his paternal blood relatives. If the tests prove the contrary, then it is just as important that Z no long labour under the impression that his father is deceased. He can then, hopefully with his mother’s assistance, cultivate a relationship with his real father. For all of the above...the relatively minor infringement of the first respondents and Z’s privacy should not trump the discovery of the truth. Failure to seek the truth in circumstances such as these would not be in the best interests of the administration of justice.” [Paragraph 30]

The order sought by the applicant was granted.
Socio-Economic Rights

Emakhasaneni Community v Minister of Rural Development and Land Reform and Others [2019] ZALCC 27; 2019 (4) SA 286 (LCC)

Judgment delivered 6 March 2019

This case dealt with the determination of just and equitable compensation that the Minister of Rural Development and Land Reform (“the Minister”) would be obliged to pay to certain landowner defendants in respect of properties the Minister had agreed to acquire from them.

The state parties relied on s 12(1)(a) of the Property Valuation Act 17 of 2014 (PV Act), read together with the definition of ‘value’ in the Act, which provided that when a property had been identified for the purposes of land reform, it had to be valued by the Office of the Valuer–General (OVG) to determine the property’s value, having regard to prescribed criteria, procedures and guidelines. It was argued the state could acquire the properties from the landowner defendants at values determined by the OVG, rather than for the compensation determined by the court, as had been provided for in the settlement agreement. [Paragraph 7]. The state parties argued that Minister was bound by the determination of compensation arrived at by the OVG.

Canca AJ (assessor EJ Sibeko concurring) rejected the state parties’ interpretation of the Act, finding that on a proper reading nothing prevented the court from retaining power to determine just and equitable compensation in respect of land, identified for land reform purposes, purchased by the Minister. Neither the court nor the minister was bound by the OVG’s determination of value. Therefore, the Minister was not prevented from paying compensation that exceeded the value determined by the OVG. [Paragraphs 34 - 35]

The OVG’s determination, Canca AJ held, could at best be used as a guideline by the minister when negotiating the purchase price of any property they intended acquiring under s 42D of the Restitution of Land Rights Act, and the landowner should then be able to approach the court for a determination of the just and equitable compensation should they be unhappy with the OVG-based valuation at which the minister undertook to acquire the property. [Paragraph 34]

Canca AJ further held that: “The valuation guidelines prescribed by the Valuation Regulations (particularly paragraph 6 of the Regulations) could, in my view, result in valuations which are much lower than just and equitable compensation determined in terms of section 25(3) of the Constitution, and will also be in conflict with the definition of “value” contained in section 1 of the PV Act.” [Paragraph 36]

Canca AJ found that the Minister was not constrained by the PV Act in the manner contended for by the State. [Paragraph 37]
LYNN v NENE AND OTHERS (LCC 95/2016) [2018] ZALCC 21 (29 JANUARY 2018)

Judgment delivered 29 January 2018

The plaintiff sought an order for eviction of the 1st to 3rd defendants from a farm co-owned by the plaintiff and his wife. The order for eviction was sought in terms of section 10(1)(c) of the Extension of Security of Tenure Act (ESTA). This provision empowered the court to order the eviction of an occupier who, by his or her conduct, had committed such a material breach of the relationship between the occupier, on the one hand, and the owner or lessee, on the other, that it was not practically possible to remedy the relationship. Some of the impugned conduct which the plaintiff alleged contributed to the material breach of the relationship included cutting fences of the property, instituting a false criminal charge against the plaintiff, and swearing at and threatening the plaintiff and his family. [Paragraph 43]

The defendants alleged that the breakdown of the relationship was caused by the plaintiff, and opposed their eviction.

Canca AJ found that the plaintiff had proven the requirements of section 10 (1)(c) of ESTA, and that because the defendants had committed a material breach of the relationship between themselves and the plaintiff, the latter could not be expected to continue accommodating the defendants. In addition, Canca AJ considered evidence that the defendants had family members residing nearby and were therefore likely to find alternative accommodation in the short to medium term. [Paragraphs 48, 62]

However, Canca AJ held that if the defendants did not wish to seek accommodation with their aforementioned family members, it was settled law that it was the State's duty to provide emergency or suitable alternative accommodation to persons such as the defendants, if there was a possibility that they would be left homeless on eviction. Therefore, Canca AJ held that the duty fell on the Municipality, relying on the authority of the Constitutional Court's judgment of Baron and Others v Claytile (Pty) limited and Another. [Paragraph 63]

"Although the Constitutional Court in Daniels v Scribante [2017] ZACC 13 held that ESTA, in certain circumstances, places a positive obligation on a landowner, Pretorius AJ, in Baron and Others v Claytile (Pty) limited and Another [2017] ZACC 24 at [35] states that "This does not mean that private landowners carry all or the same duties as the State to fulfil the obligations set out in the Constitution." [Paragraph 61]

Canca AJ held that the eviction was just and equitable.

ERASMUS v MTENJE AND OTHERS (LCC 95/2016) [2018] ZALCC 12 (29 JANUARY 2018)

Judgment delivered 12 June 2018

This was an application for an interdict preventing the first and second respondents from continuing the construction of a structure, which was being erected on the applicant’s immovable property, without her
permission, and, allegedly, in contravention of the third respondent’s (Municipality) town planning scheme and building legislation. Applicant further sought an order that the structure be vacated by the first and second respondent, in the event that it had been occupied. Applicant also sought an order authorizing the demolition of the structure.

Canca AJ held that there was a constitutional duty on the applicant to tolerate the respondents’ presence on the property and allow them, in the absence of other suitable shelter, to complete the construction of the informal structure. [Paragraph 37]

On the issue of the erected structure not complying with the property’s title deed, Canca AJ held that it did not appear that non-compliance therewith would constitute a criminal offence. At most, non-compliance would afford civil remedies to the person(s) or institution in whose favour it was registered. In the result, the court accepted the argument by the respondent that the spirit, purport and objects of the Bill of Rights, as well as the provisions of section 5 of ESTA, imposed a duty on landowners to accommodate ESTA occupiers in premises that were consonant with the right to human dignity. [Paragraph 32]

In these circumstances, the application was dismissed, and Canca AJ held that the first respondent was entitled to complete the impugned structure and to occupy it upon completion.

On 26 November 2018 Canca AJ granted the applicant leave to appeal to the Supreme Court of Appeal against the whole of the judgment and order made in this case. [See Erasmus v Ntenje and Others (LCC202/2017) [2018] ZALCC 18 (26 November 2018)].

**VAN DER MERWE AND ANOTHER v KLAASE; IN RE: KLAASE v VAN DER MERWE AND OTHERS (LCC 09/2014) [2014] ZALCC 15 (7 OCTOBER 2014)**

*Case heard 30 July 2014, Judgment delivered 7 October 2014.*

This matter dealt with three applications: first, an application for to appeal to the Supreme Court of Appeal against a previous judgment by Canca AJ confirming, on automatic review, an eviction order granted against Mr Klaase. Second, an application by Klaase’s wife to be joined as second respondent, and for further proceedings, including the execution of the eviction order, to be suspended pending the determination of her rights under the extension of Security of Tenure Act (ESTA). Third, Mr Klaase sought an order suspending the execution of the eviction order until his wife’s ESTA rights were determined. [Paragraphs 2 – 4].

The Magistrates Court had decided that “the respondent and all persons occupying through him were ordered to vacate the house on the farm by a certain date.” [Paragraph 10]. The applications were opposed on the basis that Mrs Klaase had never been given an independent right to occupy the premises, and was not born on the property but on a neighbouring farm. It was also argued that Mrs Klaase was never a permanent employee on the farm but rather a seasonal worker who never obtained an independent right of occupation. [Paragraph 15].
Canca AJ held that Mrs. Klaase was a “resident” and not an “occupier” in her own right. [Paragraph 24]. All three applications were dismissed, with no costs awarded (Paragraph 43).

A petition for leave to appeal to the Supreme Court of Appeal was dismissed. However, in **Klaase and Another v Van Der Merwe N.O. and Others [2016] ZACC 17; 2016 (6) SA 131 (CC)**, the Constitutional Court overturned the decision of the Land Claims Court. The court held that Mrs. Klaase had shown that she was an occupier in terms of ESTA, and was thus entitled to the protections set out in the Act. [Paragraph 65]. The court held that the “the Land Claims Court’s finding that Mrs. Klaase occupied the premises “under her husband” subordinates her rights to those of Mr. Klaase. The phrase is demeaning and is not what is contemplated by section 10(3) of ESTA. It demeans Mrs. Klaase’s rights of equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA. The construction by the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured.” [Paragraph 66]
JUDGE ZEENAT CARELSE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 16 October 1966

BA LLB, University of Durban, Westville (1992)

CAREER PATH

Acting Judge, Supreme Court of Appeal (October 2018 – March 2019)

Judge, Gauteng High Court (2009 – )

Judge, Land Claims Court, (2009 – , ad hoc)

Acting Judge, Gauteng High Court (2008)

Regional Magistrate, Tembisa Magistrates Court (2004 – 2008)


Public Prosecutor, Pietermaritzburg/Pinetown Magistrate’s Court (1994 – 1998)

Member, Judicial Officers Association of South Africa (JOASA) (2006)

International Association of Women Judges (IAWJ)

Mentor (2009 - )


Member (2004 – )

Member, Gender Committee, Commonwealth Magistrates’ and Judges Association (2000)
Islamic Guidance, Teacher/mentor (1982 – )

Case heard 22 August 2019, Judgment delivered 8 November 2019

This case involved the interpretation of a consent order given in the initial restitution proceedings, which was made an order of court. The applicant had lodged a claim for restitution of rights in terms of the Restitution of Land Rights Act, seeking the restoration of land as opposed to financial compensation. After a site visit was conducted, applicant indicated that it wished to consider financial compensation rather than restoration. An order of court was made, and it was this order that was in dispute as the applicant averred that the respondents had failed to comply with the order. The court then considered the interpretation of the court order under three categories: its text/language, its context, and “interpretation giving rise to sensible and businesslike results.” [Paragraph 15].

Carelse J found that the applicants were seeking to introduce new evidence, and the relief sought was not contemplated in the order, properly interpreted. [Paragraph 34]. Furthermore, the applicants’ approach would lead to results that were not sensible or businesslike. The Applicant’s interpretation of the order would have granted financial compensation by having regard to the current developed market value of the properties under claim, rather than the historical under-compensation of the informal land rights of which the Applicants were dispossessed. These land rights were based on subsistence agriculture, not commercial farming. [Paragraph 35].

Carelse J ordered that the applicant’s legal representatives were not be permitted to recover their legal costs under legal representation provided in terms of the Act. Carelse J held that “[w]hen public funds have been provided to litigants in terms of section 29(4) of the Act there is a fiduciary duty on the legal representatives to be responsible when instituting litigation and they must bring litigation that is fully motivated. When a legal representative fails to do so and brings unwarranted applications, there is no reason why this Court should not disallow their fees. As soon as the Applicant’s counsel’s [sic] became involved in the matter he must have realised that the application was ill-advised and there is no reason why the Commission should pay his fees.” [Paragraph 44].

The application was dismissed.

COLCHESTER ZOO SA PROPERTIES (PTY) LTD v MDAKANE & OTHERS (1108/17) [2018] ZASCA 188 (13 DECEMBER 2018)

Case heard 16 November 2018, Judgment delivered 13 December 2018

The issue before the court was whether the second respondent was an “occupier” in terms of the Extension of Security of Tenure Act (ESTA) and if not, whether he should be evicted from the farm where he resided. The second respondent, who was six years old at the time, arrived on the farm with his family sometime in 1989. He started working on the farm in 2003. In 2007 he left for Johannesburg, returning during the December holidays. In 2011, he returned to care for his sick father who did not
survive. After his burial, the second respondent left the farm. Thereafter, his visits home were infrequent. Nevertheless, the Land Claims Court found that he was an occupier in terms of ESTA, and could only be evicted in accordance with the provisions of that Act. [Paragraphs 5 – 8].

Carelse AJA (Maya P, Mathopo, van der Merwe and Makgoka JJA concurring) held that whilst the respondent regarded the homestead as his ancestral home, and though both his parents were buried on the farm, the degree of his physical presence on the land was such that he “could not have ‘resided’ on the farm in terms of the definition of occupier under the provisions of ESTA. [Paragraph 12] Thus, the respondent was not an “occupier” in terms of ESTA.

Carelse AJA then turned to consider whether the second respondent could still be evicted, noting that it did “not necessarily follow, as the appellant seems to suggest, that if the respondent is not an ‘occupier’, an eviction order should be granted. As appellant was not aware of the second respondent’s whereabouts, it was not clear whether the applicable legislation was complied with. The matter was therefore referred back to the Land Claims Court to determine whether it would be just and equitable for an eviction order to be granted. [Paragraph 14].


This was an application for temporary emergency accommodation to be provided to the applicant and his family due to their eviction. The applicant and his family were rendered homeless as a result of the eviction. He and his wife were people with “special needs” and had three children living with them, one of which was epileptic. [Paragraph 28].

Carelse J (Yacoob AJ concurring) held that the applicant had shown a prima facie right to relief, as it would “force the Municipality to implement its housing policy in a manner consistent with the Constitution.” [Paragraph 27]. Despite the respondent’s contention that there was no evidence of a well-grounded apprehension of irreparable harm, the facts that the applicant and his family were sleeping on the street on the very first night of eviction, were elderly, had an epileptic grandchild to care for and were living at different homes for a maximum of two days at a time, all demonstrated a well-grounded apprehension of irreparable harm to their personal security and property, as well as to their human dignity. [Paragraph 28].

The main thrust of the respondent’s case, relevant to the balance of convenience, was that it lacked the resources to house the applicant and his family, a claim Carelse J rejected, noting that the Municipality had put up no evidence to support the allegation that it lacked resources to provide temporary emergency housing. Applicant had “made bald allegations without any substantiation.” [Paragraph 33]. Further, the respondent claimed that alternative remedies were available in the form of R10 000, which had been offered as relocation costs. Carelse J held that this money was indeed for relocation and not for temporary emergency housing. [Paragraphs 35 – 37].

The municipality was ordered to provide the respondent and his family emergency temporary accommodation pending finalisation of the main application.
FLORENCE (DODGEN) V BROADCOUNT INVESTMENTS (PTY) LTD & OTHERS (LCC 148/08) [2012]
ZALCC 11 (5 JUNE 2012)

This was a claim for restitution in terms of the Restitution of Land Rights Act by the Florence family, who had been dispossessed of their land due to discriminatory laws in 1970. Four issues came before the court: 1) The loss suffered by the plaintiff as a result of the dispossession of their rights and whether such loss would equate to just and equitable compensation, calculated at the time of dispossession, 2) the appropriate method used to calculate the value of the 1970 loss into present day value, 3) the amount of financial restitution the family should receive as solatium due to the hardship they suffered as a result of the dispossession 4) whether the second respondent (the Government) could be ordered to pay for the costs relating to the erection of a memorial plaque.

With regards to the first issue, Carelse J held that the applicant had indeed been dispossessed, and was still left to determine whether the full purchase price of the property had been paid at the date of dispossession. Carelse J held that, based on the evidence presented, that the purchase price for the property had indeed paid in full. Carelse J found that “[i]t has been stated over and over again that when interpreting a constitutional right such as the right to restitution the interpretation should be generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefits of their constitutional rights.” [Paragraph 16] The “inescapable conclusion” was that equitable redress for the family should be the amount of their 1970 financial loss, escalated to its present day value. [Paragraph 19].

Insofar as the second issue was concerned, Carelse J referred to the Farjas judgment, a case which determined that the CPI adequately caters for change in the value of money over time and agreed to the use of the CPI to determine the value of the loss over time. Carelse J found that CPI was the appropriate method to convert the 1970 loss to present day value [paragraphs 20 – 21].

Regarding the third issue, of solatium, Carelse J emphasised the symbolic nature of solatium and found further that “[t]he Florence family life was disrupted and the family was split up...the Florence family suffered emotionally, financially and psychologically by the forced removal...” [Paragraph 39]. The claimants were thus awarded R10 000. On the final issue, that of the erection of a memorial plaque, Carelse J declined to award the costs of a memorial plaque, on the basis that those costs had been agreed to between the plaintiff and defendant in a private settlement agreement and that as a result it lacked the jurisdiction to make such an order. [Paragraph 43].

The matter was taken on appeal to the Supreme Court of Appeal (Florence v Government of the Republic of South Africa [2017] JOL 37227 (SCA) and the Constitutional Court (Florence v Government of the Republic of South Africa 2014 (10) BCLR 1137 (CC)). The SCA considered the appropriateness of the CPI as a measure of the change of value of money over time, and found that Carelse J had acted judiciously in the use of the CPI. The court held that “[i]t has already been found in Farjas that the LCC is entitled to rely upon the CPI to determine changes in the value of money, and we are bound by that decision. In these circumstances it cannot be said that the LCC misdirected itself in adopting the same approach.” [Paragraph 10]. Regarding the erection of the plaque, the SCA held that there was no basis for the conclusion that the LCC had no jurisdiction to order the state to pay those costs, and awarded R50 000 for the erection of a memorial plaque.
The majority of the Constitutional Court held that the use of the CPI as a measure for the change in monetary value over time was correct. It further concluded that the LCC was correct in its finding that it had no power to order the respondent to pay for the erection of a memorial plaque, thereby reversing that part of the SCA’s decision.

CHILDREN’S RIGHTS

NONO CYNTHIA MANANA V PRESIDING OFFICER OF CHILDREN’S COURT, KRUGERSDORP AND OTHERS 2013 (4) SA 379 (GSJ)

This was an appeal against the decision of the Commissioner of the Children’s Court that the children in question were not in need of “care and protection” as stipulated in s150(1)(a) of the Children’s Act. The issue was whether a caregiver who owed a legal duty of care may be appointed as a foster care parent, and whether the foster care grant may be provided by the first respondent. The children were living with their grandmother, the appellant, since birth. They had no known father and their mother had passed away. The social worker recommended that the children were, in terms of the Children’s Act, indeed in need of care and protection and that a foster grant should be made available to the appellant. The Commissioner disagreed, on the basis that the children were already being taken care of by the appellant and were not in need of care and protection, resulting in the determination that no requirement existed to legalise the placement of the children with the appellant.

Carelse J (Mathopo J concurring) held that:

“[T]he findings of the Commissioner can only lead to untold hardships for the many children who are in the care of their grandparents. This is the reality of our society. To perpetuate these hardships will be to defeat the objects and spirit of our Constitution and will not be in the best interests of the children.” [Paragraph 16].

Carelse J noted that grandparents do owe a common law duty of support towards their grandchildren, and it was on that basis that the respondents argued that the appellant be excluded from becoming a foster parent. Carelse J held that:

“Such a conclusion would exclude children in the care of their grandparents who are found to be abandoned or orphaned from accessing government source of support. To do so would be to distinguish and create various categories of children. ... Nowhere ... is such a distinction made. ... All orphaned children are to be treated equally before the law.” [paragraph 24].

When interpreting s150(1)(a) of the Act, Carelse J held that no distinction should be made with respect to carers who owed the children a duty of support and those that did not.

The findings of the Commissioner of the Children’s Court were substituted for an order declaring that the children are in need of care and protection, are to be placed in foster care with their grandmother and that a foster care grant should be paid for all three children to the foster care parent.
MR MAzikawakheL WanA nCUBe

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 21 December 1957
B Juris, University of Zululand (1983)
LLb, University of Zululand (1997)
PG Dip, University of Natal (2002)
LLM, University of Natal (2003)

CAREER PATH

Acting Judge
  Kwazulu – Natal High Court (November – December 2009; March – April, November – December 2012; March – April, April – June, September 2013; 2017 – )
  Gauteng High Court, Johannesburg (April – May 2009)

Regional Magistrate (2014 – )
Magistrate (1986 – 2013)
Prosecutor (1983 – 1985)
Court Interpreter (1982 – 1983)
Part-time Lecturer, University of Zululand (no dates)

Member, Judicial Officers Association of South Africa (1996 – 2013)
Member, The Association of Regional Magistrates of Southern Africa (2014 – )
Member, Black Lawyers Association (2015 – )

Member, Blessed St Gerald Community Out Reach Programme
This matter required the court to determine whether it would be appropriate to appoint a Special Master to deal with the severe backlog in respect of labour tenants’ claims.

