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

OCTOBER 2018

INTRODUCTION

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

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

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

METHODOLOGY OF THIS REPORT

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

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

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

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

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

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

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

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

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

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

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

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

SUBMISSIONS REGARDING THE INTERVIEWS

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

15. In this submission we raise two issues. The first relates to the criteria used for identifying recommended candidates, particularly in light of some of the appointments recommended following the April 2018 interviews. The second relates to some judicial vacancies not being advertised, and being left open for a long time.

CRITERIA AND APPOINTMENTS FROM THE APRIL 2018 SITTING

16. In our submissions to our April 2018 reports, we again raised the issue of the criteria used by the JSC is one that we have made repeatedly over the years we have observed the work of the commission. We argued that while the Constitution provides broad guidance as to the qualities a judge should possess, there is a need for a more detailed that needs to go into the identification of whether a candidate has the qualities for judicial appointment. We recounted the development of supplementary criteria under the leadership of former Chief Justices Mahomed and Ngcobo, and suggested that a further elaboration of supplementary criteria may be of assistance to the current JSC.

17. Regrettably, we feel fortified in this view by significant concerns over some of the appointments that were recommended to the President following the JSC's April 2018 sitting. We are concerned that some recommended candidates exhibited significant weakness in their interviews. These included instances of candidates struggling to explain basic, fundamental legal concepts; candidates possessing professional legal experience that appeared insufficient to qualify them for appointment as a judge; candidates who had exhibited weaknesses in previous interviews which did not seem to be addressed or overcome, and yet candidates were still nominated; and candidates failing to appreciate, at east without heavy prompting, fundamental questions of judicial independence in relation to membership of political parties.

18. We respectfully suggest that these concerns demonstrate the need for the JSC articulate and follow clearly identified criteria for candidates to meet in order to be recommended for appointment.

VACANCIES LEFT OPEN

19. While there are relatively few candidates being interviewed in this sitting of the JSC, compared to previous rounds, we are concerned that some significant vacancies remain open and have not been advertised. In particular two vacancies on the Constitutional Court have stood open for a significant amount of time. One has stood open since the retirement of former Deputy Chief Justice Moseneke in May 2016, a period of more than 2 years. The second has stood open since the retirement of Justice Nkabinde at the end of 2017, thus for a period of almost one year.

20. We are particularly concerned about the issue because of the necessity of filling these positions with acting judges. Although a widespread feature of our legal system, there are long and deeply held concerns about an over-reliance on acting judges, focusing on issues such as a lack of security of tenure compared to permanent judges, and the lack of an open, transparent and inclusive process of appointment for acting judges.

21. In the First Certification judgment, the Constitutional Court, after accepting that the appointment of acting judges was "a well established feature of the judicial system in South Africa", held:

> "If there is a vacancy in a Court the JSC is under a duty to fill it. It may no doubt delay or defer an appointment until a suitable candidate is identified, but it should not be assumed that it will abdicate its responsibility by allowing permanent vacancies to be filled indefinitely by acting judges."[2]

22. We are concerned that the length of time the two Constitutional Court vacancies have been left open may be moving beyond the point of reasonably delaying an appointment until suitable candidates are identified, and we would urge the JSC to advertise these vacancies for the commission's next sitting.

23. We acknowledge that this position may seem to contradict the concerns we have previously raised about the JSC interview a small number of candidates for Constitutional Court vacancies. We stand by that concern, and it is not inconsistent with a concern about leaving permanent vacancies on the court open for such a long period of time. Even though there may be a legitimate basis for concern that there may be a lack of applicants, it seems preferable for the vacancies to at least be opened up and candidates encouraged to apply, to avoid problematic perceptions about the vacancies developing. It is not clear that simply waiting for the passage of time will address the issue of too few candidates putting themselves forward.

ACKNOWLEDGEMENTS

24. This research was conducted by Chris Oxtoby, DGRU senior researcher, and Musa Kika, Godknows Mudimu, and Kate Loughran, DGRU research assistants.

[2] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) A 744 (CC), paragraphs 127 – 128.

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

DGRU

31 August 2018

JUSTICE BOISSIE MBHA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of birth : 31 July 1952

BJuris, University of Fort Hare (1981)

LLB, Witwatersrand University (1985)

Advanced Diploma in Labour Law, University of Johannesberg (1996)

Advanced Diploma in Tax Practice, University of Johannesberg (1999)

LLM, University of Johannesberg (2010)

CAREER PATH

Acting Judge, Constitutional Court (2016)

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

Acting Justice of Appeal, Supreme Court of Appeal (2012 – 2013)

Judge, alternate chairperson, Court of Military Appeals (2007 – 2014)

Judge, Gauteng High Court (2004)

Acting Judge, Gauteng High Court (2003 – 2004)

Senior Military Judge, South African National Defence Force (2003)

BH Mbha Attorneys (1990 – 2003)

Professional Assistant, Bowman Gilfilian Attorneys (1986 – 1990)

Articled Clerk, R.N. Bhoolia Attorneys (1983 – 1986)

Member and co-chairperson, Committee for continuing legal education for judicial officers, Johannseburg High Court (2012 – 2014)

Member, SA Council for Medical Schemes (2002 – 2003)

Member, Transvaal Law Society Council (1998 – 1999)

Member, Black Lawyers' Association (1987 -)

SELECTED JUDGMENTS

PRIVATE LAW

LAUBSCHER NO V DUPLAN AND ANOTHER [2016] ZACC 44.

Case heard 18 August 2016; Judgment delivered 30 November 2016.