Ncube J noted the history of the litigation, and inability of the Department to comply with its own timeframes or provide accurate information. Based on this history, Ncube AJ considered the appointment of a Special Master:

“The concept of a Special Master is a relatively novel one in South African law. However, the role and function thereof is not unlike that of a court appointed amicus curiae or the family advocate. Their powers too are determined by the court and they assist in matters where specialist skills or capacity are needed.” [Paragraph 20].

Ncube AJ considered the benefit of such an appointment given a report that 10 914 labour tenant applications remained unsettled at the time:

“A Special Master, if appointed, could play a crucial role in aiding the Department to develop a comprehensive strategy for the efficient processing and referral of claims and the reporting thereon to the Court. ... An important factor to bear in mind is that it is unfortunately the case, and one beyond the control of this Court, that currently there is only one permanent Judge and an additional 4 or 5 Acting Judges at the Land Claims Court each term. This means that often no single judge will hear an entire matter until its completion as occurred in this particular case. Each new judge appointment to an on-going case is required to familiarise himself or herself with the history and detailed issues of the dispute between the parties. Were a Special Master to be appointed, as envisaged, these disadvantages would be significantly ameliorated for the benefit of all concerned.” [Paragraphs 27 – 28]

Upon consideration of all the factors, Ncube AJ found that the appointment of a Special Master would expedite labour tenants’ claims and provided all parties an opportunity to present candidates for the position. Ncube AJ directed the Special Master, once appointed, to prepare an Implementation plan in
collaboration with the First Respondent. Such plan would include the performance duties of the First Respondent and the Department with the supervision of the Special Master.

The matter was taken on appeal to the Supreme Court of Appeal in Director-General for the Department of Rural Development and Land Reform and Another v Mwelase and Others; Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another (306/17;314/17) [2018] ZASCA 105; 2019 (2) SA 81 (SCA) (17 August 2018). The SCA found that the appointment of the special matter was “a textbook case of judicial overreach” [paragraph 51], and that such appointment could not stand. The SCA ordered that the Director - General appoint a senior manager to administer the national implementation of both the LTA and ESTA.

This matter was taken to the Constitutional Court in Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another (CCT 232/18) [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC) (20 August 2019). The court set aside the order of the SCA, holding that the Land Claims Court had “directed itself properly and scrupulously to the facts before it.” [Paragraph 69].


Case heard 19 March 2019, Judgment delivered 10 May 2019

This was an opposed urgent application for an interim interdict. The first applicant (“Phillip”) was the son of the second applicant. The first and second respondents were married in community of property, and owners of a farm, where applicant’s parents were employed as general workers. Applicant was born on the farm and resided there with his parents and siblings. Applicant also provided labour on the farm. The farm was sold by the owner to his son, who then sold it to respondents. Many of applicant’s family members who passed away were buried on the farm. After the sale to the respondents, the applicant’s family house remained on the farm and applicant’s sibling resided there. Another sibling would occasionally visit. Respondents, together with the Department, relocated applicant’s sibling to another farm. Applicant, at the time, was working on a mine. When a sibling passed away, permission was requested to bury him at the farm, which was denied. Thereafter, applicant’s attorneys wrote a letter to respondents attorney indicating that second applicant was returning to their homestead on the farm after an absence due to health and requesting that a key be provided to open the gate. Respondents refused giving rise to the application. Respondents also lodged an eviction application with applicant’s lodging a counter application that they were occupiers in terms of ESTA. That trial as an action was still pending in the Magistrate’s Court. [Paragraphs 4 – 9].
Ncube AJ dismissed various points in limine [paragraph 10], and found that first applicant did indeed reside on the farm.

“For a person to either climb over or crawl under the fence in order to gain access to his home is not concomitant with that person’s right to dignity which is entrenched in the Constitution. There is no evidence that Phillip will not be able to keep the main gate locked if he is provided with a duplicate key to open the gate.” [Paragraph 18].

Ncube AJ found that applicants were “likely to succeed” in their counter action in the Magistrates’ Court, and had established a prima facie right “which might be open to some doubt.” Respondents were criticised for ignoring the presence of the first applicant on the farm “as if he did not exist.” [Paragraph 20].

The interdict was granted pending the finalisation of proceedings in the Magistrates’ Court. [Paragraph 22].

**MHLONGO V SELSELY FARM TRUST & ANOTHER [2008] JOL 21541 (LCC)**

*Judgment delivered 29 February 2008*

Plaintiff sought an order declaring that he was a labour tenant at Selsey Farm. He had moved to the farm in 1954. His mother had worked for a Mr Kimber for 43 years. Kimber’s son subsequently took over Selsey Farm, and continued to employ plaintiff as a tractor driver, and plaintiff also performed other duties on the farm.

Ncube AJ held it was clear that the Mhlongo family had been allowed to crop on Selsely Farm, and that they also had a right to graze cattle on the farm. [Paragraph 4]. Plaintiff’s evidence showed that he had inherited his mother’s cattle when she passed away in 1982. Thus between 1954 and 1982, he had no cattle himself, but was working on the farm and was paid a salary. [Paragraph 8].

Ncube AJ found:

“Looking at the evidence of the plaintiff in its entirety, he impressed me as being an honest, reliable and truthful witness. He is very old, sick and weak but he survived a long cross-examination ... There were few instances where he appeared to be evasive. This, however, cannot be said to be caused by deliberate untruthfulness or to say the least, recklessness in giving evidence.” [Paragraph 14]

“What is also clear from the evidence is that all occupiers of Selsely Farm were given freedom on the farm during the days of Mr Michael Kimber. They could freely graze their cattle. They could use water on the farm and they could hold cultural functions as they liked. ... One can understand why occupiers find it difficult to co-operate with Mrs Wray, who now comes with restrictions and rules which they must comply with. These restrictions are new and the occupiers are not used to them. However, that does not mean that occupiers should not obey the instructions of the owner of the farm.” [Paragrapghs 59 - 60]

Ncube AJ found that the fact that the plaintiff and his mother had been resident and working on the farm for such a long time did not in itself qualify them as labour tenants. [Paragraphs 63 – 65]. Ncube AJ considered the definition of “labour tenant” in the Land Reform (Labour Tenants) Act, and identified the
applicable test as being “whether a person is a farm worker or not.” First defendant had failed to prove
that the plaintiff was a farm worker, and thus the presumption remains that the plaintiff was a labour
tenant.” [Paragraphs 70; 72]

Ncube AJ then dealt with a counter-claim for eviction, and held that the Act provided that a labour tenant
could not be evicted while an application for acquisition of rights in land was pending, unless special
circumstances existed which made it fair, just and equitable to do so. No such circumstances were present
in this case. [Paragraph 75].

Plaintiff was declared to be a labour tenant, and the first defendant’s counterclaim was dismissed. Pending
the determination of the issue of acquisition of land, conditions were imposed on plaintiff’s use of cattle.
BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 27 July 1955

B Proc, University of South Africa & University of Durban Westville (1981)

CAREER PATH

Judge, Gauteng High Court (2018 - )

Acting Judge

South and North Gauteng High Court (2016-2017)

Land Claims Court (2010-2016)

Eastern Cape High Court (2002)


Managing Partner, CM Sardiwalla and Company (1982-2012)

Member, Advisory Board, Small Claims (1987- )

Member/Exco, Rules Board for the Courts of Law (1999-2011)

Member/Vice President, KZN Law Society (1998-2004)

Member, Commonwealth Lawyers Association (1999-2003)


Branch Chairperson, NADEL (1989-2002)
SA Law Commission, Domestic Arbitration Project (1999-2001)

Member, Fidelity Fund, Board of Control (1998-2000)

Exco Member, Engineering Council of South Africa (dates not supplied)

Deputy Mayor, Local Council, Ladysmith Emnambhiti (dates not supplied)

Chairperson, Flood Liaison Committee

Co-Chair, Acaciaville Housing Action Committee

Member, African National Congress (1989 - 2011)
This was a restitution of land matter. Plaintiff argued that certain communities enjoyed indigenous rights to the land and this was a clear indication that the communities who lived there were removed subsequent to colonial occupation. The eight to twenty forth Defendants, (Land-Owner Defendants) disputed that a Community existed in the area, whereas the plaintiff contended that the indigenous communities existed prior to the arrival of the 1820 settlers. The Land-Owner Defendants contended that even if these communities existed, their rights were extinguished by colonial conquest. The Land-Owner Defendants further argued that the subdivision of the Commonage was not as a result of the application of any racially discriminatory law or practice, and hence the plaintiff was not dispossessed of rights in land as a result of racially discriminatory laws or practices.

Sardiwalla AJ held:

“... The Richtersveld Community decisions indicate that the rights people enjoyed must be determined by reference to customary or indigenous law. The Land-Owner Defendants contend that because the Xhosa's holding of the land was not registered in the Office of the Governor in the Cape Colony, or the offices of the Landrost, they did not exist. The only persons who held such rights are those who registered them in these official places that only Whites had access to. It is clearly and blatantly a flawed approach. Accordingly, it must fail.” [Paragraph 118]

“While in the past indigenous law was seen through the common-law lens, in the context of our internationally acclaimed Constitutional dispensation it must be seen as an integral part of our law. The courts are obliged by Section 211(3) of the Constitution to apply customary law when it was applicable, subject to the Constitution and any legislation that dealt with customary law. In doing so the courts had to have regard to the spirit, purport and objects of the Bill of Rights.” [Paragraph 119]

“Racial discrimination lay in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. Precisely, what happened in Salem. [...] The inevitable impact of this differential treatment was racial discrimination against the Plaintiff, which caused it to be dispossessed of its land rights. ...” [Paragraph 122]

“The threshold [of defining a community] is deliberately low and this Court is empowered to use a generous notion of what constitutes a Community. [...] Mr Nondzube’s testimony described the community’s shared interest in the Commonage that the families grazed their cattle and ploughed the land according to communal rules. The families interacted with each other and through their chief there were demarcations and homesteads were built and land was allocated. Cattle were grazed communally in one area. This evidence could not be refuted only because the basis of the defence is that such people did not exist. It is difficult to conclude that such persons could have lived on the Commonage in such large numbers and not form a Community. Even more difficult is that such a large number of people would go unnoticed. Given the constitutional imperative to perceive the notion of a Community generously, it is difficult to come to another conclusion. Therefore, I find that the Plaintiff is a Community in terms of the definition of a Community in the Act.” [Paragraph 132]
“As a result of the above I find that the Plaintiff enjoyed a right in land in the Commonage after 19 June 1913. Such right stemmed from the Xhosa occupation of the Zuerveld which was never extinguished and extended to the community that occupied the Commonage in Salem after 1913.” [Paragraph 148]

It was found that the Salem Community was dispossessed of a right in land after 19 June 1913, as a result of past racially discriminatory laws and practices in terms of section 2 of the Restitution of Land Rights Act 22 of 1994, and there was no order as to costs.

The decision was upheld by the Supreme Court of Appeal in *Salem Party Club v Salem Community* (20626/14) [2016] ZASCA 203 (13 December 2016) - Pillay and Dambuza JJA (Seriti and Mbha JJA concurring) and Cachalia JA dissenting. An appeal to the Constitutional Court was dismissed: *Salem Party Club and Others v Salem Community and Others* (CCT26/17) [2017] ZACC 46; 2018 (3) BCLR 342 (CC); 2018 (3) SA 1 (CC) (11 December 2017).

**ROOYENDAL (PTY) LTD V MINISTER OF LAND AFFAIRS 2013 JDR 1003 (LCC)**

*Case heard 29 July 2011; 03 – 07 October 2011; 29 February - 02 March 2012; 24 October 2012, Judgment delivered 14 May 2013*

The plaintiffs were farm owners and farmed in the names of juristic persons. They sued the first and second defendants for payment of certain input and development costs based on an oral agreement. Plaintiffs alleged that agreement was reached in the course of several meetings pursuant to the settlement of a land claim, and instituted this claim to enforce the alleged oral agreement for the payment of input costs and development costs, following a purchase of land by the Department of Land Affairs from the plaintiffs for restoration to claimants. In the alternative the plaintiffs claimed that the properties were sold for an amount below their actual value and claimed the difference from the defendants.

Sardiwalla AJ held:

“What is pertinent from the evidence of the plaintiffs is that the deeds of sale would have not been signed had the defendants not undertaken to pay the input costs. The importance that the plaintiffs place on these costs is underscored by the alternative claim for an increased purchase price indicating that the plaintiffs felt that the purchase price paid was not sufficient. ...” [Paragraph 66]

“The evidence of the plaintiffs clearly suggests that input costs were material to the purchase and sale agreements. In fact both Boshoff and Hohls testify that had the agreement relating to input costs not been concluded they would not have signed the deeds of sale. Which begs the question why was the aspect of input costs not included in the written agreements.” [Paragraph 70]

“It is highly improbable as the plaintiffs allege that the second defendant stated that they did not want to reduce the agreement to writing because the money was to come from another source; the second defendants and all the witnesses for the defendants unequivocally state that they do not have any direct access to the budgets of other ministries. It is equally improbable that the second defendant would commit to an amount of almost five million rand of tax payers money on the basis of an oral agreement.” [Paragraph 77]

“It is improbable that a person who has been a legal practitioner for over two decades would have advised her clients to conclude oral agreements that would amount to almost five million rand. She was present at
all meetings, was aware that negotiations were taking place and Shange's refusal to record the input and
development costs in writing. “” [Paragraph 82]

“The plaintiffs version that a seasoned practitioner and conveyancer took the advice of a government
official not to record an agreement that was pertinent to a negotiation process is highly improbable.”
[Paragraph 84]

“There is no agreement on what the merx actually is, input costs consists of various elements and I am not
persuaded that the State agreed to pay all input costs without determining precisely what input costs
actually entailed.” [Paragraph 96]

The plaintiffs’ claim was dismissed with costs. This decision was unanimously upheld on appeal in
Rooyendal (Pty) Ltd v Minister of Land Affairs 2015 JDR 1694 (SCA).

NDABA V BRAITHWAITE NO 2013 JDR 1284 (LCC)
Case heard 16 March 2012, Judgment delivered 14 November 2012

This was an application for an interdict restraining the respondents from harassing, intimidating and
removing or threatening to remove the applicant, her family members and her livestock from a farm. The
applicant and her family members were residents of a farm owned by Damview Trust with the respondents
being trustees of the trust. They had been residing on the farm since 1994 in terms of a labour tenancy
agreement entered into by the applicant's husband and the previous owner. The applicant's husband
provided labour on the farm until he was retired due to ill health and subsequently died in 2010. The
applicant also provided labour on the farm, and contended that her right of residency emanated from her
husband's status as a labour tenant in terms of the Land Reform (Labour Tenants) Act. In the alternative,
she argued that she was a labour tenant in terms of the Act and additionally she was an occupier in terms
of the Extension of Security of Tenure Act.

Sardiwalla AJ held:

“In order to comply for such relief the applicant needs to meet the requirements for a final interdict as the
relief she is seeking is not interim in nature and will have the effect of a final determination of the rights of
the parties to the litigation.” [Paragraph 20]

“… [T]he respondents allege an agreement was entered into with the deceased husband. The respondents
have the onus of proving the existence of such an agreement and the terms and conditions thereof.”
[Paragraph 24]

“… [T]he respondents have failed to discharge their onus of proving there was an agreement. The evidence
before me is contradictory and inconclusive.” [Paragraph 32]

“The alternate hurdle that the respondents face is the enforceability of a contract against the applicant.
The doctrine of privy of contract has its basic tenements in the principle that people must be bound by the
contracts they make with each other. The doctrine provides that parties who are not privy to a contract
cannot sue or be sued on it. Thus even if it is doubtful there was an agreement with the deceased husband
what is clear is that there was never one with the applicant. While the respondents contend that she was
aware of the agreement and was employed to supplement their income because of it this is not sufficient; she was not privy to the contract and thus cannot be bound by it. ...“ [Paragraph 33]

“To grant the applicant a final interdict I must be satisfied that the applicant is being imminently threatened with eviction. The applicant has not shown this within the ambit of ESTA.” [Paragraph 35]

The application was dismissed.

ADMINISTRATIVE JUSTICE


Applicant sought to interdict the first respondent from publishing a report, following a refusal to grant the applicant an extension to respond and comment. [Paragraphs 1 – 3].

Sardiwalla J considered the legal framework in terms of which the office of the Public Protector operated [paragraphs 9 – 15], and examined the requirements for the granting of an interim interdict. [Paragraphs 16 – 19]. Sardiwalla J identified that, as there was a dispute as to whether the applicant had a right to engage with and respond to the findings of the report prior to publication, the core question for determination was whether the applicant had established a prima facie right. [Paragraph 19].

Sardiwalla J discussed the audi altram partem rule [paragraphs 20 - 34], holding that courts had a duty “to uphold and vindicate the constitutional rights of the applicant to his good name”, but that this could not preclude the Public Protector from discharging the “duties and responsibilities exclusively assigned to it by the Constitution.” It was necessary to “strictly recognise[] the right of the applicant to have the inquiry conducted in accordance with natural justice and fair procedures.” [Paragraph 33].

Sardiwalla J found that it was common cause that the report directly implicated the applicant, and implied that he had violated the Ethics Code. First respondent had never engaged with the applicant during the preliminary or investigative process. This went against “the principles of natural justice and fairness.” [Paragraph 35]. Sardiwalla J found that the applicant had a prima facie right to challenge and present his version in relation to the report’s conclusions, and the first respondent’s failure to afford such an opportunity threatened applicant’s right to natural justice and fair procedures. Furthermore, applicant would suffer irreparable harm if publication went ahead. Applicant would suffer prejudice if the interdict were not granted, whereas the first respondent would suffer a “mere delay.” [Paragraph 35].

An interim interdict was granted.
Plaintiff in *Sardiwalla NO v Road Accident Fund* (441/2003) [2009] ZAKZPHC 45 (21 September 2009)

Instituted action in the KwaZulu-Natal High Court at Pietermaritzburg, in his capacity as Administrator / Executor of the Estate of the plaintiff, against the Road Accident Fund (the defendant) for payment of damages arising from injuries sustained in a motor vehicle collision which occurred on 2 September 1998.

Quoted speaking at a breakaway session on court-annexed mediation at the Law Society of South Africa (LSSA) held its annual general meeting (AGM) on 1 and 2 April 2016 in Johannesburg.


“Acting Judge Sardiwalla said that court-annexed mediation was a very important topic that has raised many eyebrows, and had received tremendous support and just as much criticism, giving some background on court-annexed mediation: “It is a mediation process that is linked to the courts, not controlled by the courts, not a function of the courts, not a function of anyone within the court system, but an independent facility that is housed, for convenience, at courts”.

He added that the background behind the court-annexed mediation was that litigation has become far too expensive and that the majority of the people in this country cannot afford to resolve their disputes in a formal manner: “[M]any a families and many individuals have been totally destroyed because of disputes that could have been resolved. They just did not have the capacity and the support to have these disputes resolved’. Judge Sardiwalla said that the process of court-annexed mediation was accessible to everyone, although, targeted for the less fortunate, adding that in the two years since the launch of the 12 sites in Gauteng and North West, 1 500 disputes had been resolved.