This matter concerned the intestate succession rights of unmarried same-sex partners in a permanent same-sex partnership, in which the partners had undertaken reciprocal duties of support. The deceased and the respondent had lived together in a permanent same-sex partnership, with reciprocal duties of support. The partnership was never formally solemnised or registered, and the deceased died intestate. At issue was whether the respondent could nevertheless inherit. The high court found that the respondent was the only intestate heir. Mbha AJ (Nkabinde ADCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring) dismissed the appeal. Froneman J wrote a separate concurring judgment.

"Although this Court had specifically ordered that the benefit be extended to permanent same-sex partners, the Legislature, within its rightful discretion, widened the ambit of protection to include both same-sex and opposite-sex unmarried partners. The result is an apt example of the Legislature "equalising up" while giving effect to the rights prescribed by this Court's order. In my view, the Court in *Gory* had clearly foreseen the enactment of CUA and had envisioned that same-sex permanent partners would continue to be protected despite not concluding a "marriage" (or union as it turned out to be), under the new dispensation. Any indication to the contrary is best left to Parliament to decipher." [Paragraph 32]

"Civil unions concluded under CUA constitute a new category of beneficiary for purposes of ISA and are distinguishable from same-sex permanent life partnerships. As a result, same-sex permanent partners will continue to enjoy intestate succession rights under section 1(1) of ISA, as per the *Gory* order, until such time that the Legislature specifically amends the section." [Paragraph 55]

In an article entitled ***Moralistic view of marriage leaves unmarried couples unprotected*** [http://constitutionallyspeaking.co.za/moralistic-view-of-marriage-leaves-unmarried-couples-unprotected/], Professor Pierre de Vos criticises the majority judgment for not revisiting the sexist reasoning in the *Volks v Robinson* judgment. In an aside, he also argued that the judgment wrongly and in

a demeaning way referred to same sex marriages concluded in terms of the Civil Union Act in inverted commas as "marriages" or as civil unions – "as if such unions are not fully fledged marriages that are identical to different sex marriages." This, he argued, suggests the Court's reluctance "to accept the equal status of marriages concluded under the Civil Union Act, even though the Act explicitly recognizes that such marriages may be called marriages and that they attract the same legal rights and duties as other marriages."

SOCIO-ECONOMIC RIGHTS

GOVERNING BODY OF THE RIVONIA PRIMARY SCHOOL AND ANOTHER V MEC FOR EDUCATION: GAUTENG PROVINCE AND OTHERS [2012] 1 ALL SA 576 (GSJ)

Case heard 3 - 4 October 2011, Judgment delivered 07 December 2011

Applicant sought to set aside a decision taken by the Head of Department: Gauteng Department of Education, instructing the Principal of the Rivonia Primary School to enroll a learner in Grade 1 at the school, contrary to the school's admission policy as determined by the governing body. Mbha J held that the Schools Act did not grant a school governing body an unqualified power to determine a public school's admissions policy; that the power to determine the maximum capacity of a public school in Gauteng vested in the Gauteng Department of Education and not in the school governing body; that the Gauteng Department of Education had the power to intervene in the school governing body's power to determine the admission policy of a public school; and that the MEC for Education, Gauteng Province, was the ultimate arbiter whether or not a learner should be admitted to a public school.

"Our Constitution places a duty on all the courts to interpret legislation in a manner that is consistent with the Constitution and that best promotes constitutional values. The primary right involved in this matter is the right to a basic education. This right is guaranteed by section 29(1)(a) of the Constitution. It is enshrined in the Bill of Rights. In terms of section 7(2) of the Constitution the State must respect, protect, promote and fulfil these rights. Accordingly, the statutory powers, rights and obligations of the applicants and the first to third respondents must be understood in the context of the constitutional commitment to substantive equality in section 9, and, importantly the constitutional guarantee of access to a basic education in section 29(1)(a). The importance of the right to basic education is underscored by the fact that, unlike other socio-economic rights it is not subject to the limits of "availability of resources" or "reasonable legislative measures. Secondly, central to the quest and government's commitment to transforming the current, unjust and unequal basic education system is not only about redressing past injustices, but importantly it is also about breaking the cycle of poverty that perpetuates the patterns of class and racial inequality generation after generation. Undoubtedly, the right to education is an empowerment right that enables people to realise their potential and improve their conditions of living. …" [Paragraphs 24-26]

"Leaving schools to determine their admission policy, including the power to determine their capacity, and subject only to appeals in individual cases, one unwittingly creates space privileged schools can use and manipulate that power to fortify rather than dismantle existing inequalities. Schools such as the applicants could thus craft admissions policies that allow them to continue to offer a premium education to their learners, while ignoring the increased demand their action places on other schools in the area

that are already operating with fewer resources and higher learner-to-class ratios. … [I]nterpreting the Act to deny government the ability to intervene to ensure an equitable distribution of learners across all schools in the areas prevents it from fulfilling its obligation under section 7(2) of the Constitution to "respect, protect, promote and fulfil" the right to equality and to a basic education. … " [Paragraphs 73-74]

The judgment was criticised by Jonathan Jansen, "Ruling Courts disaster", *Times* 15 December 2011, page 19:

> "Judge Mbha sided with the government in a series of pronouncements that make no sense to me. This was about the right to basic education, he reasoned. I am not sure how a child attempting to transfer from the Lifestyle Montessori School to another school constitutes the denial of basic education. The judge then goes on a lengthy diatribe against the protection of white privilege. This too makes no sense when the school already enrols 388 black pupils of whom 52 (of 120) are in Grade 1; in other words, the school is closing in on 50% black enrolment and will, no doubt, become a dominant black school in time. How does this preserve racial privilege?
>
> The judge then queries the link between admission policies and school capacity. But surely a central tenet of admission policy is to ensure classrooms have manageable numbers that teachers can cope with? That is a pedagogical matter to be decided by educators, not a legal matter to be decided by a judge. …
>
> What makes this judgment even more puzzling is that the parents at the second school themselves built nine additional classrooms and out of their own pockets paid for additional teachers simply to ensure that the education of children - including 388 black pupils - did not succumb to the serious dereliction of duty by the Department of Education to fix its broken schools … So what does the judge do? He sides with the politicians and the bureaucrats to make sure no schools work rather than protect the few that do - mostly on private monies. …
>
> I have seen this movie before in post-colonial Africa, with familiar actors in the moving rhetoric of a narrow African nationalism in which Judge Mbha so eagerly participates. …"

The decision was overturned by the SCA in **Governing Body, Rivonia Primary School and Another v MEC for Education, Gauteng Province and Others 2013 (1) SA 632 (SCA)**, finding that the instruction to admit the learner contrary to the school's admission policy had been unlawful. However, the Constitutional Court in turn reversed the SCA in **MEC for Education, Gauteng Province and Others v Governing Body, Rivonia Primary School and Others 2013 (6) SA 582 (CC)**, finding that the HoD of Education had been empowered to issue the instruction to the principal to admit the learner in excess of the limit in its admission policy, but that in exercising that power, the HoD had to act in a procedurally fair manner, and had not done so.

ADMINISTATIVE JUSTICE

CAPE TOWN CITY V AURECON SA (PTY) LTD 2017 (4) SA 223 (CC)

Case heard 3 November 2016, Judgment delivered 28 February 2017.

Applicant sought to review its own decision, in terms of which respondent had been awarded a tender, and set the tender aside due to procedural irregularities in the award of the tender.

Mbha AJ (Nkabinde ACJ, Cameron, Froneman, Jafta, Khampepe, Madlanga, Mhlantla JJ, Musi AJ and Zondo J concurring) held:

"The City launched its application 532 days after the decision to award the tender to Aurecon was made. Taking the 180-day period into account, its application was 352 days late. The question is whether the City has made a proper case for condonation. This will invariably require determining whether the City offered a satisfactory explanation that necessitates a relaxation of the rules in the interests of justice." [Paragraph 45]

"The City's application was nearly a year late. The City was questioned during the hearing specifically on the seven-month delay from 17 January 2012 to 29 August 2012. The former was the date on which Aurecon was informed that a pending appeal against the award of the tender had been resolved. The latter was the date on which the City tabled the award for consideration ... Its counsel could not offer any reason for the delay other than ascribing it to bureaucratic governmental processes. Suffice to say, this explanation is unsatisfactory." [Paragraph 48]

"The SCA held that the procedural irregularities as alleged were not in fact irregularities at all and, before this court, the City did little to assuage that finding. If the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention. However, this is not such a case and a weighing of factors leans decidedly against granting condonation." [Paragraph 50]

The application for leave to appeal was dismissed.

CRIMINAL JUSTICE

MOYO V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS; SONTI V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (387/2017; 386/2017) [2018] ZASCA 100; 2018 (8) BCLR 972 (SCA); [2018] 3 ALL SA 342 (SCA) (20 JUNE 2018)

Case heard 2 March 2018, Judgment delivered 20 June 2018.

This matter involved two consolidated appeals, challenging the constitutionality of sections 1(1)(b) and 1(2) of the Intimidation Act 72 of 1982. The first appeal sought to have section 1(1)(b) declared unconstitutional on the grounds that it infringed the right to freedom of expression, and the second appeal attacked section 1(2) for creating a reverse onus and infringing the right to be presumed innocent, the right to silence, and the right against self incrimination. The high court had dismissed the challenges,

finding that section 1(1)(b) did not infringe the right to freedom of expression; and that while section 1(2) did infringe the presumption of innocence, this was justified under the limitations clause.

Mbha JA (Van der Merwe JA concurring) held that section 1(1)(b) was unconstitutional:

"The real problem with s 1(1)*(b)* is, in any event, its overbreadth, which could not be cured by the court a quo's attempt to read it down. … [I]t in fact matters little whether s 1(1)*(b)* … only applies to the creation of reasonable fears. Even if it could be read that way, which in my view it definitely cannot, its prohibitions would still not confine it to violent threats. This section plainly limits the right to freedom of expression guaranteed in s 16 of the Constitution." [Paragraph 35]

Mbha JA then considered whether the limitation could be justified under section 36 of the Constitution:

"One of the purposes of the right to freedom of expression is to foster tolerance of competing political views and the manner in which they are expressed. In a democracy such as ours, we have to tolerate people who have different views, and we have to accept that those views might be expressed in ways we do not like. … I have taken into consideration the legislative history of s 1(1)*(b)* of the Act. What clearly emerges from such history is that the offence of intimidation is a product of apartheid era legislation that was designed to control dissent against an unjust system. It then becomes clear that its purpose has been rendered constitutionally offensive in modern day South Africa." [Paragraphs 42 – 43]

"The contention that s 1(1)*(b)* of the Act promotes 'inter-communal peace and harmony' is, in my view, a classic analogue of the justifications given in non democratic regimes for stifling political dissent. There can be no debate over the fact that democracy thrives on the expression of disagreement. Of course, some limitations on the right to freedom of expression are necessary. But there can be no justification for the imposition of limitations on the right to freedom of expression simply to pacify the expression of disagreement, or to create a comfortable, placid political atmosphere." [Paragraph 44]

"I accordingly find that s 1(1)*(b)* of the Act constitutes one of the last and most insidious of the apartheid regime's efforts to curtail freedom of expression and political action that was aimed at bringing that abominable regime to an end. It has no place in a free, open and democratic South Africa which respects, protects, promotes and fulfils the right to freedom of expression and falls to be struck from our statute books." [Paragraph 45]

Mbha JA also found section 1(2) to be unconstitutional. For the majority, Wallis JA (Maya P and Makgoka AJA concurring) held that section 1(1)(b) was not unconstitutional, as it could be interpreted in a manner consistent with the constitution, and served a valuable purpose. The majority agreed that section 1(2) was unconstitutional, but for different reasons [see summary paragraphs 84 – 87].