Judge Sardiwalla said that there has been consultation with the universities where deans of all the faculties of law were addressed about this mediation, and that his committee had received an overwhelming nod for the project and the deans were planning to introduce mediation as a course in the LLB degree. Judge Sardiwalla also said that there has been great interest by state organisations who would like to use the court-annexed mediation process to try and have a first bite at resolving disputes in a semi-formal way, without the court process.”

Quoted commenting on the Launch of project to use lawyers as magistrates:


“Sardiwalla stressed that "this project is being supported voluntarily and without remuneration, purely as a service to the people of our country". Nonetheless, whilst there was potential of the project to help to reduce the backlog of many cases, it was criticized by some experienced legal specialists on the basis that it as a clever way for career opportunists to “fast track” through the normal experiential process of promotion.”
BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 11 May 1968

BA, University of Durban Westville (1991)

LLB, University of Durban Westville (1994)

CAREER PATH

Acting Judge, KwaZulu-Natal High Court (August - September 2018; June 2019; Scheduled March 2020).

Advocate (1999 - )

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

Candidate Attorney, Vassit Sewpal |1995

Member of the Society of Advocates of KwaZulu-Natal
Advocacy trainer and lecturer for the Society of Advocates of KwaZulu-Natal
Member of Selection Panel for Pupil Advocates for the Society of Advocates of KwaZulu-Natal
Oral Examiner for Motion Court Practice for Pupil Advocates
Chairperson of Tax Appeal Board
No dates given]
Case heard 7 September 2018, Judgment delivered 21 December 2018

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

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

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

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

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

Case heard 7 June 2019, Judgment delivered 4 July 2019

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

Bedderson AJ (Jappie JP concurring) held that the Magistrate had failed to consider the sentencing requirements in the case of S v Zinn. Hence she did not sufficiently deliberate on the mitigating factors of the appellant’s case. It was common cause that the appellant was a first time offender. He was a relatively young man at the time of the commission of the offence. He gained nothing from the commission of the offence and was gainfully employed at the time. He had three minor children under his care. These were personal circumstances that warrant consideration for a lesser sentence. Moreover, the Magistrate had failed to adequately contemplate the role the consumption of alcohol had played and importantly, the appellant’s prospects of rehabilitation. Accordingly, the imposition of fifteen years was excessive and harsh.

The appeal succeeded, and the sentence was set aside. The appellant was sentenced to twelve years imprisonment, half of which was suspended for five years.

SIBONISO HLABISA V THE STATE, UNREPORTED JUDGMENT, CASE NO. AR 620/2017 (KWAZUL-NATAL HIGH COURT, DURBAN)

Case heard 7 June 2019, Judgment delivered 28 June 2019

The Appellant was charged with the rape of a minor, who was approximately 6 years old. The appellant pleaded not guilty, but was subsequently found guilty by the court a quo and sentenced to life imprisonment. The appeal was against sentence only. [Paragraph 1]

Bedderson AJ (Jappie JP concurring) held that it was trite that an appeal court could interfere with the sentence if there was a material misdirection, irregularity or if the sentence imposed was disturbingly shocking or startlingly inappropriate or that it induced a sense of shock. In this matter, the court a quo was bound to impose a life sentence unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. [Paragraph 12]

Bedderson AJ held:

“It is clear from the reading of the judgment on sentence that the Learned Magistrate over emphasised the seriousness of rape of young children. He failed to balance the factual circumstances that led to the commission of the rape in question. It is common cause that the rape took place during a
traditional ceremony held at the complaint’s homestead over a weekend where considerable amounts of alcohol were being consumed. ... [The accused] stated that he started drinking from about 08h30 that morning and only stopped consuming alcohol at the time of the arrest. It is quite clear from the foregoing that one cannot ignore the role that the consumption would have played in the commission of the offence which the Learned Magistrate simply ignored.” [Paragraph 15]

Bedderson AJ found that the appellant had consumed excessive amounts of alcohol. He was 31 years old and had two minor children. A life sentence was the harshest sentence that could be imposed and, in those circumstances, it denied the appellant the possibility of rehabilitation. Those factors and the possibility for rehabilitation provided substantial and compelling reasons for imposing a lesser sentence. A sentence of 18 years was held to be sufficient, and would send a message to the community that rape, especially of a minor, would be met with a severe sanction.

The appeal is upheld, and the Appellant is sentenced to 18 years imprisonment.
BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born: 10 February 1958.

BA Law, University of Durban Westville (1980)

LLB, University of Natal – Pietermaritzburg (1982)

Certificate in Constitutional Litigation, University of Natal – Durban (1994)

CAREER PATH

Director, Govindasamy, Ndzingi & Govender Inc (2011 - )

Govindasamy & Pillay Attorneys

Sole practitioner (2006 – 2011)


[as per application form]


Professional Assistant, AK Essack Morgan Naidoo & Co (1984)


Board member; Finance Committee member, Legal Practice Fidelity Fund (2018 – 2019)

Board member, Attorneys Fidelity Fund (2013 – 2018)

Law Society of South Africa
Member (1984 – 2019)

Council member (2013 – 2014)

KwaZulu - Natal Law Society

Member (1984 – 2018)

President (2013 – 2014)

Chair of numerous committees between 2001 – 2018)

NADEL


National Treasurer (2016 – 2018)

National Deputy Treasurer (2014 – 2016)

National Assistant Secretary (1991 – 1993)

Member, Pietermaritzburg branch (1994 – 2019)

Member, African National Congress (1990 – 2019)

Member, United Democratic Front (1983 – 1990)

South African Football Association (SAFA)


Member and Chair of numerous committees between 1994 – 2019.

MWELI AND OTHERS V S (AR827/16) [2017] ZAKZPHC 43 (27 OCTOBER 2017)

Case heard 19 September 2017, Judgment delivered 27 October 2017

Five appellants were convicted on one count of robbery with aggravating circumstances in the Regional Court. They appealed against conviction and sentence. A core issue was whether the evidence of the complainant, who had been a single witness to the event, had been correctly accepted by the trial court. [Paragraphs 1 – 6].

Govindasamy AJ (Nkosi J concurring) analysed the evidence of the complainant, and found that the trial court had given a “careful and well – reasoned judgment”, being aware that the evidence of the single witness had to be treated with caution. [Paragraph 12]. Govindasamy AJ further considered the evidence of another state witness, a taxi driver, and found that whilst there were “clearly certain unsatisfactory features” and “some contradictions” in the evidence, these should not be over-emphasised, and the contradictions were not material. [Paragraphs 23 – 24]. The court a quo was correct to accept the evidence. [Paragraph 28].

Govindasamy AJ held that the court a quo had been correct to find that the only reasonable inference to be drawn from the evidence was that the appellants had committed the robbery. This inference was consistent with all the proven facts, and the proven facts excluded “every other reasonable inference … except that the appellants [were] the perpetrators of the robbery. [Paragraph 43].

Regarding the appeal against sentence, Govindasamy AJ held that the court a quo had correct found that there were no substantial and compelling circumstances, and that the aggravating factors outweighed the mitigating factors. [Paragraph 53]. The appeal was therefore dismissed.

S V MKHIZE 2011 (1) SACR 554 (KZD)

This case involved the admissibility of a confession made in a criminal trial. The accused argued that the confession was inadmissible as he had been assaulted and threatened to make a statement.

Govindasamy AJ considered the provisions of Section 35(1) of the Constitution, and Section 50(1) of the Criminal Procedure Act (relating to the time for which an accused may be detained after arrest), and found that section 50 of the CPA “was designed to discourage police officers from secretly and irregularly arresting and detaining an accused”, and that while section 39(3) dealt with lawful detention during the period between lawful arrest and the first court appearance, it did not “legalise the accused’s detention until [the] accused is eventually charged.” [Paragraphs 35 – 38].

Govindasamy AJ commented on the “disturbing” fact that the accused had not been brought to court within 48 hours of his arrest or his warning statement being taken. [Paragraphs 39 – 40]. Govindasamy AJ held further that:

“The evidence certainly does not show in any way that the exceptions to the 48 hour time limit are applicable to this case. The accused’s right in terms of Section 35(1)(d) was violated, plain and simple. ...
The fact that he was only brought to court on 6 November 2009, was a serious breach of his Constitutional right and “made a mockery of his fundamental right.” [Paragraphs 43]

Govindasamy AJ emphasized that the constitutional right to a fair trial required criminal trials to be conducted in accordance with “notions of basic fairness and justice”, and that evidence obtained in violation of an accused’s “fundamental right” was inadmissible. Govindasamy AJ found that a judicial officer had no discretion regarding unconstitutionally obtained evidence, since “[t]o admit such evidence, contaminated as it is, will be a violation of the accused’s rights and above all will be prejudicial to the administration of justice.” [Paragraphs 49-52] Against this backdrop, Govindasamy AJ considered the accused’s “strong claims” to have been assaulted during the interviewed at which the confession was obtained, and questioned why the accused should be disbelieved and the police officers believed, when the latter had “in the first place … violated the accused’s right not to be unlawfully detained.” [Paragraph 63].

Govindasamy AJ found that the accused’s evidence could not be faulted. It had been improper to take the accused’s confession when he should at that time have been in court, where he would have had his rights explained in open court by an independent judicial officer. [Paragraph 72]. Govindasamy AJ held that the confession had not been freely and voluntarily made without undue influence and was therefore inadmissible. [Paragraphs 74 – 77]. Absent the confession, the state case was “rather weak”, and “[n]o reasonable court” could convict “on such flimsy evidence.” [Paragraph 88].

CIVIL PROCEDURE


Case heard 7 March 2011, Judgment delivered 17 June 2011

This was an application for condonation in terms of Section 3 (4) of the Institution of Legal Proceedings against certain Organs of State Act, for non-compliance with Section 3 (2) (a) of the Act.

Govindasamy AJ noted that the need for procedural requirements for litigating against organs of state had been found to be constitutional. [Paragraph 11]. In this case, prescription would ordinarily have been delayed for a period of one year after the applicant had become a major, the incident giving rise to the claim having occurred in June 2003, when the applicant was 15 years old and a minor. Applicant initially believed the incident to have been a mistake, and only in January 2006 was it suggested to him that the act in question was wrongful. He consulted with an attorney, and only then (in January 2006) appreciated that the conduct of the Deputy Principal had been wrongful. This appreciation would have set the process of prescription in motion, but for the fact that he was 18 years old at the time, and was a minor against whom prescription did not run. As he was a minor at the time the envisaged claim arose, applicant would have had a year after he turned 21 to institute a claim, therefore by 26 August 2009. However, in July 2007 section 17 of the Children’s Act commenced and reduced the age of majority to 18 years. Applicant then had to institute his envisaged action by 30 June 2008. [Paragraphs 18 – 21].

Govindasamy AJ held that, if taken literally, the change in the age of majority would have the effect of impinging on applicant’s rights. Govindasamy AJ found that:
“The legislature must have been aware that when the age of the majority changed from 21 years to 18 years under the Children’s Act it did not intend to affect the Applicants right to a claim for damages against the Respondent under the Age of Majority Act. I am of the view that once that date is established ie. 29 August 2009, it remains immutable and any change in Applicants status, read with the Prescription Act, would not affect that date.. Any other interpretation in terms whereof the Applicant would be deprived of his acquired right or accrued right would lead to an absurdity. Moreover it may be said to be irrational and discriminatory of the Applicant. It is surely not in the interests of justice or fairness and equity that Applicant’s right may be taken away by the stroke of a pen. ...” [Paragraphs 26-29]

Govindasamy AJ held further that nothing in the Children’s Act indicated that it would operate retrospectively. [Paragraph 31]. The act had to be read so as not to interfere with any accrued rights of a child. Thus any child whose cause of action arose before the commencement of section 17 of the Childrens’ Act was still entitled to the same period of time in which to institute their claim as they would have had if the age of majority had not changed. [Paragraph 32].

“Under the circumstances I am of the view that a proper case for condonation has been made out. The Applicant is entitled to the benefits of constitutional dispensation that promotes rather than inhibits access to courts of law” [Paragraph 40]
MS SHARON MARKS

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 18 September 1959

BA, University of KwaZulu-Natal (1979)

LLB, University of KwaZulu-Natal (1982)

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

CAREER PATH


Assessor, High Court (2005 – 2006)

Regional Court Magistrate (1992 - )

District Court Magistrate (1986 – 1992)


Member, JOASA (1983 – 1986)

ARMSA

Member (1986 - )

National Treasurer (2004 – 2006)

Salaries and services committee (2002 – 2005)

SA – IAWJ

Member (2004 - )

Programmes Committee (2004 – 2006)

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

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

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

Case heard 5 November 2015, Judgment delivered 2 December 2015

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

Marks AJ held:

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

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

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

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

The application was dismissed. An appeal to the SCA was dismissed: Pearson v eThekwini Municipality (241/2016) [2017] ZASCA 63 (29 May 2017).

CIVIL PROCEDURE


Case heard 4 August 2014, Judgment delivered 6 October 2014

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

Marks AJ held:

“The contention by the Ministers that Rule 28 of the Uniform Rules is applicable to amendment of pleadings only is misplaced. ... Rule 28 ... governs amendments to pleadings and documents and sets out succinctly the procedure to be followed. The Rule is not confined to pleadings only, it includes all documents and even includes affidavits. The language of the Rule is clear and unambiguous. ... At the date of the hearing the Ministers had not given notice of its intention to amend their notice of motion ... In fact, the amended notice was not properly filed in the papers before court either. Neither did the Ministers made a substantive application to amend the notice of motion ... It is clear that there is merit in the argument that an irregular step has been taken ... and Ethekwini is fully justified in noting an objection ... ” [Paragraph 11.1 – 11.4]

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

“... [T]he argument ... that it could never have been the Court’s intention is based on his mistaken submission that in ALL cases the right of professional privilege is an absolute limitation of a party’s constitutional right of access to information. ... Moreover, the office of the Ministers is a constitutional body with a public interest duty. It must operate with transparency and accountability. The Ministers have a duty to explain to the public how they arrived at the decision that Ethekwini now seeks to review. The documents sought by Ethekwini will assist in the enquiry into the rationality of the decisions taken by the Ministers. It cannot simply be stated now that these documents are covered by privilege or confidentiality. ... ” [Paragraphs 14.3 – 14.5]
“… Notwithstanding that the documents to be dispatched by the Ministers were not listed the interpretation of the order is that ALL of the documents, including those which the Ministers now seek to claim as confidential, irrelevant and privileged were included in the order to be dispatched. In other words, the Court’s intention was not that a “reduced record” be dispatched by the Ministers to Ethekwini.” [Paragraphs 15.2 – 15.4]

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

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

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

The application to strike out the defence was similarly dismissed.

CRIMINAL JUSTICE

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

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

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

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

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

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

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

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

The appeal was dismissed.
BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 25 February 1967

B Juris, University of Bophuthatswana (1990)

LLB, University of the North-West (2000)

LLM (Criminal Justice) Nelson Mandela University (2010)

CAREER PATH


Regional Court Magistrate, Pietermaritzburg (2004 - )

District Court Magistrate, Port Elizabeth (2000 – 2004)

Public Prosecutor, Itsoseng Magistrates’ Court (1995 – 1999)

Legal Administration Officer, Justice Department, Mmabatho (1990 – 1994)

Clerk, Justice Department, Mmabatho (1989 – 1990)

Basic and Advanced training for Aspirant Judges. SAJEI, January and July 2013.

Member, Judicial Officers Association of South Africa (JOASA) (2000 – 2005)

Member, Association of Regional Magistrates of South Africa (ARMSA) (2005 – )
SELECTED JUDGMENTS

CIVIL PROCEDURE

NAYSJMITH V PICK ’N PAY RETAILERS (PTY) LTD, UNREPORTRED JUDGMENT, CASE NO. AR 61/18 (KWAZUL-NATAL HIGH COURT, PIETERMARITZBURG)

This was an appeal against a ruling of absolution from the instance by the Pietermaritzburg District Magistrates Court. Plaintiff had sued the defendant for damages after falling in the defendant’s store. Plaintiff claimed to have tripped over a protruding crate. The court a quo held that, as the plaintiff’s version was that he had only seen the crate after he had fallen, there was insufficient evidence to establish that the crate was protruding, and ordered absolution from the instance.

Mogwera AJ (Poyo Dlwati J concurring) set out the test for absolution from the instance, which was not whether the evidence led by the plaintiff established what would finally be required to be established, but whether there was evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff. This implied that a plaintiff had to make out a prima facie case - in the sense that there was evidence relating to all the elements of the claim - to survive a claim for absolution. [Paragraph 15]

The plaintiff’s version of events was rejected by the trial court on the basis that there was no evidence to the effect that the crate was protruding from under the table. The plaintiff had steadfastly testified that the crate was not safely tucked under the table but was in fact protruding. This evidence had not been contested by the time absolution was granted. No other explanation has been tendered which could properly explain how the foot was caught. Therefore, his version must prevail, until such time as the evidence is contested by the defendant. Mogwera AJ found that it could not be said that the plaintiff’s version was inherently improbable. [Paragraphs 16 - 19]

Additionally, the plaintiff appealed on the ground that the magistrate had lacked impartiality. Mogwera AJ held that it was clear from the record that the magistrate not only advised counsel for the defendant to seek an absolution order, but also highlighted his perceived weaknesses of the plaintiff’s case. Mogwera AJ cited the SCA decision in Ngobeni, where it was held that the presiding officer must conduct a ‘trial open-mindedly, impartially and fairly and such conduct must be manifest to all those concerned in the trial and its outcome.’ The magistrate’s conduct had violated this principle. [Paragraph 28]

The appeal succeeded, and the order of absolution from the instance was set aside.

CRIMINAL JUSTICE

MTSHALSLI AND OTHERS V THE STATE, UNREPORTRED JUDGMENT, CASE NO. 592/17 (KWAZUL-NATAL HIGH COURT, PIETERMARITZBURG)

This was an appeal against a sentence of three years’ imprisonment for the possession of dagga, imposed under the Drugs & Drug Trafficking Act. The accused had also been declared unfit to possess a firearm. [Paragraph 1]
Mogwera AJ (Barnard AJ concurring) considered the personal circumstances of the accused [paragraph 5], and discussed the quantity of dagga found in the appellants’ possession. The appellants were found in possession of large quantity of dagga, although the exact quantity was unknown due to the police weighing the dagga in buckets, without factoring in the bucket’s weight. However, the court a quo held that due to the prevalence of dagga in the community, the court must impose a sentence of deterrence lest the community take the law into its own hands. [Paragraph 6]

Mogwera AJ held that there was insufficient information on which to determine an appropriate sentence, especially if it involved the deprivation of freedom. Moreover, the discrepancies in the evidence regarding quantity benefited the appellants, and could not be used to justify imposing a harsher sentence. In addition, the personal circumstances of the appellants were all somewhat favourable. All three were first time offenders. Mogwera AJ held that it was always desirable to give a first time offender, especially of a non-violent crime, a non-custodial sentence, and to focus on rehabilitation to ensure less chance of re-offending. [Paragraph 11]

The Firearms Control Act provided that a person would automatically be unfit to possess a firearm if they were found guilty of dealing in drugs. The appellants were not found to be dealing dagga and thus the order ruling that they were unfit to hold a licenced firearm was incompetent in law.

The appeal was upheld. The sentence was set aside and replaced, with each accused being sentenced to a fine of R10 000 or a sentence of 3 years imprisonment, wholly suspended for 5 years on condition that they were not found in possession of drugs in contravention of the Act. The order declaring the appellants to be unfit to possess a firearm was also set aside.

**STATE V SMITH AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. CC 90/2010 (KWAZUL-NATAL HIGH COURT, PIETERMARITZBURG)**

Judgment delivered 11 November 2011

The two accused were charged with one count of murder and another count of housebreaking with intent to rob. Both pleaded not guilty to the charges. However, Mogwera AJ found that it was evident from the accused’s’ plea that they were not disputing their role in the housebreaking and robbery, which occurred after the murder. [Page 2] The main issue in dispute was therefore the murder charge.