S V MAFOHO 2013 (2) SACR 179 (SCA)

Case heard 12 March 2013, Judgment delivered 28 March 2013

Appellant had, in 2001, been sentenced to 275 years imprisonment having pleaded guilty to 60 counts of robbery with aggravating circumstances, attempted murder, rape, attempted rape and pointing a firearm. At issue was the appropriateness of the sentence in light of legislative provisions regarding eligibility for parole.

Mbha AJA (Mthiyane DP, Shongwe JA, Schoeman and Swain AJJA concurring) dismissed the appeal:

"Section 136(1) of the new Act provides that any person serving a sentence of incarceration (that is, offenders serving determinate and indeterminate sentences immediately before the commencement of the new Act) is subject to the provisions of the old Act. Clearly, this section preserves the policy and guidelines that applied at any time before the new Act came into operation in 2004. … It is therefore clear that … the parole provisions applicable to the appellant were those set out in s 65(4)(a) of the old Act, namely that a prisoner serving a determinate sentence imposed prior to July 2004 is not considered for parole before having served half of the sentence, unless the date for considering parole is brought forward as a result of credits earned. …" [Paragraphs 12 - 13]

"On 1 October 2004 the Parole and Correctional Supervision Amendment Act … (the 1997 Act) came into operation. The 1997 Act amended s 65(4)(a) of the old Act by providing that a prisoner serving a determinate sentence shall not be considered for placement on parole, unless he has served half of his term of imprisonment, provided that no such prisoner shall serve more than 25 years before being considered for parole. Of particular relevance to this case is that the 1997 Act also amended … the old Act by providing that, in respect of imprisonment contemplated in s 52(2) of the Minimum Sentences Act … the prisoner shall not be placed on parole unless he has served at least four-fifths of the term of imprisonment imposed, or 25 years, whichever is the shorter." [Paragraph 14]

"In my view, s 9 of the 1997 Act is intended to ensure legal continuity and to prevent a hiatus developing. Clearly, the repeal of s 65 of the old Act and its substitution in terms of the 1997 Act ensured that there was no gap in continuity between the provisions of s 65 as contained in the old Act, and as substituted in terms of the 1997 Act. … The issue, accordingly, is the effect, of the amendment of the parole period in s 65(4) of the old Act, upon the appellant's right to parole. … [T]he intention of the legislature was to create equality amongst those prisoners eligible for parole, irrespective of whether they were sentenced before or after the passing of the new Act. …" [Paragraphs 16 - 17]

DEPUTY JUDGE PRESIDENT CAGNEY MUSI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 17 November 1962

Diploma Iuris, University of the Western Cape (1985)

BA (Law), UWC (1988)

LLB, UWC (1991)

BA (Honours) Public Administration, UWC (1993)

LLM, University of Cape Town (1995)

CAREER PATH

Acting Judge President, Free State High Court (February – April 2015, December 2016, January – April 2017, April – June & July – September 2017, June – October 2018)

Deputy Judge President, Free State High Court (2017 -)

Acting Justice, Constitutional Court (August – December 2016)

Judge of Appeal, Labour Appeal Court (2014 -)

Acting Judge of Appeal, Labour Appeal Court (February – June 2010, July – December 2012, July – December 2013)

Acting Judge, Lesotho High Court and Lesotho Labour Appeal Court (2010)

Acting Judge, Labour Court (April – June 2008, September – December 2009)

Judge, Free State High Court (2005 -)

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

Regional Magistrate (1997 – 2004)

Admitted as an attorney of the High Court (2001)

District Magistrate (1992 – 1997)

Regional Court Control Prosecutor (1991 – 1992)

Public Prosecutor (1986 – 1992)

Chairperson, Commission for the Remuneration of Public Office Bearers

International Association of Magistrates and Judges

Honorary President, African Regional Group (2014 -)

President, African Regional Group (2006 – 2010)

Judicial Officers Association of South Africa (JOASA)

National President (2002 – 2004)

Chairperson, Western Cape (2000 – 2001)

Member, Western Cape Appointments Committee for Magistrates (2001 – 2004)

Magistrates' Association of South Africa

Member of Executive Committee (1994 – 1995)

Deputy Chairperson (1993 – 1994)

Board member, Law Race and Gender Unit, University of Cape Town (2005)

Advisory Board Member, Canada – South Africa Justice Linkage Project (2002)

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

MARITZ V MUNICIPAL MANAGER: MATJHABENG LOCAL MUNICIPALITY (2050/2016) [2017] ZAFSHC 125 (20 JULY 2017)

Case heard 8 June 2016, Judgment delivered 20 July 2016.

This case dealt with the difference between an actual and a deemed refusal of information under the Promotion of Access to Information Act (PAIA). The parties were involved in a dispute over the termination of the applicant's electricity supply. Applicant argued that the termination had occurred without due process, and requested access to documents, but received no response. In the ensuing litigation, respondent argued that the applicant had not exhausted internal remedies. Applicant argued that an internal appeal was not peremptory in the case of a deemed refusal.