Mogwera AJ noted that the evidence of the State’s main witness (Mduduzi) amounted to accomplice testimony, and therefore had to be placed under scrutiny. However, the essential features of the housebreaking and robbery were corroborated by the testimony of both accused. [Page 8]

Mogwera AJ found that Mduduzi’s evidence left the impression that he was trying limit his role in the saga to a minimum. There were aspects of his evidence which were untruthful, and he could not explain convincingly. [Pages 2-4]

Accused 2 claimed to have been compelled into participating by Mduduzi, to have joined out of concern for his own safety, and that Mduduzi had murdered the deceased. However, the evidence of accused 1 contradicted that claim and unequivocally showed that accused 2 had freely participated.
Accused 2 did not at any stage do anything to disassociate from the common purpose and actively participated in the robbery. Furthermore, his testimony was punctured with improbabilities and was not credible. [Pages 15 - 18]

Mogwera AJ held that on the basis of the inconsistencies and improbabilities of accused 1 and accused 2’s testimony and the strength of the circumstantial evidence supporting Mduduzi’s version, the accused’s version of events was implausible.

The accused were found guilty of murder and housebreaking with intention to rob. They were sentenced to 20 years imprisonment each for murder, and 10 years each for housebreaking with intention to rob.
BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 3 September 1954

BA LLB, University of KwaZulu Natal (1982)

LLB, University of KwaZulu Natal, (1984)

CAREER PATH


Advocate, KwaZulu Natal Bar (1992 – )

Appointed senior counsel June 2014.

Prosecutor, Department of Justice (1989 -1991)

Professional Assistant, Adams and Adams Attorneys (1986 – 1989)

Candidate Attorney, Adams and Adams Attorneys (1985)

Candidate Attorney, Goodrickes Attorneys (1984)

KWAZULU NATAL LAW SOCIETY

Member (1984 -1989)

MARITIME LAWYERS ASSOCIATION

Member (1986 – 1989)
SOCIETY OF ADVOCATES OF KWAZULU NATAL

Member (1992 – to date)

DURBAN HIGH SCHOOL GOVERNING BODY

Member and Chairperson of the Disciplinary Committee (2003 – 2011)

SELECTED JUDGMENTS

PRIVATE LAW


This case involved three applications challenging the respondent’s conduct rules for residents. The first application (the rules application) sought to have certain rules declared unlawful. In a counter-application, respondent sought an order declaring that it was entitled to suspend the use of access cards to the applicant for as long as certain fines were not paid. The second application (the spoliation application) sought confirmation of a provisional order directing respondent to re-activate access cards and biometric access. In the third application (the trespass application) applicant sought an order directing respondent to allow contractors to access the estate. [Paragraph 2].

On the rules application, a challenge was raised that the respondent was purporting to carry out the functions of traffic officers on the roads on the estate, which were argued to be public roads in terms of the National Road Traffic Act. [Paragraphs 24 – 29]. A further challenge was that the rules precluded residents from choosing their own service providers or contractors. [Paragraphs 30 – 33]. Applicant also challenge rules which, it alleged, restricted the times at which domestic employees were allowed to walk on the roads on the estate. [Paragraphs 34 – 39]. Topping AJ accepted respondent’s argument that several of the issues had not been raised in the applicants’ founding papers, and noted that it was “an established principle that an applicant in motion proceedings must stand or fall on its founding papers and may not introduce new issues or arguments in reply.” [Paragraphs 42 – 43]. These issues were accordingly not taken into account in determining the application. [Paragraph 44].

After finding that it was the lawfulness of the rules themselves, rather than their application, that was in issue, Topping AJ held that there was no consequence for non-compliance with the rules by a third party. Therefore, respondent was not seeking to control the conduct of all persons entering the estate or to impose the provisions of the National Road Traffic Act on them. [Paragraphs 57 – 58]. As to the complaint that residents were precluded from selecting their own service providers, Topping AJ found that, when considering the rules as a whole, it was “immediately evident that the owners of units within the estate have contractually bound themselves to live within a controlled environment.” [Paragraph 66]. There was no reason why the respondent would not seek to ensure “that the standard of construction and
landscaping that takes place on the estate conforms to the agreed standard.” [Paragraph 67]. The list of accredited contractors was furthermore not a closed list. [Paragraphs 70 – 71]. Topping AJ found that the rules did not imply the restriction of movement for domestic employees that was contended for. [Paragraph 77]. Rules relating to controls over the access of domestic employees were not unlawful. Whilst they might “irk one’s “individual sense of propriety and fairness” because of their restrictive and regimented nature, they cannot be said to be contrary to public policy.” [Paragraph 82].

Regarding the counter – application, Topping AJ held that it did not necessarily follow that because of the dismissal of the rules challenge, the relief in the counter application flowed automatically, since none of the rules challenged entitled respondents to suspend the applicants’ access cards or biometric access. [Paragraphs 84 – 85]. Respondent failed to establish an evidential basis for the underlying contraventions [paragraph 103], and thus the relief sought in the counter – application was not granted. [Paragraph 105].

In respect of the spoliation application, Topping AJ rejected respondent’s argument that applicant had an alternative means of accessing the property via the visitor’s lane as being in conflict with the conduct rules. [Paragraphs 125 - 126]. Respondent’s argument that it had legally suspended access was without merit, and the provisional order was confirmed. [Paragraphs 129 – 130].

In respect of the trespass application, applicant failed to establish that there had been an intrusion on his property so as to found the claim. [Paragraph 144].

The rules and trespass applications were both dismissed, while the spoliation application was successful.

On appeal, a full bench of the high court upheld the roads challenge, on the basis that the Association had no power to regulate any aspects of public roads. Flowing from this, to the extent that the rules restricted the rights of domestic employees to freely be on and traverse the public roads on the estate, those rules were also unlawful. Singh and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and Others 2018 (1) SA 615 (KZP).

On a further appeal to the SCA, the court found that the roads were private, not public roads, and therefore the roads challenge was dismissed. Mount Edgecombe Country Club Estate Management Association II (RF) NPC v Singh and Others (323/2018) [2019] ZASCA 30; 2019 (4) SA 471 (SCA) (28 March 2019.)

NETCARE ST AUGUSTINE’S HOSPITAL (PTY) V EEG & SLEEP LABORATORY, UNREPORTED JUDGMENT, CASE NO.9088/2013 (KWAZULU-NATAL LOCAL DIVISION, DURBAN).

Case heard 29 May 2015, Judgment delivered 1 July 2015

This was an application for eviction. The dispute revolved around the meaning of the clause “no sooner than six calendar months before the expiry of the initial period of lease, nor later than six calendar months before expiry of period of lease.” The parties were in agreement that, should the Respondent have wished to exercise an option to renew the sublease, it would have to have done so within this time period. [Paragraph 10].

Topping AJ held that there was nothing to indicate that the parties had intended that an “inexact moment” be calculated in determining the notice period. Therefore “broken units” were not to be taken into account, and a day six calendar months prior to the expiry of the initial lease period could be calculated. [Paragraph
13]. Topping AJ held further that it made business sense that the parties would have intended that advance notice be given of respondent’s intention to exercise the option, to give an opportunity for meaningful negotiations regarding the rental for the option period. [Paragraph 19].

Topping AJ then considered the intention to exercise the option to renew:

“... [I]t has to unequivocally convey to the recipient, using ordinary reason and knowledge, that it was intended to be such an exercise of the option. It has to leave no room for doubt and the recipient is not required to apply any special knowledge or ingenuity in ascertaining the meaning of what is conveyed in the notice.” [Paragraph 28]

Topping AJ held that when the intention to exercise the option was conveyed in a written document, “the actual but uncommunicated intention of the person addressing such writing is irrelevant”, with only the communication expressed in the written document to be considered. [Paragraph 29].

Topping AJ concluded that the respondent was in unlawful occupation of the leased premises [paragraph 32], and granted the eviction order.

CIVIL PROCEDURE

ETHEKWINI MUNICIPALITY V BHARDWAJ (3135/2015) [2015] ZAKZDHC 80

Case heard 25 June 2015, Judgment delivered 11 September 2015

Applicant sought an order declaring the respondent to be in contempt of an order granted in the main application, where the applicant sought an order interdicting and restraining the respondent from undertaking any building construction work upon his immovable property. The relief was sought on the grounds that the respondent had failed to comply with certain town planning and statutory building provisions.

Topping AJ found that it was common cause that the respondent had failed to obtain applicant’s ‘special consent’ for a relaxation of building lines. As a result, no building could be constructed within a “prohibited area” 7.5 metres from the respondent’s boundary. [Paragraph 7]. Topping AJ found that once the applicant had proved the grant of the order, service on the respondent (or that the order had come to respondent’s notice), non compliance with the provisions of the order and \textit{mala fides}, an evidentiary burden then rested on the respondent to advance evidence which established a reasonable doubt that the non-compliance was wilful and \textit{mala fides}. [Paragraph 13]. Topping AJ noted that the grant of the order and notice was admitted, leaving the issues to be determined as whether respondent had not complied with the order, and done so wilfully and \textit{mala fides}. [Paragraph 14]. Topping AJ noted further that the respondent had been prohibited from undertaking any construction work contrary to the approved plan, but that no prohibition was placed regarding work taking place over the building line. [Paragraph 17].

Topping AJ held that on the evidence, it was clear that respondent had proceeded to build on the prohibited areas, and that construction had taken place after the grant of the order, in contravention of the provisions of the order. [Paragraph 20]. Topping AJ noted that the respondent had been represented by an attorney at all relevant times I the proceedings, and his assertion that he was under a
misapprehension that he was entitled to proceed with the building works was “clearly unworthy of credence”, and fell to be rejected. [Paragraph 23].

Topping AJ held that the applicant had been duty bound to approach the court to obtain an interdict. The court could not condone the “unauthorised and illegal conduct” of the respondent: “I am of the view that a lenient approach in the present instance would also lead to an open invitation to members of the public to follow the course adopted by the Respondent and to continue with the construction of buildings and structures in circumstances where the authority therefor has not been obtained from the relevant municipality…” [Paragraph 26]

Topping AJ ordered that the structures not contemplated by the approval plan and constructed after the issuing of the order be demolished within 30 days. [Paragraph 28].

**CRIMINAL LAW**

*S v STEYN 2018 (1) SACR 410 (KZP)*

**Case heard 8 September 2016, Judgment delivered 2 June 2017**

Appellant was charged with driving a motor vehicle with a blood alcohol level in excess of the level prescribed by the National Road Traffic Act. Appellant disputed that the tested sample was taken from him, and argued that the statement by the nurse who took the blood sample had supplemented by another person. In the appeal, the admissibility of the evidence of a police handwriting expert, who had been called by the court, was placed in issue. Appellant argued that the magistrate had called the witness, not to determine what was essential to a just decision of the case, but to impeach the testimony of the appellant’s expert witness.” [Paragraph 23].

Topping AJ (Radebe J concurring) noted that the court had a “wide discretion” in deciding whether to invoke the provisions of section 186 of the Criminal Procedure Act, and call a witness. Once the court concluded that a witness’s evidence was essential to a just decision of the case, the presiding officer would be compelled to call that witness. “A failure to do so in such circumstances would amount to an irregularity.” [Paragraph 26].

Topping AJ found that the appellant’s expert witness had “not advance[d] the appellant’s argument that there was doubt as to whether the blood examined … was the appellant’s. The argument was premised on the proposition that the recording of the numbers placed on the seal of the container in which the blood vial was transported was unreliable because Ms Ndluli’s statement had been tampered with or altered. At the end of the day, Mr Irving [the expert witness] could not say that this was so.” [Paragraph 29]

Topping AJ held that it was reasonable to believe that the magistrate was attempting to discover the truth in order that substantial justice be done between the accused and the prosecution:

“I cannot see how it can be said that the learned magistrate’s decision to have the original of Ms Ndluli’s statement examined by an expert was done to impeach the testimony of Mr Irving. … Mr Irving’s examination of the statement was inconclusive at best. It most certainly did not go so far as to establish that the document had been tampered with and that the numbers identifying the blood sample that had been taken for testing had been erased and rewritten, as was contended for by the appellant.” [Paragraph 30].
Topping AJ held that it had not been shown that the magistrate had failed to apply her mind to the provisions of section 186 of the Act. The decision to call the witness was not improper. [Paragraph 31].

The appeal was dismissed.
JUDGE SHANE KGOELE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth: 18 June 1964

BProc, University of the North (1987)

LLB, UNISA (2005)

LLM, UNISA (2008)

CAREER PATH

Judge, North West High Court (2009 - ), Mpumalanga High Court (from 1 October 2019).

Acting Deputy Judge President, North West High Court (July -September 2018).

Acting Judge, North West High Court (2008)

Magistrate, Regional Court (2008)

Trainer, Justice College (2001)

Senior Magistrate (1999)

Magistrate (1991)

Prosecutor (1988)

International Association of Women Judges

- Member (2004 - )
- Provincial Executive Member (2010 – 2013)
- President, South African Chapter (2014 - )
- President, Southern African Region (2014 - )

Member, JOASA (2001 – 2009)
SELECTED JUDGMENTS

PRIVATE LAW

PELSER V MIRUKA (898/2014) [2015] ZANWHC 69 (29 OCTOBER 2015)

Case heard: 11 August 2015; Judgment delivered 29 October 2015

Plaintiff, a former university lecturer, claimed damages against a former colleague for defamation, flowing from an e-mail circulated among university staff, inter alia accusing the plaintiff of plagiarism.

Kgoele J held:

“The submission by the defendant that the statements complained of are not defamatory of the plaintiff is in my view a bald statement which is not even substantiated. The meaning of the word "Plagiarism" is clear and in the academic world as the plaintiff correctly stated, is a very serious allegation that denotes that plaintiff acts fraudulently by imputing other people’s work as his and therefore conducts himself in an unethical manner. In my view, the statement in its ordinary construction is capable of conveying to the reasonable reader a defamatory meaning which tends to lower or diminish the esteem with which he is held by others. The plaintiff therefore discharged this onus.” [Paragraph 20]

“In my view, the defendant failed to discharge the onus of establishing either some lawful justification or excuse or the absence of animus iniurandi on his part.” [Paragraph 25]

Plaintiff was awarded damages of R100,000, plus interest and costs.

CIVIL PROCEDURE


Case heard 15 June 2018, Judgment delivered 17 August 2018.

Two applications for contempt of court were brought by intervening parties against the fifth respondent (NUMSA), alleging that NUMSA had failed to comply with an earlier court order postponing and regulating the further conduct of a business rescue application, and that NUMSA had failed to comply fully with a Rule 35(12) notice requesting various documents. [Paragraphs 1 – 14].

Kgoele J noted that, due to the serious consequences of incarceration, civil contempt proceedings should be used “as a last resort.” [Paragraph 29]. The disputed order was clearly “a procedural order to manage the main application.” There were “a host of remedies available to a litigant when procedural Orders are not complied with. Contempt of Court is obviously not one of them.” [Paragraphs 31 – 32].

There were no exceptional circumstances present in this case, and other options were available to the contempt applicants. They were not entitled to approach the court “for this drastic remedy when they have other remedies available to utilise.” [Paragraphs 41 – 42].
The application was therefore dismissed with costs.

**CRIMINAL JUSTICE**

**MATITWANE V REGIONAL COURT PRESIDENT AND ANOTHER (CA20/2017) [2017] ZANWHC 71; 2018 (1) SACR 209 (NWM) (23 NOVEMBER 2017)**


This was an application to review and set aside the summary cancellation of the applicant’s bail. Applicant had pleaded guilty contrary to instructions after a misunderstanding with his legal representatives. The case proceeded with applicant representing himself, but after the first state witness had testified he changed his mind and sought legal representation. The regional magistrate granted a postponement and cancelled the applicant’s bail, on the ground that his conduct amounted to delaying tactics, and there was a concern that he would pay bail and disappear. [Paragraph 6]. Applicant argued that this amounted to a gross irregularity.

Kgoele J (Gura J concurring) held:

“It is apparent that the cancellation of the bail of the applicant was not in line with the provisions of Section 68(1) of the CPA. There was no application that was brought before the Court and no evidence under oath was led which justified the cancellation of bail. The Presiding Regional Magistrate acted wholly *mero motu* without being authorised by any legislation to take the step in the manner in which she did. It is trite law that a Magistrate’s Court is a creature of Statute, and in the absence of an enabling Statute, the actions of the presiding Regional Magistrate were grossly irregular.” [Paragraph 12].

Furthermore, Kgoele J held that the decision was “clearly biased” as the *audi alteram partem* rule had not been adhered to. [Paragraph 13]. The decision of the magistrate was set aside, and the applicant’s bail was reinstated. [Paragraph 14].

**S v SHELDON-LAKEY 2016 (2) SACR 632 (NWM)**

Case heard 20 May 2016; Judgment delivered 4 July 2016.

Appellant was convicted of committing a consensual act of sexual penetration with a boy under the age of 16, in contravention of section 15(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act. She was sentenced to four years’ imprisonment. Appellant had been a temporary educator at the school where the victim was a learner. Appellant raised a defence that the victim had deceived her into believing that he was 16 years or older, and that she at the time reasonably believed that he was older than 16 years.

Kgoele J (Gura J concurring) held:

“Although the appellant was not a professional counsellor/therapist, I find it strange that she could embark on the exercise of counselling a learner without establishing his/her age. Her reason, that she
only wanted to show and make the victim understand that God would help him biblically, does not exonerate her. Instead, it is one of the reasons why she should have started by enquiring and verifying the age of the victim. Age is also important in discussing religious beliefs with children. It is even more so when dealing with emotions of children. In addition, she admitted during cross-examination that, from the backdrop of her studying a law degree, she knew that the age of a child is important insofar as relationships are concerned. The appellant nevertheless, besides counselling the victim without verifying his age, recklessly proceeded to an extent of falling in love with him without verifying his age first, and ended up having sexual intercourse with him.” [Paragraph 19]

“While due weight must be given to the appellant's personal circumstances, the offence she committed remains a serious one. Sexual offences are prevalent in our society. The legislature, reflecting social morals of society, enacted legislation in an attempt to curb sexual intercourse between adults and children, and for good reason. Right-thinking members of society expect adults to protect children, not to abuse them. The exploitation of emotionally immature children and the risks of sexually transmitted diseases are causes for serious concern. … [T]he offence pertains to an instance of consensual intercourse between a 39-year-old woman, who is married, and a school-boy of at least 16 years at the time of the commission of the offence. The fact that the appellant was in an educator – learner relationship with the child aggravates the matter. What compounds the matter further is that the sexual encounter occurred more than once, even after the appellant received the birth certificate of the victim. The offence was committed by a person who clearly knows what the law and the Scripture say about morality.” [Paragraphs 29 – 30]

The appeal was dismissed.

CHILDREN'S RIGHTS

RUDI V SONJA (115/13) [2014] ZANWHC 3 (9 JANUARY 2014)


The court was required to determine whether the applicant had acquired parental responsibilities and rights in respect of a minor child, in terms of section 18(2) and (3) of the Childrens’ Act. The parties were the biological parents of the child, but had never married or lived in a permanent life partnership.

Kgoele J held:

“The Act does not require that the father must only prove that he contributes to the child’s upbringing, but that he can also prove that he has attempted in good faith to contribute to the child’s upbringing. I am satisfied that the applicant has managed to prove that he has attempted to contribute to the child’s upbringing, and what remains for this Court to consider is whether the said attempt was for a reasonable period.” [Paragraph 18]

“Once again the Act does not define what a reasonable period is. It therefore goes without saying that the phrase “reasonable period” is problematic to deal with. The only solution is to rely on the circumstances of a particular matter to determine what is reasonable. The problem that I find with the submission of the respondent is that she based the sufficiency of contact of JD and applicant to
numerics. According to her Legal counsel 15 times in 8 and half years is not sufficient. The question that remains unanswered is, when will the contact and/or visit with the child be numerically enough to be regarded as “reasonable”? ...It has been proved in this matter that the applicant beside paying maintenance, visited the child and had contact with him at the least, 15 times as alleged by the respondent. On other numerous occasions he attempted to come and visit or have contact with JD but the contact was refused apparently by JD himself. The fact remains he had attempted to have an interaction with the child and stopped when he was ordered to when the proceeding in this matter started. .... It is quite clear ... that the condition / circumstances were not always conducive for the applicant to have contact with his child. Therefore, the circumstances that prevailed must in my view be taken into consideration in evaluating whether 15 times contacts which the applicant had with JD is sufficient to constitute “reasonable period”. In my view, they do.” [Paragraphs 19 – 20]

The application was granted.

MEDIA COVERAGE


“Judge Kgoele pointed out that it was an undisputed fact that women judges have contributed to the progressive jurisprudence of SA. She said that there are many policies and laws, but the question that remains to be answered, is how do those policies and laws benefit society? ...”

‘The South African chapter platform has helped to strengthen the qualitative participation of women in the judiciary. We acknowledge that transformation this far has occurred in the judiciary,’ Judge Kgoele said. However, she said the transformation was not enough and the biggest challenge is whether ordinary people felt the transformation that has happened in the judiciary thus far. ...”
JUDGE SHEILA MPHAHLELE

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born: 24 August 1968.

BPRoc, University of Limpopo (formerly University of the North) (1991)

LLB, University of Limpopo (formerly University of the North) (1993)

CAREER PATH

Judge

Acting Judge President, Mpumalanga High Court (January – May 2019)

Acting Deputy Judge President, Mpumalanga High Court (October – December 2019).

Mpumalanga High Court (October 2019 - )

Gauteng High Court (2013 - )

Insolvency Practitioner, Merithing Trust CC (2000 – 2013)

Attorney, Mphahlele Attorneys (1999 – 2013)


Member, South African Chapter of the International Association of Women Judges (2016 - )
Member, Attorneys’ Development Fund (2011 – 2013)

Member, Law Society of South Africa (2004 – 2013)

Deputy President, Law Society of the Northern Provinces (2008 – 2009)

Chairperson, Gauteng Law Council (2005 – 2006)

Member, South African Women Lawyers’ Association (2002 – 2013)

Member, Association for the Advancement of Black Insolvency Practitioners (2000 – 2013)

Member, NADEL (1996 – 2013)

Legal Advisor, Mamelodi Society for the Care of the aged.
CACOURIS V LEMMETJIES AND ANOTHER (41135/09) [2012] ZAGPJHC 76 (4 APRIL 2012)

The plaintiff instituted action against the first and second defendants alleging that he was arrested without a warrant, and that after the arrest, he was maliciously and unlawfully detained until he was granted bail. Plaintiff had been arrested and charged with the possession of a stolen motor vehicle. [Paragraph 4]. The case against him was subsequently struck from the role. [Paragraphs 6 – 7].

Mphahlele J noted that the plaintiff’s business partner had had to cancel a meeting and disclose the reason, with the result that “his arrest was widely publicized.” [Paragraph 8]. Mphahlele J noted that the plaintiff had been charged for being in possession of a stolen motor vehicle, even though the trailer in question had been found in the possession of a third party, and was alleged to have been stolen six years after the plaintiff had sold it. Plaintiff was detained for approximately sixty-four hours “despite the available information that the trailer was registered in the plaintiff’s name.” First respondent had possession of an official certificate indicating that the plaintiff was the registered owner. Furthermore, there was “no evidence that there was reason to believe that the plaintiff would have absconded or failed to appear in court if a summons to appear in court was obtained.” [Paragraph 20]

Mphahlele J held:

“I find the circumstances of the plaintiff’s arrest and the conditions under which he was detained unacceptable ... Constable Lemmetjies could not have reasonably believed in the validity of the charges on the basis of the information available to him. Constable Lemmetjies further abused the court process by intentionally and wrongfully setting the law in motion by initiating a criminal charge against the plaintiff. Constable Lemmetjies was therefore instrumental in making and prosecuting the charge against the plaintiff.” [Paragraph 22]

Mphahlele J held that the actions of the first respondent were “malicious and without any reasonable and probable cause.” [Paragraph 23] Plaintiff had suffered humiliation due to the arrest, and suffered a “negative emotional impact” due to the humiliation and the conditions of his detention. It was “clear from the evidence that the plaintiff suffered considerable indignity during the detention.” [Paragraph 24]. The claim succeeded, and plaintiff was awarded damages of R150 000.

CIVIL PROCEDURE

LAUBSCHER AND ANOTHER V BEZUIDENHOUT (A889/15) [2016] ZAGPPHC 1204 (15 NOVEMBER 2016)

Case heard 17 May 2016, Judgment delivered 15 November 2016

Appellants sought condonation for the late filing of the appeal record, which had been delayed due to a misunderstanding with the transcribers. [Paragraphs 1 – 5].
Mphahlele J (Kubushi J concurring) found that there was “no doubt” that the appellants had experienced challenges in obtaining the correct record from the transcribers, and that they had “demonstrated the desire to prosecute the appeal. Out of frustration and in order to prevent the lapsing of the appeal the appellants not only filed the affidavit explaining its predicament but also attached the incorrect record obtained from the transcribers.” [Paragraph 14].

Whilst finding the respondent’s argument that the appeal had lapsed to be “opportunistic” [paragraph 15], Mphahlele J held that whilst the appellants had taken reasonable steps to comply with the requirements the applicable rule and been unable to file the correct record timeously due to transcription problems, they were “required by the court rules to apply for condonation of the late filing of the correct record.” The court could not grant such an order in the absence of a proper application. [Paragraph 19]

The application for condonation of the filing of the incorrect record was therefore dismissed.


Case heard 25 August 2015, Judgment delivered 4 September 2015

Applicant had instituted an action for damages in the regional court. By agreement between the parties, the court granted an application for the matter to be transferred to the district court. However, the district court refused to allocate a trial date, with the magistrate finding that there was no provision in law for the transfer of a matter from a regional to a district court, and since the matter had already been enrolled in the regional court, it could not be transferred subsequently to the district court. [Paragraph 2].

Mphahlele J, after commenting that the magistrate’s decision “simply stated the background and the law and thereby failed to apply the legal principles to the merits of this case. It is therefore difficult to appreciate the reasoning for the order granted” [paragraph 4], held that the definition of ‘court’ in the Magistrate’s Court Act included both the regional and district courts. Where parties consented to transfer a case, there was no need to show that undue expense or inconvenience would result if there was no transfer. Therefore, the regional court had been correct to transfer the matter to the district court based on the consent of the parties. [Paragraph 6].

Mphahlele J noted that “[a] disconcerting fact is that the applicant’s main case is in limbo. The regional court has granted an order for the case to be transferred to the district court; however the 1st respondent has, without good cause, refused the case to be heard in the district court. Further the 1st respondent’s order failed to provide a directive on the further handling of the matter. In the result, the applicant is unreasonably being denied the right to be heard.” [Paragraph 10].

The decision was set aside, and the applicant granted leave to proceed with the main action in the district court.
CRIMINAL JUSTICE

IVAN DON VAN DER LINDE AND OTHERS V THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS, UNREPORTED JUDGEMENT, CASE NO: 27899/2008 (SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

Case heard 21 February 2013, Judgment delivered 10 April 2013

Applicants sought an order under the Prevention of Organised Crime Act (POCA) to rescind a restraining order, on the basis that the criminal proceedings against the first applicant had been concluded. First applicant had been charged with fraud in the Magistrate’s Court, and was ultimately discharged. The state delivered a notice of intention to lodge an appeal. The appeal was subsequently struck from the roll due to the lack of a proper record of proceedings in the court below.

Mphahlele AJ rejected an argument by the applicants that where a defendant has been acquitted, ‘conclusion of proceedings’ did not include the setting aside or not of such acquittal on review or appeal. On the other hand, if convicted, the ‘conclusion of proceedings’ was defined as the setting aside of the conviction. Mphahlele AJ held that the words “the defendant is acquitted or found not guilty of an offence and “the conviction in respect of an offence is set aside on review or appeal” substantively meant one and the same thing. Mphahlele AJ held further that while it may be true that POCA did not provide that a restraint order remained in force pending an appeal against acquittal, “this should be seen as a lapse in drafting as opposed to a clear intention to frustrate the very purpose of POCA.” [Paragraph 12]

Mphahlele AJ then examined the “general purpose” of POCA:

“POCA was conceived of the state’s resolve to introduce effective measures to combat organized crime in an endeavour to respond to its duty to respect, promote and fulfil the rights in the Bill of Rights. This is against the background that organized crime infringes on people’s rights enshrined in the Bill of rights and presents a danger to public order and safety and economic stability and has the potential to inflict social damage. The aim is also to ensure that no person convicted of an offence should benefit from the fruits of that or any other offence. The legislation is intended to provide for a civil remedy for the preservation and seizure, forfeiture of property which is derived from unlawful activities or concerned in the commission or suspected commission of an offence. ... ” [Paragraph 14]

Mphahlele AJ noted that first applicant was “married to the second applicant, is a sole member of most of the applicants and a director of the other applicants”, and that the case was one “where it may be appropriate to pierce the corporate veil.” The relief sought would have the effect of putting assets suspected of having been obtained through the proceeds of crime “back in the hands of the applicants whilst there is still a possibility that the first applicant could be successfully prosecuted.” This went against “the very purpose of POCA and the spirit of the Bill of Rights.” The application was dismissed.” [Paragraph 18]
In an application for summary judgment, respondents took a point in limine that the court had no jurisdiction to hear the matter, as the respondents and the property to be executed were based in the province of Mpumalanga. [Paragraph 5].

Mphahlele J found that the areas of jurisdiction of the Gauteng High Court had been determined by the Minister with effect from 25 January 2016, and the Judge President was empowered under the Superior Courts Act to divide the area under the jurisdiction of that division into circuit districts. [Paragraphs 6 – 7]. At the time, the Mpumalanga Province fell under the jurisdiction of the Gauteng Division functioning as Mpumalanga Division. On 29 January 2016, the Judge President had issued a notice establishing the Mbombela and Middelburg Civil Circuit Courts in the Mpumalanga Province. [Paragraph 8].

Mphahlele J quoted from a Practice Directive, which provided that, with effect from 1 February 2016, legal proceedings in the Mpumalanga province had to be issued through the Mbombela and Middleburg courts. [Paragraph 10]. Mphahlele J held that by issuing this directive in terms of his powers under the Constitution and the Superior Courts Act, the Judge President had “effectively established the areas of jurisdiction of the Mbombela and Middelburg Circuit Courts, until further notice.” The wording of the directive was clear, and there was no suggestion that the Judge President had acted outside his powers. The Practice Directive had to be adhered to. [Paragraph 11].

Mphahlele J therefore held that the court had no jurisdiction to hear the matter. [Paragraph 12].

Law Society of the Northern Provinces v Osborne and Another (76614/2015) [2017] ZAGPPHC 874 (2 February 2017)

This was an application to have the first and second respondents struck off the roll of attorneys. Allegations against the respondents included that they had failed to submit auditor’s reports timeously; that they had practised as attorneys without being in possession of fidelity fund certificates; that they had shared their offices and shared fees with “a non-attorney to whom they relinquished control over their firm and their trust banking account”; and that they had failed to account to clients and to keep proper accounting records in respect of their practice. [Paragraph 2].

Mphahlele J (Bam J concurring) analysed the findings of the disciplinary proceedings against the respondents, and held:

“The Court and the applicant has a duty to act where an attorney's conduct falls short of what is expected and to curb the erosion of values in the profession. The protection of the public against unscrupulous legal practitioners goes hand in hand with the court’s obligation to protect the integrity of the courts and the legal profession. Public confidence in the legal profession and in the courts is undermined when the strict requirements for membership to the profession are diluted. ... [T]he first
and second respondents can no longer be considered fit and proper persons to practise as attorneys of this court.” [Paragraph 28]

“The respondents displayed lack of appropriate training and supervision to practise as attorneys. From the inception of the practice the respondents displayed total lack of appreciation of the Attorneys Act and the rules of the applicant. ...” [Paragraph 29.

The application was granted.
BIOGRAPHICAL INFORMATION AND QUALIFICATION

Born: 14 January 1959

Bluris, University of the Free State (1983)
LLB, University of the Free State (1985)

CAREER PATH

Acting Judge, Mpumalanga High Court (2019 - )


Attorney (1986 – 2013)
  - Sole proprietor, Brauckmann Jooma Attorneys (2004 - 2008)
  - Partner, Vester & Brauckmann (1987-1995)
  - Professional Assistant, Brandmuller (1987)
  - Candidate Attorney, Brandmuller Van Den Berg & Vester (1986)
  - Candidate Attorney, Daffue & Maree (1985)

Member of the NBCSA National Executive Committee (2018)
Member of Judge President Advisory Committee, Mpumalanga (2017 - )
Regional Coordinator, NBCSA Mpumalanga Region (2017)
Member of the Ethics Committee, NBCSA, Gauteng Region (2016)
Chairperson, NBCSA Judicial Committee Gauteng Region (2016)

Member of Law Society of the Northern Provinces (1986 – 2013)
SELECTED JUDGMENTS
PRIVATE LAW

MABENA V BIDVEST PROTEA COIN SECURITY (PTY) LIMITED 2019 JDR 2249 (MN)

Case heard 16 September 2019, Judgment delivered 6 November 2019

The plaintiff sought damages for an injury sustained during the course of a protected strike outside the Wonderfontein mine. As a result of the injury, the plaintiff had lost his left eye. During the course of the trial, it became evident that the rubber bullet had been discharged by an employee of the defendant’s, acting in the course and scope of their employment. The legal issue to be determined was whether the defence of necessity was available to the defendant. [Paragraphs 1-8]

Brauckmann AJ held that, taking into account the concessions made by the defendant in their heads of argument and during trial, it was apparent that the plaintiff had sustained the injury on the relevant day. The plaintiff’s onus of proof was thus discharged. Further, it was common cause that the bullet had been fired by the defendant’s employee acting in the course and scope of their employment. Thus, the defendant bore the onus of proving on the balance of probabilities that their version was correct. [Paragraphs 105-108]

The defendant claimed the defence of necessity with the notion of sudden emergency as justification. In order to constitute a lawful defence, of necessity, it was necessary to prove that there were reasonable grounds to believe that the conduct of the crowd created a danger that had commenced or was imminent and that could cause injury to person or damage to or destruction of property. This was an objective inquiry. The question was whether a reasonable person in that position would have believed that there was such a danger. Furthermore, the means employed to prevent such danger must be proportional. [Paragraph 38]

The circumstances that gave rise to the ‘sudden emergency’ must not have been caused by the defendant’s fault. Brauckmann AJ held that the defendant, by allowing a harvester to enter the designated picketing area under the circumstances, caused the unrest, and thus, was at fault. Brauckmann AJ cited the appellate division case of S v Bradbury as authority for the proposition that when one consciously invites trouble on oneself, one cannot raise necessity as a defence.

The defendant was found liable to pay any damages that may be proven, with the issue of quantum to be determined separately.

BIPROPS 46 (PTY) LTD V D S VAN HUSSTEEN (PTY) LTD 2019 JDR 2253 (MN)

Case heard 28 May 2019, Judgment delivered 14 June 2019

The applicant sought to evict the respondent from a commercial premises. The two parties had signed a five year lease. The applicant argued that upon expiration of the lease it became
a month to month lease, and could be terminated on one month’s notice. The respondent argued that their agent had entered into a new lease with the applicant which at the time of hearing was in operational existence. The respondent had email exchanges to such affect. In the alternative, the respondent argued that they had exercised their right of renewal as per the lease. [Paragraph 1-5]

Brauckman AJ held that in terms of the lease, the respondent was afforded a right to renew. A right to renew is a *pactum de contrahendo*, which is an offer to renew coupled with an offer to keep the main offer open, subject to the terms and conditions of the written document. Brauckman AJ cited the SCA judgment in *Van Zyl* to the effect that when the offer to keep the main offer open is accepted by the grantee. It is simply an agreement to make a contract in the future. It is a promise to contract, but not a contract. [Paragraph 13]

Brauckmann AJ then considered the conditions for renewal. The respondent had to have previously satisfied all debts promptly and properly; had to have given written notice 6 months before expiration of the lessee’s intention to extend and 6 months prior to expiration agreed on all terms and conditions of the lease. [Paragraph 7]. Brauckmann AJ held that the applicant was required to prove that the respondent had failed to meet the conditions in clause 11. [Paragraphs 15-16]

Brauckmann AJ held that the applicant had failed to show that the respondent had not met its obligations. An email exchange between the parties’ respective agents was evidence of the respondent’s intention to extend. Further, it was clear from this email exchange that a lease agreement was drafted by the applicant and sent to the respondent’s premises, which could be assumed to contain the terms and conditions. Brauckmann AJ noted that as the applicant had brought the matter for review by way of application, the court had limited fact finding capacity. [Paragraphs 30 - 37]

**ADMINISTRATIVE JUSTICE**

**GOVAN MBEKI MUNICIPALITY V NEW INTEGRATED CREDIT SOLUTIONS (PTY) LTD 2019 JDR 2508 (MN)**

*Case heard 5 November 2019; Judgment delivered 3 December 2019*

This matter concerned the validity of an agreement concluded by the plaintiff and the defendant, whereby the defendant undertook to provide debt management services. The plaintiff sought to declare this contract invalid, unlawful and void *ab initio* due to the procurement procedure being unfair. [Paragraph 1-2]. Newcastle Municipality had advertised a tender for debt collection and management in respect of debts 60 days old. The municipality specifically excluded the collection of outstanding debts of less than 60 days. The defendant’s bid was amongst the highest bids received by the municipality at a commission fee of 16.5% for all amounts collected on behalf of the municipality. The municipality appointed the defendant. Subsequently, a variation was agreed whereby the defendant would indeed collect debts from less than 60 days for a commission fee of 2.5% of all debts. [Paragraph 8- 15]
This variation of the agreement to include the debt collection of debts from less than 60 days was not subject to a competitive bidding process. Thus, the 2.5% commission was not taken into account when adjudicating the tender bid. Consequently, the plaintiff argued that the adjudication process was not fair as other suppliers were disadvantaged and the defendant may not have been the lowest bid. Plaintiff argued that as the variation occurred before the contract was signed, and the tender process should have been started afresh. [Paragraph 15-20] Govan Mbeki Municipality (the plaintiff) contracted with the defendant under Regulation 32 of the Municipal Supply Chain Management Regulations, which permits the accounting officer of a municipality to procure goods or services under a contract secured by another organ of state, thereby avoiding a time consuming and expensive tender bidding process.

Brauckmann AJ held cited the judgment of Eastern Cape High Court in Blue Nightingale Trading for authority that the agreement must still meet all the constitutional requirements in s217 of the Constitution for validity. Thus, if the original agreement was constitutionally invalid, the consequent Regulation 32 contract was unlawful. [Paragraph 62] The core legal issue to be determined was whether the court had to set aside the entire agreement, or merely the variance to include debts of less than 60 days. Citing the SCA judgment of Retail Motor Industry, Brauckmann AJ found that severance of the offending provision was within the court’s remit. [Paragraph 86]

Brauckmann AJ found that the original bidding process for the variance agreement was not subject to a competitive bidding process and was accordingly unconstitutional. Thus, the subsequent agreement made by the plaintiff under Regulation 32 of the Municipal Supply Chain Management Regulations carried the same defect. Consequently, the variance agreement was unconstitutional and invalid, and was severed from the contract. However, Brauckmann AJ held that the agreement pertaining to debts older than 60 days was valid, as it had been subject to a competitive bidding process. Therefore, the plaintiff was liable the defendant. [Paragraph 100]

WAKKERSTROOM NATURAL HERITAGE ASSOCIATION V DR PIXLEY KA ISAKA LOCAL MUNICIPALITY 2019 JDR 2463 (MN)

Case heard 29th October 2019.