Musi AJP held:

"… The internal appeal is an administrative appeal which is, in my view, available to a requester in the case of a deemed refusal and an actual refusal." [Paragraph 23]

"It seems to me that the internal appeal is a total reconsideration of the decision, with or without additional information, after both sides have been given the opportunity to state why the decision should be confirmed or set aside. … The appeal provisions of the Act, in my view, includes an administrative appeal based on a deemed refusal." [Paragraph 26]

"When a Statute expressly states that the exhaustion of internal remedies is an indispensable condition precedent before launching an application to a court then that condition must first be fulfilled. Section 78 makes it compulsory for an aggrieved requester to first exhaust the internal remedies against a decision of the information officer before approaching a court. It is one of the compulsory mechanisms in the Act which enables persons to obtain information swiftly, inexpensively and effortlessly." [Paragraph 29]

"… [O]ne purpose of the deeming provision in the Act is to give the requester the right to the take the next procedural step. The next procedural step is in my view, an internal appeal. The interpretation advanced … does not promote swift and inexpensive access to information but encourages a process that is notoriously slow and expensive: court applications. An allied disadvantage for impecunious requesters is that the information officer can ignore the request in the hope that the requester does not have the resources to launch a court application. The interpretation that the deemed refusal is internally appealable gives the requester a cheaper and faster remedy and, it gives the public body an opportunity to self-correct. Section 2 of the Act enjoins a court to prefer an interpretation that is consistent with the objects of the Act over any alternative interpretation which is inconsistent with those objects. … There is in my judgment, in the context of the Act, no substantive difference between a deemed refusal and an actual refusal. …" [Paragraphs 41 – 42]

"Mr Ayayee submitted that the applicant should pay the costs, because as an attorney she ought to have known that she must exhaust her internal remedies. I disagree. Firstly she acted on legal advice. Secondly, and more importantly, if the public body did what it was supposed to do, she would not have launched this application. The conduct of the municipality is disconcerting. … Public bodies have a constitutional duty to give people access to information so that they can exercise their

rights. When they try to subvert a person's constitutional right by being unresponsive and playing possum their conduct should be deprecated." [Paragraphs 44 – 45]

The application was dismissed.

LABOUR LAW

PT OPERATIONAL SERVICES (PTY) LTD V RETAIL & ALLIED WORKERS UNION ON BEHALF OF NGWELETSANA (2013) 34 ILJ 1138 (LAC)

Case heard 19 September 2012, Judgment delivered 27 November 2012

This appeal revolved around the question of whether the functus officio doctrine applied to CCMA commissioners, and if so, whether the commissioner in casu had been functus officio. The Labour Court had found that the doctrine did apply to rulings made by commissioners acting under the auspices of the CCMA, and that CCMA commissioners could not set aside their own rulings.

Musi AJA (Waglay AJP and Ndlovu JA concurring) held:

"It is now settled that commissioners conducting arbitrations under the auspices of the CCMA are performing an administrative function. Although commissioners perform an administrative function such function includes adjudicative functions." [Paragraph 23]

"... There was no need for the court a quo and there is no need for this court, given the clear provisions of the LRA, to embrace, in this matter, a restrictive or broad interpretation of s 10(1). Section 10(1) must yield to a contrary intention in the LRA. ... Section 144 of the LRA gives commissioners the right to vary a decision under certain limited circumstances. They therefore have a limited right to revoke their decisions." [Paragraph 27]

"... In my view the court a quo was correct in its conclusion that the *functus officio* doctrine applies to CCMA commissioners. They may therefore only revisit their decisions to the extent that it is permitted by the provisions of s 144 of the LRA. They may not do so whenever they like, but may do so if the jurisdictional facts in s 144 are present. They may also do so ... when they have performed an allied function but not yet performed the power or duty bestowed on them by the legislature." [Paragraph 28]

"I conclude that Cellier [the commissioner] did not finally perform his statutory function or duty in relation to the merits of the rescission application ... It cannot therefore be said that he exhausted his powers and discharged his mandate in relation to the rescission application. The court a quo erred in coming to the conclusion that the ruling ... rendered Cellier *functus officio* and that he could therefore not entertain the subsequent applications for condonation and rescission ... " [Paragraph 38]

"Taking all the circumstances of this case into consideration, especially the dilatoriness of the appellant, fairness and the law dictate that no order as to costs should be made ... The Director of the CCMA is requested, in the interest of justice, to ensure that the arbitration proceedings are expedited." [Paragraphs 41 – 42]

The appeal was upheld.

NATAL WITNESS V GOZUNDER & OTHERS (2010) 31 ILJ 2339 (LAC)

Case heard 25 February 2010, Judgment delivered 4 June 2010

This case dealt with the common-law rule of peremption of a right to appeal. First respondent had been charged with misconduct over anonymous e-mails he had sent to a female colleague. He pleaded guilty to contravening the company's internet and sexual harassment policies, and was given a warning for the former and dismissed for the latter. Following arbitration, the second respondent commissioner found the dismissal to have been substantively fair. The Labour Court found the dismissal to be procedurally fair but substantively unfair, and ordered reinstatement.

Musi AJA (Waglay JP and Tlaletsi JA concurring) held:

"The appellant subsequently applied for leave to appeal. The application for leave to appeal was dismissed … on 24 November 2008. … The appellant was granted leave to appeal by this court on 31 May 2009. The appellant did not mention anything, in its founding affidavit in support of the petition, about the interaction between the parties between 24 November 2008 and December 2008. …" [Paragraphs 14 - 15]

[The interaction in question involved correspondence from the appellant's attorneys to first respondent's attorneys, indicating that despite disagreement with the Labour Court's decision, appellant had elected to accept the finding, and expected first respondent to report back to work. First respondent argued that appellant's right to appeal had thereby been perempted.]