This matter concerned a bulk water pipeline project, which was part of the respondent municipality’s Integrated Development Plan. The pertinent issue was whether the municipality had complied with the relevant environmental legislation and the constitutionally embedded principle of legality. The applicant’s sought an interdict preventing the municipality proceeding with the construction of the project, and declaring that the project could not proceed until such time as the municipality was granted an additional water licence, and the Environmental Authorisation (EA) was granted. Further, the applicant sought the review and setting aside of the decision to construct the pipeline project. [Paragraph 1-3] The granting of the interdict was premised on the court’s findings in terms of the water licence and EA and review.
Brauckmann AJ held that the National Environmental Management Act (NEMA) was enacted to give effect to the environmental rights in Section 24 of the Constitution. Certain activities were identified by the Minister (or MEC of a Province), which may not commence without an EA. Brauckmann AJ concluded that the municipality’s project fell within the ambit of these prescribed activities and consequently they required an EA. [Paragraph 51 - 64] Brauckmann AJ then considered the impact of the Water Act, which regulated water use. The municipality had a water licence, but the applicant contended that the project would use in excess of the permitted quantity. [Paragraphs 69 - 73]

Brauckmann AJ identified that the core of the review application as being the argument that the decision taken by the municipality was irrational and unlawful. Brauckmann AJ found that the municipality had failed to conduct a hydrological test, which resulted in the decision being irrational, as there must be a rational connection between the means employed and the objective sought. Further, it was unlawful because the decision was predicated on a material mistake of fact as the dam’s reported yield was incorrect. Moreover, the municipality had failed to incorporate the cost of the required infrastructure when factoring in the price of water for the residents and if it had it would have been evident that the Zaaihoek dam (which had the infrastructure) provided a cheaper solution than the Martins Dam. Thus, the decision was irrational. [Paragraph 93 - 109]

The respondents were therefore interdicted from proceeding with construction until they had obtained an Environmental Authorisation order. Further, the respondents were interdicted from drawing water from the relevant dam in excess of their current allowance. Lastly, the decision to construct the pipeline is reviewed and set aside.

CIVIL PROCEDURE

WALDECK NO V THE LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA 2019 JDR 2005 (MN)
Case heard 2 October 2019, Judgment delivered 14 October 2019

The application was made in terms of Rule 35(12) of the Uniform Rules of Court, which regulated the rules of discovery and inspection. The applicants sought an order from the court compelling the respondent to provide copies of the relevant documentation in order for the applicants to dispute the respondent’s locus standi. [Paragraph 1] The respondent was the cessionary of a debt owed by the applicant. The respondent had completed a cession agreement with the applicant’s original debtor. The respondent argued that the applicant was barred from receiving copies of the relevant documents due to confidentiality, as the applicant had no vested interest in what was agreed between the two parties. [Paragraph 21] However, the respondent had allowed the applicant’s attorney to view the relevant documents.
Brauckmann AJ held that, once confidential information fell into the public domain, the confidentiality ceased to exist. [Paragraph 46]. The court held that when the respondent allowed the applicant’s attorney to view the documents, it constituted a waiver of confidentiality. Thus, reliance on confidentiality was misplaced. [Paragraphs 54 – 56]. The applicant must be placed in the position to dispute the *locus standi* of the respondent. Thus, Brauckmann AJ held in favour of the applicant and ordered the respondent to provide the relevant documents. [Paragraphs 59 - 61].
MR. BRUCE LANGA

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born: 26 April 1959
Diploma Iuris, University of the North (1981)
LLB, UNISA (2003)
LLM, UNISA (2004)

CAREER PATH

Acting Judge

Mpumalanga High Court (January – December 2019)
Gauteng High Court (April 2019)
Western Cape High Court (July 2017 – September 2018)
Regional Court President (2013 - )
Regional Magistrate (2004 – 2013)
Assistant Magistrate (1983 – 1985)
Public Prosecutor (1982 – 1983)

Member, Association of Regional Magistrates of South Africa (2005 - )
Judicial Officers Association of South Africa

Provincial Chairperson, Limpopo (2002)
NEC Member (1999 – 2003)
Member, Magistrates Association of South Africa (1994 – 1996)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

MOSSEL BAY YACHT BOAT CLUB V CHAIRPERSON OF TNPA NATIONAL PROPERTY COMMITTEE AND OTHERS [2018] JOL 40074 (WCC)

This was an application to review and set aside a decision by the property committee to award a tender to the third respondent, in a respect of a portion of the Mossel Bay Port. Applicant further sought an order that the third respondent’s tender was non-responsive for failing to comply with various terms, conditions and specifications. [Paragraph 18].

After reviewing the applicable case law, Langa AJ (Samela J concurring) noted that a tender bid that did not comply with the terms, conditions and specifications of the tender invitation stood “to be disqualified as non-responsive or unacceptable.” Whether a tender was non-responsive turned on “the actual terms, conditions and specifications of the invitation to tender”, and a factual determination had to be made as to whether an irregularity had occurred in the award of the tender. If this was found, a further determination as to whether the irregularity constituted a ground for setting aside the award. [Paragraph 34].

Langa AJ found that the third respondent’s bid was complaint in respect with several of applicant’s objections. [Paragraphs 35 – 48]. An allegation of bias was dismissed as “the applicant had not provided any substantiating evidence and the allegation amounts to groundless inferential reasoning. In any event despite making the allegation, the applicant conceded in the founding affidavit that it did “not have proof that the Property Committee was biased in awarding the tender” ...” [Paragraph 48].

As to an objection relating to the scoring and evaluation criteria, Langa AJ found that:

“[A]pplicant’s challenge did not, in my view, deal with the crux of the criterion ... which is the rental. It is common cause that the rental offered by the third respondent was better than that of the applicant and I am therefore satisfied that the points awarded to the third respondent were justified.” [Paragraph 58].

Langa AJ concluded that the challenges based on the formal were without merit, the applicant having “failed to prove the alleged non-compliance with specifications, prescripts, requirements or conditions which would render the tender unacceptable and non-responsive.” Furthermore, “judged against the values of fairness, equitableness, transparency, competitiveness and effectiveness, the third respondent’s tender complies with all the specifications and conditions of tender as set out in the contract documents.” [Paragraphs 60 – 61].

The application was dismissed.
The defendant (excipient) raised an exception to plaintiff (respondent)’s particulars of claim. The main claim main claim is based two credit agreements allegedly concluded with the defendant personally, for the sale and supply of goods to the Defendant. Plaintiff brought two claims in the alternative, based on an alleged fraudulent misrepresentation, and on suretyship contracts. Defendant’s exception was based on a denial that the credit agreements were entered into; that no misrepresentation had been established; and that the purported suretyships were invalid and unenforceable. [Paragraphs 1 – 5].

Langa AJ began by dismissing an application by the Plaintiff to strike out certain paragraphs and annexures in the notice of exception, as well as an application to amend the particulars of claim, holding that this was not possible at the exception stage. [Paragraphs 21 – 26]. Langa AJ held that the plaintiff’s allegations regarding the credit agreements and alleged misrepresentation were “manifestly false or improbable”. [Paragraph 28]. Langa AJ found that the Plaintiff’s claims were contradicted by Plaintiff’s pleadings in other litigation in Namibia and South Africa. [Paragraph 28.1.3]. Langa AJ held that it could not possibly be proved that the Defendant had entered into the credit agreements in his personal capacity. “In the result I am satisfied that the facts pleaded in paragraphs 3 to 8 of the Plaintiff’s amended particulars of claim do not disclose a cause of action or alternatively lack the averments necessary to sustain a cause of action for the relief claimed.” [Paragraph 29].

Regarding the first alternative claim, Langa AJ found that the Plaintiff had failed to establish any misrepresentation by the Defendant. [Paragraphs 30 – 31].

“In the result I am satisfied that the facts pleaded in the first alternative claim set out in paragraphs 12 to 18 of the amended particulars of claim, are palpably untrue or so improbable that they cannot be proven and accordingly cannot be accepted. The exception should therefore also be dismissed on this ground.” [Paragraph 32].

Regarding the exception to the second alternative claim, based on purported suretyship agreements, Langa AJ held that this involved a legal enquiry, and that a contract in terms of which a person purported “to stand as surety for his or her own debt, is invalid and not legally enforceable.” [Paragraph 34]. Langa AJ found that the Plaintiffs averments meant that “the Defendant is professed to be both the principal debtor and surety in respect of both credit agreements.” As a result, the suretyship agreements were invalid and could not be enforced. “I find that the exception should succeed on this ground as well.” [Paragraph 36].

Langa AJ then considered the impact of a judgment by the Namibian High Court in litigation involving the parties, and held that:

“new and alternative facts alleged by the Plaintiff in the amended particulars of claim are contradicted by the facts which were accepted as correct by the Namibian High Court when the default judgment was granted. Therefore to the extent that they are contradicted by the facts in the Namibian High Court, the amended particulars of claim are so improbable that they cannot be proved and should in my view be disregarded.” [Paragraph 40].

Plaintiff’s application to amend the particulars of claim and to strike out were dismissed. The Defendant’s exception was upheld.
ADVOCATE THANDOLUHLE MANKGE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 7 June 1976

B Juris, University of Zululand (1996)

LLB, University of Zululand (2001)

LLM, University of Pretoria (2007)

Postgraduate Certificate in Mining Tax Law, University of the Witwatersrand (2011)

Certificate in Mining Tax Law, University of Stellenbosch Business School (2012)

CAREER PATH

Acting Judge, Mpumalanga High Court (January 2019 – )

Pretoria Society of Advocates, Member of Bar Council (2015 – 2017)

Advocates for Transformation, Provincial Secretary (2015-2016)

Judicial Officers Association of South Africa, Provincial Executive Member (2011 – 2012)

District Court Magistrate (2004 – 2013)

Assistant Control Regional Court Prosecutor, Durban Magistrate’s Court (2003 – 2004)

Prosecutor, Department of Justice and Constitutional Development (1997 – 2004)

Regional Court Prosecutor

Acting Assistant Regional Court Prosecutor


SELECTED JUDGMENTS

PRIVATE LAW
MOKWENA v MINISTER OF POLICE, UNREPORTED JUDGMENT, CASE NO. 984/2017, MPUMALANGA HIGH COURT, MBOMBELA

Case heard 13 May 2019, Judgment delivered 13 June 2019

The plaintiff sought damages against the defendant on the basis that she was intentionally shot with rubber bullets by members of the South African Police Service (SAPS). The defendant denied the claim by contending that members of the SAPS were acting in self-defense when they fired rubber bullets to disperse a crowd of violent protesters that were throwing stones at them. As a result, the defendant pleaded a defence of *volenti non fit injuria*, by arguing that the plaintiff willingly placed herself in a position where harm might result.

Mankge AJ found that the plaintiff failed to establish her claim on a balance of probabilities based on a lack of credible evidence that she presented to the court, such as failing to support the claim of injuries that she sustained through medical evidence. [Paragraphs 46, 49]

As a result, Mankge AJ held that the plaintiff failed to establish a case of intentional, wrongful and unlawful assault against the defendant. The matter was dismissed, and the plaintiff was ordered to pay the defendant’s costs. [Paragraphs 50, 52]

TS OBO HS v LEKWA LOCAL MUNICIPALITY (1900/17) [2019] ZAMPMHC 9 (23 OCTOBER 2019)

Case heard 16 September 2019, Judgment delivered 23 October 2019.

In this matter, the plaintiff in her representative capacity as the mother of a minor child instituted an action for damages against the defendant. The plaintiff alleged that the minor child was electrocuted after being exposed to live electrical cables from a distribution transformer box belonging to the defendant, that was left open. The defendant however, contended that all the electrical installations were duly safeguarded and complied with the applicable statutory and regulatory standards. The court was called upon to only decide on the merits of the matter, and not the quantum for damages.

After considering the facts before the court, Mankge AJ held that the defendant was negligent in not fixing the door of the transformer box in question, especially since it had been situated in the middle of a residential area, where the probabilities were high that there will be children around. In addition, Mankge AJ held that if the door of the transformer box had been closed, the minor child would not have touched the electric wires. [Paragraph 70]

Mankge AJ held further that the defendant had a duty in terms of section 4(2)(i) of the Municipal Systems Act to promote a safe and healthier environment in the municipality. Therefore, had the defendant fulfilled its duty by ensuring that the door of the transformer box was closed, the minor child’s soccer ball would not have entered into the box and this would not have caused the child to approach the distribution box. [Paragraphs 72, 74]

In the result, Mankge AJ held that the defendant had failed to rebut the presumption created by applicable statutory standards that required them to fulfill a duty of care. The defendant was thus held liable to compensate the plaintiff for damages, the amount to be determined.
NOMBULA v MAHLANGU AND ANOTHER, UNREPORTED JUDGMENT, CASE NO. 3341/18, MPUMALANGA HIGH COURT, MIDDLEBURG

Case heard 13 September 2019, Judgment delivered 11 October 2019

This was an application for an eviction order against the 1st and 2nd respondents. The applicant argued that she was the lawful occupier of the immovable property in question, and that the respondents were unlawful occupiers in that the lease agreement in terms of which they occupied the property had expired. Further, that the respondents were in unlawful occupation of the property as the applicant had not consented to their further occupation of the property. The respondents contended that the applicant was not the owner of the property and therefore did not have the right to enter into the lease agreement. [Paragraphs 4 - 5]

Relying on the Constitutional Court decision in Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and another [2015] ZACC 34, Mankge AJ held that “when being sued for eviction at the termination of a lease agreement, a lessee cannot raise as a defence that the lessor has no right to occupy the property. This flows naturally from the rule that a valid lease does not rest on the lessor having any title.” [Paragraph 27]

Mankge AJ held that the respondents had failed to establish that they are in lawful occupation of the property in question and that the continued occupation of the property without paying any rental amount, as required by the lease agreement, went against the principle of good faith. In addition, Mankge AJ found that the respondents failed to raise the defence that the applicant’s lack of title over the property offended the spirit, purport and object of the Bill of Rights, and that this was an issue that could have been important for the determination of the matter. [Paragraphs 28 - 29]

In the result, Mankge AJ granted the application for the eviction, but refused to grant a prayer to grant occupation to the applicant, on the basis that it had been established that the property in question belonged to the Municipality and the applicant had failed to prove how she lawfully took over her late husband’s lease agreement with the Municipality. [Paragraphs 33 - 34]

Mankge AJ emphasized that any symptom of lawless and the disregard for the rule of law should be discouraged at all costs. [Paragraph 34]

MONOMATOTO INVESTMENTS (PTY) LTD AND OTHERS v BRAINWAVE PROJECSTS 1953 (PTY) LTD AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 1178/2019, MPUMALANGA HIGH COURT, MBOMBELA

Case heard 21 November 2019, Judgment delivered 11 December 2019

The applicants sought relief to restrain the respondents from using the first respondent’s land contrary to the municipality’s land use scheme, as well as an order to compel the respondents to use the land only for agricultural purposes.
The respondents contended that the application should be dismissed on the basis that they had undertaken steps to correct their actions, by submitting an application for the rezoning of the land and for building plans. These submissions were pending before the Municipality.

Mankge AJ considered the evidence, including the submission that an application that sought to address the issues in court was pending before the Municipality. Mankge AJ emphasized the need for the court to not grant a final order on the basis of the doctrine of separation of powers. Reliance was placed on several decisions of the Constitutional Court, which stressed that the judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution. [Paragraphs 29, 38]

However, Mankge AJ also took into account that the complete dismissal of an interdict, pending the application before the Municipality, would be inconsistent with the constitutionally protected right of access to courts for a resolution of disputes. The application to the Municipality had been submitted to the Municipality in early 2018, and the matter before the court was heard towards the end of 2019. Mankge AJ held that this was a clear indication that the process of the alternative remedy might delay the matter even further, and that refusing the applicants relief in the form of an interim order would be tantamount to the refusal of justice, which the applicants were entitled to. [Paragraphs 44 – 46]

In the result, Mankge AJ granted an interim interdict, pending the outcome of the application to the Municipality, that interdicted and restrained the 1st and 2nd respondent from hosting any events for commercial gain on the properties in question. In addition, the 1st and 2nd respondent were ordered to use the properties in question for residential and agricultural purposes only, pending the outcome of the application before the Municipality. [Paragraph 52]

COMMERCIAL LAW

STANDARD BANK OF SOUTH AFRICA LTD v SPACE PLAN DEVELOPMENT (PTY) LTD, UNREPORTED JUDGMENT, CASE NO. 1262/18, MPUMALANGA HIGH COURT, MBOMBELA.


In this matter, the court determined whether it would be just and equitable to provisionally wind up the respondent in terms of section 345 (1)(c) of the Companies Act of 1973, as requested by the applicant.

The respondent contended that the application for the provisional winding up should not be granted, on the basis that the applicant did not comply with the requirement of the service to the employees as outlined in ss 346 and 346A of the Companies Act. [Paragraph 10]

Mankge AJ considered that one of the purposes of the Companies Act is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all stakeholders. In this matter, the applicant did not furnish a copy of the application for the winding up of the company to the trade union that represents the respondent’s employees, as required by section 346(4A)(a)(i) of the Companies Act. [Paragraph 19]
Mankge AJ also took into account section 38(1) of the Insolvency Act, which provided that the employment contracts of employees are suspended with effect from the date of granting of a sequestration order. In this regard, Mankge AJ reasoned that the purposive interpretation of section 38(1) required the court to ensure that giving notice of the application for liquidation to the employees outweighed the effect of notifying the employees about a court order that has already been granted. This, the court found, is important in order to fortify the employee’s right to dignity. [Paragraphs 25, 27 and 35]

As a result, Mankge AJ held that the non-compliance of the applicant with section 346(4A)(a)(i) of the Companies Act prevented the application for the winding up of the respondent from moving forward. The application was dismissed with costs. [Paragraphs 41, 49].

CRIMINAL LAW

SINDANE v THE STATE, UNREPORTED JUDGMENT, CASE NO. R17/2019, MPUMALANGA DIVISION, MIDDLEBURG


This was a special review in terms of section 304(4) of the Criminal Procedure Act (the CPA). The court was asked to determine whether there were any irregularities in the trial proceedings, resulting in the Magistrate applying the incorrect provisions of the CPA, and whether the sentence imposed on the accused was in order. [Paragraph 9] The accused had been sentenced to a fine or imprisonment for having failed to attend court after being released on bail.

Mankge AJ (Mphahlele ADJP concurring) held that the trial court had used the incorrect provisions of the CPA in conducting an enquiry for failure to appear, and that it had also used the incorrect approach in convicting the accused. In addition, Mankge AJ found that the sentence imposed by the trial court, in sentencing the accused to a fine of R5000 or three months imprisonment, was not in accordance with the provisions of section 72(2) of the CPA. This provision provides for a sentence of a fine not exceeding R300 or to imprisonment for a period not exceeding three months. [Paragraph 16]

In the result, Mankge AJ held that “the provisions used by the presiding magistrate in conducting the enquiry and sentencing the accused was an irregularity.” The conviction and sentence were therefore set aside. [Paragraph 17]
BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 2 June 1974

Bluris, University of the Western Cape (1996)

LLB, University of the Western Cape (2003)

LLM (Family Law), University of South Africa (2007)

Advanced Certificate in Alternate Dispute Resolution, Arbitration Foundation of South Africa and University of Pretoria (2015)

CAREER PATH

Chairperson of the Appeal Tribunal, Compensation Fund, Department of Labour (2016 -)

Acting Judge

Mpumalanga High Court (28 January - 15 February 2019; 15 April – August 2019)

Northern Cape High Court (13 March – 22 September 2017)

Limpopo High Court (10 October – 18 December 2016)

Acting Regional Court Magistrate, Bethlehem (1 July – 30 September 2016)

Advocate, Johannesburg Society of Advocates and Polokwane Bar (2012)


Senior Legal Administrator Officer, Family Directorate, Department of Justice & Constitutional Development (October 2007 – February 2009)

Project Manager, Gender Advocacy Programme (GAP). (May 2003 – September 2007)

Researcher/Trainer, LRG Research Unit, Faculty of Law, University of Cape Town. (October 2001 – April 2003)

Public Prosecutor, National Prosecuting Authority (June 1998 – September 2001)
Member, South African Woman’s Legal Association (SAWLA) (2016)

Member, Advocates for Transformation (AFT) (2012)

Member, Black Lawyers Association (BLA)

SELECTED JUDGMENTS

PRIVATE LAW

CHANGING TIDES 184 (PTY) LIMITED V MOTRADE 40 (PTY) LIMITED AND OTHERS, UNREPORTED JUDGMENT, CASE NO. 2069/2017 (MPUMALANGA HIGH COURT, MBOMBELA)

Case heard 1 August 2019; Judgment delivered 19 September 2019

This was an application for the correction of a servitude. Applicant gained the servitude when it bought the dominant tenement from the first respondent. The first respondent subsequently sold the servient tenement to the second respondent. In terms of the servitude, the applicant had the right to draw water from the servient tenement’s dam. The applicant contended that the amendment of the servitude was to bring it in accordance with what was agreed with the first respondent. [Paragraphs 1-6]

The applicant drew the court’s attention to clause 18 which stated that the 1st respondent granted a perpetual water servitude in favour of the dominant tenement. Thereby, creating a real right to draw water from the dam, pipeline and access to electricity required to realise this right. However, a paragraph in the registered servitude states that the applicant may not draw from the dam. Thus, there existed a material contradiction between what the contract granted and what in fact was registered. [Paragraphs 8 - 12]

Respondents argued that rectification could not effect the transfer of a right. Furthermore, before the servitude was registered both owners were consulted, and thus the assertion that the servitude was changed could not hold. Respondents also raised the point in limine that an application was inappropriate to deal with such material disputes of fact. [Paragraphs 14 - 16]

Ndlokovane cited the SCA case of Zandspruit Cash & Carry where the court stated that interpretation of a contract required evidence of the factual matrix. The high court judgment of Freeman & Freeman was cited, where the court stated that rectification of a contract must be done by way of action, not application proceedings. Furthermore, the NDPP v Zuma judgment was cited for the proposition that application proceedings are inappropriate to resolve factual issues. [Paragraphs 20 - 22]

Ndlokovane AJ found that the crux of the matter was a dispute over the terms and conditions of the contract. It was also disputed as to whether the applicant had read and accepted the deed of servitude. Ndlokovane AJ found that it was not possible to properly establish these facts without cross-examination. [Paragraphs 23 - 26]

The application was dismissed with costs.
CIVIL PROCEDURE

ROPE CONSTRUCTION CO (PTY) LTD V BLAZECOR 116 CC AND ANOTHER [2017] ZANCHC 40 (26 MAY 2017)
Case heard 15 May 2017; Judgment delivered 26 May 2017

This was an appeal against a decision of the court a quo to not permit an amendment to the appellant’s particulars of claim during the course of the trial. The appellant had sued the 1st respondent (“Blazecor”) and the 2nd respondent (“Lange”), in terms of a suretyship agreement. [Paragraphs 1-3]

The appellant claimed that Blazecor, represented by Lange, had executed a written application for credit facilities in the appellant’s favour. This application was accepted and the appellant supplied goods to the 1st respondent. The appellant contended that Lange had bound himself as surety and co-principal debtor and was hence liable, together with Blazecor, for payment. The respondents’ offered a bare denial in response. [Paragraphs 4-6]

Ndlokovane AJ (Mamosebo J concurring) noted that applications for amendments to pleadings were permitted under the Magistrates Court Act. It was common cause that the appellant attempted to amend its pleadings after its case was closed, but before addresses to the court. The balance due was not contested by Lange, and the purpose of the amendment was to provide coherence between its pleadings and the uncontested evidence. Furthermore, Ndlokovane AJ found that the respondents had an opportunity to respond to the amendment in terms of its written submissions. Any prejudice that could have arisen due to the amendment could have been cured by a costs order. Thus, the amendment should have been allowed, especially considering that the amendment was pursuant to evidence that came to light during cross-examination. [Paragraphs 8 - 15]

Ndlokovane AJ found that the bare denial by the respondent was disingenuous considering there was a signed certificate acknowledging indebtedness, which constituted a prima facie proof of indebtedness. Thus, the 2nd respondent bore the onus to disavow this acknowledgment, which he failed to do. [Paragraphs 19 - 23]

The appeal was upheld, and judgment granted in favour of the appellant. [Paragraph 24].

CRIMINAL LAW

STATE V PIETERSE, UNREPORTED JUDGMENT, CASE NO. KS15/17 (NORTHERN CAPE HIGH COURT, KIMBERLEY)
Case heard 13 September 2017; Judgment delivered 14 September 2017

The was convicted on 15 charges, including 8 charges of rape (including victims who were minors), 1 charge of attempted rape, 4 charges of robbery with aggravating circumstances, 1 charge of housebreaking with intention to steal and theft and 1 charge of housebreaking with intention to rob and robbery. These offences were committed over a period of three years. [Paragraph 1] Counsel for
the accused argued that substantial and compelling factors existed that justified deviation from the prescribed minimum sentences. The accused was 23 years old. His mother had died when he was 10 years old, and his father worked in Rustenburg. He admitted guilt of his own volition and had apologised to the victims and their families. [Paragraphs 12 – 13] By contrast, the state argued that there were no substantial and compelling circumstances, and that the accused be declared a serial rapist having raped 8 women and attempted to rape another. Most of the offences were premeditated and were committed late at night or early in the morning when the victims were vulnerable. [Paragraph 14]

Ndlokovane AJ cited the judgment in *S v Vilikazi*, noting that in considering the personal circumstances of the accused a material consideration was as to whether the accused can be expected to offend again. Ndlokovane AJ found that the accused was a predator who prowlled the night in search for victims, and this would have continued had he not been arrested. The accused showed no remorse and although he admitted the rape of the 9-year-old was a mistake, he did not comment as to whether the rape of the 12 year old was too. [Paragraphs 14 – 16]

Ndlokovane AJ cited the SCA judgment in *S v Chapman* to find that rape and gender-based violence is a scourge on society, and that the courts are duty bound to send a clear message to the accused, other potential rapists and society that the courts will not show mercy for offences of this nature. Ndlokovane AJ cited the SCA’s judgment in *S v Malgas* to find that “the legislature prescribed life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.” [Paragraphs 18–19]

Ndlokovane AJ held that the accused could not be considered a first time offender, despite having no previous convictions, due to the serial nature of the offences over two years. The prevalence of crime committed by men against women necessitated a strong message. The aggravating factors outweigh in mitigating ones and no substantial circumstances existed justifying deviation from prescribed minimum sentence. [Paragraphs 19-20]

The accused was sentenced to three terms of life imprisonments, 7 years imprisonment, 10 years imprisonment, 15 years imprisonment and 3 years of imprisonment for the respective offences. These sentences were to run concurrently. The accused was also declared a sex offender. [Paragraph 21]

**MR. TAKALANI RATSHIBVUMO**

**BIOGRAPHICAL INFORMATION AND QUALIFICATIONS**

Born: 8 December 1973

B Juris, University of Venda (1995)

LLB, University of Venda (1999)
LLM in International Law (Cum Laude), University of Johannesburg (2004)

**CAREER PATH**

Acting Judge, Gauteng High Court (April 2013 – )

Regional Magistrate, Johannesburg (2015 – )

Acting Regional Magistrate, Johannesburg (2009 – 2015)


Admitted as Advocate (2006)

Public Prosecutor, Department of Justice (July 1996 – October 2000)

Lecturer, University of Venda (January 1996 – December 1996)

Electoral Officer, Independent Electoral Commission (April 1994)

Association for Regional Magistrates, South Africa (ARMSA)

- NEC member (2016 - )
- Chairperson, Salaries and Legislation Committees (2015 - )


Judicial Officers Association of South Africa (JOASA)

- President (2010 – 2012)
- Vice President (2008 – 2010)
- Secretary, Gauteng (2006 – 2008)

Member, Lower Court Renumeration Committee (2011 – )

Chairperson (Gauteng), National Union of Prosecutors of South Africa (1995 – 2000)


Board Member, Rearabilwe Ekurhuleni Community Centre (March 2019 – )

School Governing Body, Edenglen High School (2018 – )
The plaintiff claimed damages against the defendant as a result of being shot by an employee of the defendant, an off-duty police officer. The defendant disputed the plaintiff’s claim of vicarious liability on the basis that the identity of the police officer in question could not be established by the plaintiff, the police officer in question was off-duty at the time of the incident, was not wearing police uniform, and was not driving in a marked police vehicle. [Paragraphs 1, 4] The issues before the court were whether the plaintiff had successfully established the identity of the police officer, and whether the defendant could be held vicariously liable in such circumstances? [Paragraph 5]

On the issue of vicarious liability, Ratshibvumo AJ held that it was clear from the facts of the case that the incident did not occur whilst the employee in question was furthering his scope of employment as a police officer. Therefore, the test of deviation was applied. Referring to the Constitutional Court judgment of Booysen v Minister of Safety and Security, Ratshibvumo AJ considered “whether the
employee committed the wrongful acts solely for his or her own interests or those of the employer (the subjective question); and second, if he or she was acting for his or her own interests, whether there was nevertheless a “sufficiently close link” between the employee’s conduct and the business of his employment (the objective question”). [Paragraphs 17 - 18]

In applying the facts to the law, Ratshibvumo AJ held that the police officer in question was not pursuing the defendant’s interest, as his employer, when he interacted with the plaintiff nor was there any sufficiently close link between the employee’s conduct and that of the interests of the defendant. This was based on, amongst other things, that the employee was off-duty and driving his own private vehicle at the time of the incident and no relationship of trust existed between the plaintiff and the employee, in terms of which the plaintiff could have expected the employee to perform his duty as a police officer. [Paragraphs 25 - 26]

On the issue of whether the plaintiff successfully established the identity of the police officer, Ratshibvumo AJ held that the plaintiff failed to prove on a balance of probabilities that the person who shot him was the police officer in question. This was based on reasons that the plaintiff did not know the police officer in question and the incident occurred when it was dark. In addition, ballistic tests on the firearm and the cartridges obtained from the shooting scene were not presented to the court. [Paragraphs 33 - 34]

In the result, Ratshibvumo AJ held that the defendant could not be held vicariously liable, and the plaintiff’s claim was dismissed with costs. [Paragraph 35 and 36]

CRIMINAL JUSTICE

NKUNA v S (A62/2012) [2013] ZAGPPHC 111; 2013 (2) SACR 541 (GNP)

Judgment delivered 6 May 2013

This was an appeal against conviction and sentence. The issues for determination on appeal were whether the Magistrate’s prior knowledge of the appellant’s previous convictions, obtained during the bail application in which he presided, should have precluded him from presiding in the subsequent trial; and whether a proper approach was applied to the State’s circumstantial evidence. [Paragraphs 1 - 2]

During the bail application before the same magistrate, the appellant disclosed two previous convictions of theft and an outstanding case of housebreaking. The magistrate refused bail after he remarked that the appellant had the tendency to commit crimes. [Paragraph 3]

Ratshibvumo AJ noted that it was a long-standing practice that for the judicial officer to be informed of previous convictions before the accused was convicted constituted an irregularity that nullified the proceedings as a whole. Referring to a number of precedents, Ratshibvumo AJ found that “a judicial officer fails to uphold the Constitution that requires him to apply the law impartially if he allows his reasoning to be affected by bias. The appearance of bias may be enough to vitiate the trial in whole or in part. The very fact that the appellant knew that the magistrate who presided over the trial knew
of his previous convictions, was enough to create a reasonable apprehension on his part that the magistrate would not be impartial.” [Paragraph 6]

Even without the finding of the magistrate’s reasoning being affected by bias, Ratshibvumo AJ held that the conviction had to be set aside on the basis of insufficient evidence. The accused had been convicted on circumstantial evidence, since no one actually saw him commit theft and the cellphone stolen was never recovered from him. As such, the evidence was not sufficient to convict the appellant. [Paragraph 10 - 11]

Ratshibvumo AJ held that the magistrate should have recused himself from hearing the trial in view of his knowledge of the appellant’s previous convictions. [Paragraph 12] The appeal was upheld.


This was an appeal against the conviction and sentence of the appellant in terms of which the trial court found him guilty of raping a 10-year-old on three different occasions, resulting in a sentence of life imprisonment. [Paragraphs 1 - 2] Appellant argued that the trial court had erred in convicting due to the victim’s failure to describe the accused during her testimony. The appellant further argued that given this failure and the victim’s tender age, there could be an ulterior motive in laying charges against him. [Paragraph 5]

On the issue of conviction, Ratshibvumo AJ held that the magistrate had analyzed the evidence by taking all the relevant aspects into consideration. It was not disputed that the appellant resided with the victim in the same yard. Further, Ratshibvumo AJ held that the failure of the victim to give any description of the appellant did not mean that she was not raped, or that she did not reside with the appellant. It was sufficient that the victim named the suspect and at the end of her evidence, she was able to point to the appellant in the dock as the man who resided in the same yard as her at the time of the incident. It was held that the failure on her part to give a description of the suspect could only be attributed to the difficulty in giving a description of a person, especially for a child, and how the question was phrased. [Paragraphs 7 - 8]

On the issue of sentencing, Ratshibvumo AJ held that the magistrate was not at fault for not finding any substantial and compelling circumstances that justified imposing a lesser sentence than the mandatory life imprisonment. [Paragraph 11 and 16] Ratshibvumo AJ referred to the judgment of the SCA in S v SMM to the effect that “our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct.” [Paragraph 16]

The appeal was dismissed.
This was an application for the appointment of a *curator ad litem* of applicant’s minor child. The child’s primary residence had previously been awarded to the Respondent. The application was brought to allow the applicant to later bring a further application for the primary residence of the child to be awarded to her. [Paragraph 1]

The applicant submitted that the respondent had failed to care for or discipline the minor child on the basis that the child has developed tendencies that were displeasing, in that he threw tantrums, took and kept naked pictures of his sister on his phone, and had stolen money on several occasions when visiting the applicant. The respondent did not dispute the allegations, but contended that the child’s behavior was caused by the parties’ constant arguments. [Paragraphs 3 - 4]

Ratshibvumo AJ held that the role of a curator was important in order to assist the court and the child by advancing the child’s best interests. In the circumstances, Ratshibvumo AJ held it would be in the best interests of the child to appoint a *curator ad litem* on the basis that should a variation be made to the court order awarding residence, it would be important for the court to give the child a voice on any possible reconsideration of the order and any other litigation that involved or affects him. [Paragraphs 12 - 14]

The application was granted.

**SELECTED PUBLICATIONS**


This article considered the Constitutional Court judgment in *Masiya v DPP, Pretoria and Another 2007(2) SACR 435*, in which both the lower and high courts played an important role in protecting and promoting justice by declaring the common law definition of rape was unconstitutional to the extent that it excluded anal penetration. [Page 70]

The article also looked at how male survivors of sexual assault would remain marginalized indefinitely, on the basis that the Constitutional Court judgment “refused to extend the definition of sexual assault to include the male victims saying the facts before the court involved a female victim. Although from its judgment as a whole it would appear that the Constitutional Court would not have any problem in extending the definition to include male victims, it refused to directly give an opinion saying they will
make a decision when facts before the court involve a male victim if such a case come before it.”

[Page 72].

ADVOCATE HENK ROELOFSE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 6 August 1966

B. Com, University of Pretoria (1987)

Dip Juris, University of South Africa (1991)

B. Proc, University of Pretoria (1993)

LLB, University of South Africa (2003)

Post-Graduate Diploma in Financial Planning (ILPA), University of the Free State (2003)

CAREER PATH

Acting Judge, Gauteng and Mpumalanga High Courts (2018 – 2019)

Advocate (2003 – )


Department of Justice, Prosecutor (1989 – 1993)


Member, Mpumalanga Provincial Legal Practice Council (2018 – )

Treasurer, Mpumalanga Bar Council (2018 – 2019)

Member, Mpumalanga Bar Council (2017 – September 2019)

Member, Mpumalanga Society of Advocates (2016 – )

Member, Pretoria Society of Advocates (2008 – 2017)
SELECTED JUDGMENTS

PRIVATE LAW

GABAZA PHIKIWE KHUMALO O.B.O SIPHO SURPRISE KHUMALO V ROAD ACCIDENT FUND,
UNREPORTED JUDGMENT, CASE NO: 530/17, MPUMALANGA HIGH COURT (FUNCTIONING AS
GAUTENG DIVISION, PRETORIA – MIDDLEBURG CIRCUIT COURT)

Case heard 25 – 28 February 2019

This was a claim for damages resulting from plaintiff’s minor child being struck by a motor vehicle,
while a pedestrian. Liability for general damages (in respect of quantum) and future loss of income
were in dispute. Defendant claimed that the pedestrian had a pre-existing learning disability, which
was the primary cause of any potential loss of future income, not the accident.

Roelofse AJ held:

“The outcome of the patient’s education and his ultimate employment must be considered in light
what the experts say about his present condition. The experts agree ... Having regard to the opinions
of the educational psychologists, educational therapists, the industrial psychologists and clinical
psychologists, I accept that the accident left the patient with such an impairment that, having regard
to his probable pre-morbid and demonstrated post-morbid mental capacity, the patient suffered a
permanent total loss of earning capacity and that Grade 10 is the highest qualification patient would
have achieved with or without the accident.” [Paragraph 32].

Roelofse AJ accepted that the accident left the patient with disabilities that prevented him from
obtaining employment and found that the patient experienced a total loss of income as a result of the
accident. “It is trite that the patient is entitled to be compensated to the extent that his patrimony has
been diminished as a consequence of the accident. This loss includes future loss of earning capacity.”
[Paragraph 39].

In determining the quantum of damages, Roelofse AJ held that “[t]here is no hard and fast rule that
previous awards must be applied. The court remains with a discretion when damages is to be
awarded.” [Paragraph 44]. Damages were awarded in the amount of R600 000 in respect of general
damages and R2 635 000 in respect of loss of future earnings.

COMMERCIAL LAW

ARQOMANZI PROPRIETARY LIMITED V VANTAGE GOLDFIELDS (PTY) LIMITED AND OTHERS
(3651/2019) [2019] ZAMPMBHC 10 (11 NOVEMBER 2019)

Case heard 15 & 25 October 2019, Judgment delivered 11 November 2019

This case dealt with a dispute over business rescue proceedings in respect of a gold mining company.
Applicants sought to interdict the business rescue practitioners from implementing “failed” business
rescue plans previously adopted, and to direct the practitioners to recognise applicant as a creditor of
ADVOCATE HENK ROELOFSE

first respondent. [Paragraphs 35 – 36]. Roelofse AJ found that applicant was a creditor[paragraph 88], but declined to find that the business rescue plans had failed [paragraph 106]. Roelofse AJ further declined to order the practitioners to call a creditors meeting to authorise that new business rescue plans be prepared. [Paragraph 113].