"… 'Despite our client's dissatisfaction with the ruling of the Labour Court. . . .' Nothing turns on these words, if anything they show conduct that is inconsistent with any intention to appeal. The appellant is dissatisfied with the ruling. It knows it can petition the Judge President but decides consciously not to do so. In any event, many losing litigants that have fought a fierce legal battle are dissatisfied when they lose. It is exactly their dissatisfaction that propels them to challenge the judgment. If that statement is read in context it becomes clear that there was an unequivocal acquiescence. …" [Paragraph 26]

"The appellant's last argument was that it has not put into operation the judgment of the Labour Court because the first respondent was not reinstated neither was he paid any backpay, therefore the right to appeal has not been perempted. Total or partial fulfilment of the terms of the order is indicative of acceptance of the judgment. It is however not a prerequisite for peremption. The right to appeal can be perempted without there being any fulfilment of the terms of an order or judgment." [Paragraph 29]

"… My finding that the appellant has forfeited its right to appeal means that there is no proper appeal before us. The appropriate order would therefore be to strike the matter off the roll." [Paragraph 31]

CRIMINAL JUSTICE

S v LIESCHING AND OTHERS 2017 (2) SACR 193 (CC)

Case heard 6 September 2016, Judgment delivered 15 November 2016

The applicants sought leave to appeal against the decision of the President of the Supreme Court of Appeal to dismiss their application to refer the refusal of their petition to the SCA for reconsideration. Applicants had been convicted in the high court on charges of murder, unlawful possession of firearms,

and unlawful possession of ammunition. They were granted leave to appeal against sentence only, and petitioned for leave to appeal against their convictions. After the dismissal of that petition, a fourth person alleged to be involved in the incident was tried. At this trial, a witness from the applicants' trial recanted his earlier testimony. On this basis, applicants sought to have the refusal of their petition referred to the court for reconsideration.

Musi AJ (Mogoeng CJ, Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J and Zondo J concurring) held:

"... [T]he President dismissed their application. His reason for the dismissal was, briefly, that the further evidence that the applicants sought to adduce was discovered after they had exhausted all recognised appeal procedures provided for in the CPA. He pointed out that s 1 of the SC Act provides that 'appeal' in ch 5 does not include an appeal in a matter regulated in terms of the CPA. He held that s 327(1) of the CPA makes provision for cases where a convicted person wants to adduce further evidence that became available after all the recognised legal procedures pertaining to appeal had been exhausted. He held that ch 5 of the SC Act, and therefore s 17(2)*(f)*, is not applicable to the applicants' case. The President issued his order, refusing to refer their application for reconsideration, on 24 December 2014." [Paragraph 12]

Musi AJ considered an application for condonation for the delay (of 226 days) in bringing the appeal:

"The explanation is inept and unfortunate. It is an embodiment of institutional bureaucracy, which is characterised by an excessively layered procedure which would, in most cases, cause unwarranted delays. The systemic delays were exacerbated by the time it took for meetings to take place or actions to be taken. ... All these delays occurred whilst the applicants were in prison. ... The deleterious delays were clearly caused by the applicants' legal representatives. Legal Aid should urgently look at its processes and endeavour to eradicate the deleterious delays. Although there is a limit beyond which a litigant would not be allowed to hide behind his or her legal representative's ineptitude, this is not such a case. The applicants were incarcerated. They had no hand in the delays. This is not a case where the applicants should be punished for the delays caused by their legal representatives." [Paragraphs 17 – 18]

"The first respondent's contention, that ch 5 of the SC Act does not apply, at all, to criminal proceedings, is not textually supported by a careful reading of s 1 of the SC Act. The President has correctly, on numerous occasions, applied s 17(2)*(f)* to criminal proceedings. The first respondent's contention, that those cases were incorrectly decided, is misplaced. ... The President's interpretation creates an anomaly, in that a litigant in a civil matter who wants to adduce further evidence, after a petition had been dismissed, may utilise s 17(2)*(f)*, whereas a convicted person, in the same position, may not. That interpretation precipitated the applicants' contention that their right to equal treatment before the law would be violated. ... The interpretation, that s 17(2)*(f)* may be utilised by litigants in criminal or civil proceedings to adduce further evidence after a petition had been dismissed, eradicates that anomaly. It also preserves the applicants' right to equal treatment before the law, and is in conformity with the command in s 39(2) of the Constitution." [Paragraphs 62 – 64]

The appeal was upheld.

S v RABAKO 2010 (1) SACR 310 (O)

Case heard 7 May 2007, Judgment delivered 7 June 2007.

The central issue in this appeal was whether the rape in issue had involved the infliction of grievous bodily harm. The minority decision by Malherbe JP found that it did not. Musi J (Milton AJ concurring) held that it did:

"Grievous bodily harm is not defined in the Act. I could not find any South African authority in which the words grievous bodily harm, as used in this schedule, have been interpreted. …" [Paragraph 4]

"It seems to me that, in order to determine whether the injuries in a particular case are serious, one has to have regard to the actual injuries sustained, the instrument or object used, the number of the wounds - if any - inflicted, their nature, their position on the body, their seriousness and the results which flowed from their infliction. It must be remembered that an injury can be serious without there, necessarily, being an open wound. In order to determine this, the judicial officer will be guided by medical evidence. It is therefore advisable that in all such cases - where a finding in relation to infliction of grievous bodily harm is considered - medical evidence should be presented. The absence of medical evidence, however, is not fatal. In this matter we have the benefit of the undisputed evidence of the complainant in relation to the injuries that she sustained, as well as a medical report (J88), the contents of which were admitted by the defence. Although the J88, form that was completed by the medical practitioner who examined the complainant was not before us, it was before the regional magistrate. She read the doctor's relevant findings into the record. From those findings the doctor does not make mention of a wound on the complainant's neck. The complainant pertinently testified that she sustained an open wound at the back of her neck which was sutured. The doctor did not testify. The correctness of what he recorded was not tested. Her evidence in this regard ought to be accepted." [Paragraph 10]

"The complainant … sustained various wounds and injuries. She was stabbed no fewer than eight times with a knife. Seemingly, the three deep lacerations on her hand were the most serious. The hand is part of the body. The wounds bled to the extent that her clothes and body were full of blood. When she received medical intervention the wounds were sutured. Even without the viva voce evidence of the doctor, I am of the view that those injuries were indeed actually serious, to constitute grievous bodily harm. A careful reading of Knoetze AJ's judgment shows that he, at worst, erroneously interpreted the words restrictively; at best, he unnecessarily adopted a restrictive approach. In my view, Knoetze AJ was wrong in his finding that the injuries did not constitute grievous bodily harm. He misdirected himself in coming to that conclusion. In my judgment, the magistrate was correct in finding that this was a rape involving infliction of grievous bodily harm." [Paragraph 14]

The conviction for rape involving the infliction of grievous bodily harm was confirmed, and the appellant was sentenced to 18 years imprisonment.