Roelofse AJ held:

“When day broke in this matter as I opened the court file for the first time, I was faced with an opaque veil of mist and cloud. A multitude of issues and arguments presented itself. ... The time lapse brought heat. The heat came when more affidavits and arguments were filed. After the head came, most of the mist and cloud dissipated, the issues became clear and crisp – only until clouds yet again appeared on the horizon with an astounding revelation from VGSA. Despite the crispness of the issues, I still deem it necessary to traverse what I saw before the heat, what I saw after the heat came and what the clouds brought. I do so because somewhere, sometime, and, for some reason someone may want to consider how this judgment and the order that follow come about.” [Paragraph 5].

“As an aside, I say that the absence of money for the plans to be implemented must, in all fairness, be laid at the door of the practitioners. They demanded proof of funds in the course of the Flaming Silver transaction from Flaming Silver. Why did they not consider demanding irrevocable guarantees in some for or the other? In this way, those who proclaimed to have money would have had to put their money were there moths [sic] were. Well, that is water under the bridge. More important is to consider what must be done now in the best interest of the Vantage Companies, their creditors and other affected parties, the most vulnerable of which is their employees who continues to suffer.” [Paragraph 107]

ADMINISTRATIVE JUSTICE

EX PARTE: VAN HEERDEN (1079/2020) [2020] ZAMPMBHC 10 (27 MARCH 2020)

Applicant, who resided in Mbombela, applied for an order that he be temporarily exempt from the travel restrictions imposed by regulations responding to the Covid-19 crisis, in order to attend the funeral of his grandfather in the Eastern Cape. Applicant averred that he had not been in contact with anyone who had contracted the virus, and did not display any symptoms of the virus. Applicant further averred that he intended to comply with all remaining provisions of the regulations, and to take all necessary precautions to prevent contamination.

Roelofse AJ commented that: “[t]he circumstances of this application are extremely upsetting. It shows in the crudest manner the crude effects of the final lock down Regulations upon a family.” [Paragraph 9]. Roelofse AJ held that whilst he had “extreme sympathy” for the applicant, “I must uphold the law.”

“Unfortunately, presently, the law prohibits that which the applicant wants to do however urgent and deserving. The Executive, under enabling legislation, invoked the provisions of the Act by declaring the state of disaster in order to curb the spread of COVID-19. The Act and the final lock down Regulation applies to everyone within the borders of the Republic. I cannot accede to the relief the applicant seeks because in doing so, I will be authorizing the applicant to break the law under judicial decree – that no court can do. In addition, no matter how careful and diligent the applicant will
conduct himself, not only the applicant but many others may be exposed to unnecessary risk, even death if I grant the applicant the relief he seeks.” [Paragraph 16].

The application was dismissed.

CRIMINAL JUSTICE

MALHERBE V S, UNREPORTED JUDGMENT, CASE NO: A12/17,

This case dealt with the seizure of child pornography images from the appellant’s residence pursuant to the execution of a search and seizure warrant. The appellant disputed the lawfulness of the warrant and a trial within a trial ensued, following which the warrant was found to be lawful. The appellant then made formal admissions in terms of s220 of the Criminal Procedure Act (CPA) and was found guilty and sentenced to three months imprisonment suspended for three years. He was also declared unfit to work with children and it was ordered that his name be entered into the National Child Protection Register. On appeal, appellant sought to challenge the legality of the warrant and submitted that the sentence was shockingly inappropriate because he was a first offender.

Roelofse AJ (Mudau J concurring) held:

“[T]he court a quo specifically asked the applicant to confirm whether or not the admissions that he made was free and voluntarily which was confirmed by the appellant.” [Paragraph 10].

“... The appellant has taken his chances, played his cards and must now contend with the result. In this court’s view, it is not necessary to deal with the trial court’s finding regarding the lawfulness of the warrant because, even absent the warrant, the appellant has admitted all the elements of the offences.” [Paragraph 12].

The conviction was thus, confirmed. As to the sentence, Roelofse AJ found that court a quo was incorrect in citing a non-existent penalty provision, which was found to lead to a failure of justice. Furthermore the sentence was disturbingly inappropriate given the nature of the offences:

“There is a need to harmonise punishments for offences relating to child pornography. Child pornography is a social evil which must be dealt with decisively. This crime not only impacts most profoundly upon the child victims but also on society. It advances the exploitation of vulnerable children. It satisfies the darkest and most heinous desires of those who possess child pornography. What justification can there ever be for such an inexcusable exploitation for whatever gain or gratification?” [Paragraph 25]

Roelofse AJ referred the matter back to the magistrate’s court to determine a more suitable sentence. Finally, the appellant challenged the order made in terms of s120(4) of the Children’s Act, which deemed him unsuitable to work with children. He contended that he should have been informed that the state would invoke this provision in the same way as he would have been informed of the state’s intention to invoke the minimum sentence provisions. Appellant argued that if he had known, he would have led evidence to prevent such a finding. Roelofse AJ cited the coming into force of amended provisions of the Children’s Act which stated that upon conviction in terms of s24(b) of the Publications
Act, a convicted person must be deemed unsuitable to work with children. The appeal on that ground therefore failed.

On appeal, the Supreme Court of Appeal found that the search warrant had been invalid, which rendered the subsequent trial unfair. *Malherbe v S* (1182/2018) [2019] ZASCA 169 (29 November 2019).

**S V Mdluli (CC149/17) [2018] ZAGPPHC 896 (15 March 2018)**

*Case heard 12 – 14 March 2018, Judgment delivered 15 March 2018*

This case concerned the murder of a schoolteacher at the hands of her companion, the accused. The accused admitted to killing the deceased in a fit of rage. He tendered a guilty plea supported by a written statement.

Roelofse AJ held:

“I was extremely hesitant to refer Mr Mdluli to the photographs of the murder scene due to the graphic nature thereof and the pictures of the deceased. I thought that this would disturb and traumatise Mr. Mdluli. I apologised to Mr Mdluli that I had to refer him to the photographs. I carefully observed Mr. Mdluli as he looked at the photographs which showed the deceased. He acted with indifference to the photographs and showed no emotion. This was unexpected in light of the measure of emotion he has shown when the trial commenced.” [Paragraph 22]

In considering sentencing, Roelofse AJ held that “cannot be gainsaid that Mr Mdluli was under serious provocation, hurt and anger caused by the deceased’s perceived infidelity. … Violence was far too rife and readily employed as a solution to problems. The interests of society must be served. Members of society must understand that dire consequences will follow as a result of such heinous acts. In that, society will be protected from perpetrators committing similar acts of senseless violence.” [Paragraph 35].

Roelofse AJ sentenced the accused to 10 years imprisonment.
BIIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born: 5 May 1972
BProc, University of the North (Limpopo) (1996)

CAREER PATH

Acting Judge
Mpumalanga High Court (April – June 2018, January – March 2019)
Gauteng High Court, Pretoria (January – February 2016)
Regional Magistrate (2015 - )
Magistrate, Acting Judicial Head (2011 – 2012)
Additional Magistrate (2003 – 2012)
Public Prosecutor, Department of Justice (1999 – 2003)
Candidate Attorney, Bekker van Rensburg Attorneys (1996 – 1998)
Public Prosecutor, Department of Justice (1996)

Member, SA Chapter, International Association of Women Judges (2019)
Member, Judicial Officers Association of South Africa (2016)

SELECTED JUDGMENTS

PRIVATE LAW

KHUDUGA V PASSENGER RAIL AGENCY OF SOUTH AFRICA (59370/2011) [2016] ZAGPPHC 467 (15 JUNE 2016)

Plaintiff claimed damages for injuries sustained after being pushed out of a moving train. Plaintiff’s leg was amputated as a result of the injuries. This judgment dealt with the merits of the claim only.

Vukeya AJ analysed the evidence, and found that the court was presented with two mutually destructive versions of the event. [Paragraph 23]. Vukeya AJ identified the issue to be determined as whether the circumstances leading to plaintiff’s injury were foreseeable, and whether defendant had acted negligently in not foreseeing the possibility of harm and taking reasonable steps to prevent it. [Paragraph 26].

Vukeya AJ found that the plaintiff’s testimony had been clear and coherent, without fabrication. [Paragraph 28]. Regarding information the plaintiff had given to PRASA officials after the accident, and whether this could impact on plaintiff’s credibility or the reliability of his evidence, Vukeya AJ held:

“The plaintiff had just fallen from a moving train; his leg amputated and was bleeding profusely when he was interviewed and his ticket allegedly obtained from him. It cannot be said that he was in a good state of mind and that he was in his sound senses when he gave out the information. It cannot therefore be expected of him to recall some of the things he said, whether they made sense or not. In fact, it is questionable why the defendant opted to interview the plaintiff while he was in a state of vulnerability and then use the information obtained against him in the trial. ... I am of the view that the discrepancies in the evidence of the plaintiff, caused by the information received from him while he was in that state cannot be viewed in a serious light. Such discrepancies do not affect the credibility of the plaintiff and the reliability of his evidence and they are therefore found to be immaterial.” [Paragraphs 31 – 32].

Vukeya AJ found that PRASA was under an obligation to ensure the safety of commuters by ensuring that their train guards closed and opened doors when it was safe to do so. [Paragraph 50]. “PRASA being an organ of the state, the standard of reasonableness is viewed in the light of what is contained in the Constitution of SA which clearly requires the protection of rights entrenched in the Bill Of Rights. The court must therefore evaluate the steps taken by the defendant to prevent harm from occurring in the light of the evidence before it.” [Paragraph 51].

Defendant was found to be negligent for failing to keep the train doors closed while the train was moving. Vukeya AJ found that “[t]he fact that the plaintiff was pushed out of the defendant’s moving train whose doors were left open reinforces the legal connection between the defendant’s failure to take preventative measures and the amputation of the plaintiff’s leg.” [Paragraph 57]. Defendant was found to be liable for all of the plaintiff’s proven damages.
CIVIL PROCEDURE

LIPIDSANA DLO PRODUCTS (PTY) LTD V KAMFFER (A620/2015) [2016] ZAGPPHC 136 (8 MARCH 2016)

Case heard 4 February 2016, Judgment delivered 8 March 2016

This was an application for condonation of the late prosecution of an appeal, and reinstatement of the appeal. Applicant argued that they were not in wilful default due to factors contributing to the delay including missing portions of the transcription of the record, requiring the record to be reconstructed. [Paragraph 3]. Respondent opposed the application.

Vukeya AJ (Mothle J concurring) considered the degree of lateness, which was four months, but accepted that applicant could not have brought the application until the transcribed record was available. [Paragraph 11]. The reasons for the delay were “satisfactory”, and supported by documentary proof. [Paragraph 12]. As the applicant had taken steps to deposit the judgment amount in a trust account, the potential prejudice of the respondent not obtaining funds through execution of the judgment was removed, [Paragraph 15]. Furthermore, there were reasonable prospects that the appeal might be successful. [Paragraph 19]

Vukeya J concluded that the applicant had shown good cause why the application should be granted. The application was granted and reconstruction of the record ordered.

CRIMINAL JUSTICE


Case heard 18 February 2016, Judgment delivered 23 February 2016.

Appellant was convicted on a guilty plea in the magistrate’s court with possession of methamphetamine drugs, and sentenced to three years’ imprisonment without the option of a fine. The appeal was against the sentence. The main issue was whether a sentence of direct imprisonment was appropriate, as opposed to one where the appellant would be rehabilitated at an institution other than prison and obtain professional help for his drug problem.

Vukeya AJ (Potterill J concurring) examined questions asked by the magistrate when determining the sentence, and found that the Magistrate “was not interested in considering other forms of punishment”, and “was aware that the appellant was spending a lot of money on drugs, an element which shows that his addiction could be causing financial harm to the appellant or to his family because he was unemployed.” [Paragraphs 12, 14].

Vukeya AJ found that the Magistrate failed to give due recognition to the appellant’s drug problem. The Magistrate had correctly identified the problems caused to the appellant’s family by his addiction, but “disregarded every factor which should have been considered in favour of the appellant.” [Paragraph 17]. The appellant being a first offender who had pleaded guilty, the sentence was shockingly inappropriate. [Paragraph 18].

The appeal was upheld, and the matter was referred back to the Magistrate’s’ Court.
MKHABELA AND ANOTHER V S (A328/14) [2016] ZAGPPHC 76 (15 FEBRUARY 2016)

Case heard 15 February 2016, Judgment delivered 15 February 2015

Appellants were convicted on four counts of robbery in the Regional Court, and were sentenced to terms of imprisonment between 5 and 7 years. Appellants had been unrepresented at the trial. [Paragraphs 1 – 3].

Vukeya AJ (Baqwa J concurring) found that the Magistrate had correctly evaluated the evidence, approaching it as a whole. The Magistrate had been “very cautious in his evaluation of the witnesses' evidence”, and correctly rejected evidence of identification parades because they were conducted only in respect of the first and not the second appellant. Vukeya AJ found that there was no criticism of the evaluation and assessment of the evidence by the trial court. [Paragraphs 17 – 19].

The appeal against conviction and sentence was dismissed.
ADVOCATE NIC LAUBSCHER

BIOGRAPHICAL DETAILS AND QUALIFICATIONS

Born: 22 February 1970

B. Juris, North West University (University of Potchefstroom) (1991)

LLB, North West University (University of Potchefstroom) (1993)

CAREER PATH

Acting Judge, North West High Court (April – May, August – September 2019)

Advocate (1995 - )

Lecturer, University of the North West (1994 – 1995)

Chairperson: Appeal Review Board of the Gambling Board, North West Province (2017 - )

Chairperson: North West Province’s Townships Appeal Board (2005 – 2010)

Chairperson, School Governing Body, Mooiriver Primary School (2015, re-elected 2018 - )
SELECTED JUDGMENTS

PRIVATE LAW

PM OBO AM V MEC DEPARTMENT OF HEALTH NORTH WEST PROVINCIAL GOVERNMENT (754/2016) [2020] ZANWHC 6 (6 FEBRUARY 2020)


At issue in this case was whether the plaintiff could “shift the liability for the damages which her minor child ... suffered as a result of an injury which he sustained to the Defendant.” [Paragraph 4]. The minor child had developed cerebral palsy shortly after birth. [Paragraph 7]. Plaintiff argued that this had been caused by the failure of nursing staff to perform a caesarean section timeously. [Paragraph 12]. The core issue was identified as being when the injury leaving to the disease occurred, and whether it could have been prevented. [Paragraph 28].

Laubscher AJ examined cases where similar factual scenarios had arisen [paragraphs 43 – 48], and noted that “[t]he facts ... are peculiar and quite unique” in that they did not entirely support the opinions and conclusions of either party’s expert witnesses. [Paragraph 52]. Laubscher AJ found that the practice of applying “funnel pressure” and failure to monitor the foetus in accordance with maternity guidelines constituted negligence by the Defendant. [Paragraph 58]. However, Plaintiff had not established a clear link between the applying of funnel pressure and the injuries. The failure to monitor was negated by the fact the Plaintiff and the foetus were examined 15 minutes before the birth, and the foetus was found to be well. [Paragraph 59]. No direct and clear evidence was presented to show what action should have been taken by the medical staff. [Paragraph 60],

None of the experts were able to say when the injury had occurred. [Paragraph 68]. Laubscher AJ found that, whilst on a balance of probabilities the nursing staff the employment of the Defendant had been negligent in their actions and omissions, it was not possible to conclude “that on a balance of probabilities, such negligence did factually cause the injury to AM.” [Paragraph 71].

The Plaintiff’s claim was therefore dismissed. Laubscher AJ found that the general rule as to costs should be departed from, due to delays “attributable to the manner in which the case for the Defendant was conducted.” [Paragraph 76]. Defendant was ordered to pay Plaintiff’s wasted costs for two days on an attorney and client scale. Beyond that, no costs order was made. [Paragraph 77].

CIVIL PROCEDURE


Case heard 3 April 2019, Judgment delivered 2 May 2019

This was an urgent application to suspend the execution of a warrant of execution and to cancel a pending sale in execution, pending an application to the Magistrates’ Court to rescind a default summary judgment. [Paragraph 1].
Laubscher AJ discussed the factual background of the case, and found that the matter was urgent, as it was clear that the applicant would not be afforded substantial relief at the later hearing. [Paragraph 8]. Laubscher AJ found that applicant had provided a full explanation for why it was not to blame for the default, as it had instructed attorneys to defend the claim. “Things went awry in the offices of the attorney and it is clear ... that the attorney took the blame for the delay.” [Paragraph 35]. Furthermore, the affidavit supporting the claim for summary judgment had failed to comply with the prescribed requirements. [Paragraphs 47 – 48]. Laubscher AJ found that this was “a case of non-compliance, rather than substantial compliance”, and that as the requirements set by the legislature had not been complied with, the summary judgment application was fatally defective. [Paragraphs 51 – 53].

Applicant therefore had a prospect of success in the rescission application. The requirements for obtaining an interim interdict had been met. [Paragraph 54]. The warrant of execution was therefore suspended, and the sale in execution cancelled. [Paragraph 56].

CRIMINAL JUSTICE


Case heard 4 April 2019, Judgment delivered 2 May 2019.

Two applications were brought to set aside search and seizure warrants and restore possession of seized articles to the applicants.

Laubscher AJ remarked that “[having regard to the relief requested ... it becomes apparent that the issue at stake ... is the striking of a balance. At first glance, doing so does not seem all that difficult. However, the opposite is true.” [Paragraph 5]. Laubscher AJ remarked further that with “[c]rime reaching epidemic proportions in our country” with “lawlessness and an utter disregard for the law and the rule of law ... rampant everywhere”, “law enforcement structures become more susceptible to embark upon the slippery slope of sacrificing due process and procedure”. [Paragraphs 6 – 7]. The balance that needed to be struck was “between the effective combatting of crime on the one hand and the “constitutionally enshrined rights to dignity, privacy, freedom, security, trade and property””. [Paragraph 9].

After analysing the warrants issued in detail, Laubscher AJ noted that private individuals could not perform the functions set out in search warrants. Whilst accepting that officials of the Gambling Board appointed as inspectors and ordained as peace officers may qualify to assist the police official mentioned in the warrant, “the applicable and relevant evidence and facts to duly qualify and identify such inspectors and “peace officers” must then be contained in the affidavit presented to the Magistrate or Judge and ... the relevant details must then be inserted into and correlated with the contents of the warrant. None of this occurred ...” [Paragraph 39]. Without any averments or evidence being placed before the Magistrates confirming the status of these inspectors, they could not have been included I the warrants. The warrants fell to be set aside on that basis alone. [(Paragraph 40). The affidavits “misinformed the Magistrates, contained material contradictions and did not set out sufficient facts or evidence ...” [Paragraph 41]. Laubscher AJ found that whilst “[s]ubstance normally
triumphs over form ... in this instance the deficiencies in the form cannot be contained from infecting the substance.” [Paragraph 43].

The warrants were therefore set aside.


In an automatic review, a query was raised as to why the Magistrate had felt that a suspended sentence was inappropriate, particularly considering that both accused were first offenders with young children. [Paragraph 3]. The accused had been charged with theft from a supermarket.

Laubscher AJ (Hendricks J concurring) held that the interests of the very young minor children ought to have been more carefully considered by the trial court. Information regarding the impact of a sentence of direct imprisonment on their care and wellbeing should their mothers be imprisoned should have taken place “in a manner and at a stage which would have informed the trial court as to the appropriateness of direct imprisonment ... Not the other way around as stated by the trial court ...” [Paragraph 14.4]

Laubscher AJ found that the trial courts intention to make an example out of the accused overemphasised the interests of the community and considerations of retribution, leaving the sentencing balance “askew.” [Paragraph 15]. Laubscher AJ found that there was a “palpable disproportion” between the seriousness of the crime and the severity of the sentence. [Paragraph 23].

Laubscher AJ concluded that the sentence of 12 months’ imprisonment without the option of a fine was not in accordance with justice. [Paragraph 29]. The sentence was set aside and replaced with a sentence of 6 months’ imprisonment or a R600 fine, wholly suspended for three years on condition of no further convictions.