MEDIA COVERAGE

Recused himself from the Judicial Conduct Tribunal hearing against Judge President Hlophe:

> "Free State Judge Cagney Musi — one of tribunal's three-member panel — referred to an affidavit filed by Hlophe … in which Hlophe referred to a June 2017 judgment of the Supreme Court of Appeal that had criticised Hlophe.
>
> Hlophe said he later heard that, a month later, in July 2017, Musi had made disparaging remarks about him while chatting at a social gathering in the presence of other judges …. Hlophe said: "It was reported to me that Honourable Mr Justice Musi uttered words to the effect that it was not surprising that I would act in the manner described in that judgment …. as this was consistent with my controversial character".
>
> He had previously called Musi about this — and Musi had denied the allegations — and then written to him about it also. … Musi said he had initially decided to refuse to recuse himself. He added that Hlophe's affidavit alleged "that a particular judge, whose identity is unknown, is prepared to make an affidavit… Unfortunately, the affidavit by Judge President Hlophe… is entirely based on hearsay evidence, there is no direct evidence whatsoever.
>
> "The furthest the affidavit goes is that the particular judge will be prepared to make a statement at some future time."
>
> However, he had now decided to recuse himself in the interests of justice and the judiciary, he said.
>
> "Having considered the manner in which this whole issue has unfolded, the fact that Judge President Hlophe called me and made certain ex parte communications to me without having the other parties there, the interests of justice and obviously the interests of the judiciary — I do not think the judiciary needs this at this stage," he said.
>
> Hlophe's counsel, Thabani Masuku, then asked to respond the Musi's statement saying it was "far-reaching". He said he had noted that Musi had still not denied the allegations of having made disparaging remarks. But Labuschagne responded that he had, and that in any event, any dispute of fact should be argued at a later stage."

- Franny Rabkin, "Hlophe tribunal: Yet another delay", *Mail & Guardian,* 2 July 2018 (https://mg.co.za/article/2018-07-02-hlope-tribunal-yet-another-delay)

Quoted as ordering a lawyer to appear before him to explain delays in a criminal case:

> "Free State High Court judge Cagney Musi has ordered the lawyer of suspected genital mutilator Peter Frederiksen to appear before him at the end of this month and explain the continued delays in the matter which was supposed to go to trial by mid last year. …
>
> "I have a problem with that proposition for two reasons," said Justice Musi after Frederiksen had addressed court, saying that he had communicated with Wolf on several occasions last week and that everything was now in place.

"Mr Wolf hasn't contacted the prosecution to confirm his involvement in the matter. Also, the reason for the inordinate delay has been due to your failure to put in funds and you haven't mentioned that here now," he added.

But Frederiksen's response to that only helped complicate an already muddled matter when he mentioned that Wolf had assured everything was in place and that he had spoken to the judge about the matter.

"Hold on, I think that's something interesting. Did he speak to a judge about this matter or he spoke to the judge? If he spoke to a judge that's something else but if he spoke to the judge, I am the only judge in this matter and I am the acting judge president in this division (of the high court). So, who did he speak to?

Frederiksen's response seemed less convincing to the judge, prompting him to order Wolf to come to court.

"Mr Wolf could be reported to the Law Society for misrepresenting facts. But in all fairness, he must appear in court first and explain this," said the judge, who seemed not amused by the new twist to the matter.

The matter was then postponed, but not before Justice Musi reminded Frederiksen to expedite issues regarding his legal representation as the matter was proving costly to the state.

"I am postponing this case again. But you understand the pressure that you are putting the state under in terms of the cost of moving you from Johannesburg to here just for postponements," he said."

- "Frederiksen inquiry takes new twist", *The Weekly* 17 March 2017 (http://theweekly.co.za/?p=23392)

Interviewed by Rachel Logan, "From Magistrate to Judge", *News and Views for Magistrates*, July 2006, pages 1, 3.

"The "quantum leap" from magistrate to judge is one which Cagney Musi first made in 2004, after a joint training with the Judge President of the Northern Cape led to an invitation to participate in a new six week mentoring scheme for potential judges. Despite the obvious transformational value of such schemes in attracting a wider group of candidates to the judiciary and encouraging their progress, he remembers that the scheme was not one that was widely supported internally. In addition, he remembers little general enthusiasm among the sitting bench for the ascension of magistrates. A similar program in Gauteng was comprised solely of attorneys and advocates. When asked why that was, he speculates that this is a "class issue". Pointing out that traditionally, judges were appointed from among a white all male advocacy profession – he understands that for many, the creation of mentoring schemes is an affront to the cherished notion that one is naturally "judge material", with suitability to join the elite limited to a select group. …"

"Magistrates, he suggests, are too often "pigeonholed" as junior judicial officials, with "lesser brains". Even the ascension of attorneys to the bench was once met with outrage, and the

current Minister's programs to train female judges and drive through transformation is coming up against these kind of outdated stereotypes. For a lower court official to break through as he has done remains highly unusual. ..."

"Although he finds he has to "tread more lightly" in his personal involvement with the activist causes and projects he championed as a magistrate, he is relishing the increased professional freedom of the judiciary. ..."

"Asked whether he would hope to see other magistrates making the move to the bench, he replies without hesitation that he would definitely encourage this, even advocating that before their appointment all potential new judges should sit for some time in the lower courts to broaden their experience and understanding. ... Overall, Judge Musi says, what we should be aiming for is a single judiciary, where transformation is a reality and where what happens in the lower courts nearly mirrors the activities of the higher court in terms of independence, professionalism and opportunities. While he is optimistic that transformation is becoming a reality at the lower level, with more women and blacks coming through to the magistracy, an appalling number of rural magistrate courts still lack libraries, Jutatstat access, even office space. In parallel, while the Minister's programs are indicative of a move towards transformation in the judiciary, progress so far has "not been to the extent one can ululate about it".

ADVOCATE FIONA DIPPENAAR SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 23 September 1963

LLM (Banking), Rand Afrikaans University (1992)

LLB, Rand Afrikaans University (1988)

B Comm (Law), Rand Afrikaans University (UJ) (1986)

CAREER PATH

Senior counsel, Johannesburg Society of Advocates (2009 - present)

Acting Judge, High Court of South Africa, Pretoria Division (February, May 2018)

Acting Judge in the Gauteng Local Division, Johannesburg (2010, 2011, 2013, 2015, 2016, 2017, 2018)

Junior counsel, Johannesburg Society of Advocates (1992 - 2009)

Professional Assistant, Bowens Attorneys (1991 - 1992)

Candidate attorney, Bowens Attorneys (1989 - 1990)

Member of Johannesburg Society of Advocates (1992 - present)

Member of Law Society of the Northern Province (1991 - 1992)

Member of Northcliff Ridge Eco Park non-profit organisation.

SELECTED JUDGMENTS

PRIVATE LAW

WIERZYCKA AND ANOTHER V MANYI [2017] ZAGPJHC 323

Case heard 13 September 2017, Judgment delivered 20 November 2017

This was a defamation claim brought by urgent application. The respondent had published tweets on his social media accounts regarding the first applicant which, she contended, constituted defamation, an infringement on her constitutional rights, and a campaign of harassment and hate speech under PEPUDA. Applicant also sought declaratory relief that the respondent was liable for damages, a declaration that the statements made were defamatory and constituted hate speech under both the Constitution and PEPUDA, and a final interdict prohibiting further defamatory statements. The matter was decided only insofar as it related to the granting of an interim interdict, with the remainder of the issues referred for determination by a single judge sitting as an Equality Court and a High Court [paragraphs 72 – 77].

In determining the interim interdict, Dippenaar AJ held:

"The settled and trite approach of South African Courts in pronouncing on the provisions of s 16 of the Constitution has been that, although the right to freedom of expression is inseparable from a normal democracy, it is however, neither an absolute nor limitless right nor is it a pre-eminent right. In addition, our courts have also adopted a rather generous interpretation in holding that, inter alia, unless an expressive act is excluded by s16(2) of the Constitution, it is a protected expression." [Paragraph 87]

"In this Court's view, prima facie the statements are, especially in a South African context, defamatory considering their ordinary meaning when measured from the perspective of a reasonable reader of ordinary intelligence and tend to lower the applicants' reputation in the eyes of the public." [Paragraph 99]

"The respondent contends that even if the requirements for interim relief are met, a court should not exercise any discretion in favour of the applicants as it would stifle robust political debate." [Paragraph 127]

“The Constitutional Court thus expressly recognised the constitutional boundaries set to freedom of expression and robust political debate by the legitimate protection afforded to every person's

dignity, including their reputation. The right to freedom of expression is thus not unbridled." [Paragraph 129]

"... The respondent may freely exercise his right to freedom of expression within the recognised constitutional boundaries which protect the applicants' right to dignity. The contents of the political views expressed are not the relevant consideration, it is how they are expressed. ... A robust political debate reflecting opposing views can and should be conducted within the parameters of what is lawful without any need to exceed the parameters thereof if the fundamental constitutional values which underpin our societal norms are adhered to." [Paragraphs 131 – 132]

An interim interdict was granted, pending the determination of issues by the Equality Court.

ADMINISTRATIVE JUSTICE

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC AND ANOTHER V BROADCASTING COMPLAINTS COMMISSION OF SOUTH AFRICA [2016] ZAGPJHC 319

Case heard 7 November 2016, Judgment delivered 18 November 2016

Declaratory relief was sought in relation to the validity of procedural rules for complaints under the first respondent's framework, and to set aside a decision based on the impugned provision.

Dippenaar AJ held:

"The effect of sub-rule 3.9 of the first respondent's procedural rules is that it empowers the second respondent to oblige a complainant to choose between either having his complaint into the ethical and professional conduct of a broadcaster investigated and adjudicated by the first respondent; or to pursue a civil claim for damages against a broadcaster that may [b]e shown to have infringed the complainant's personality rights. The first respondent can thus refuse to discharge its statutory obligation to investigate and adjudicate complaints if a complainant wishes to retain the right to pursue a civil claim against an offending broadcaster in due course." [Paragraph 5]

"In its terms, sub-rule 3.9 aforesaid is inconsistent with s 192 of the Constitution, which requires a regulator of broadcasting, including the first respondent, to exercise its functions in the public interest and in accordance with the principles of fairness. Sub-rule 3.9 does not operate in the interests of a complainant or a member of the public, but operates in favour of a broadcaster. Sub-

rule 3.9 contravenes the public interest and fairness requirements of s 192 of the Constitution." [Paragraph 12]

"Sub-rule 3.9 is an unreasonable and unjustifiable limitation on the constitutional right of access to courts. If a complainant is required by an organ of state to waive hi[s] right to institute an action for damages against a broadcaster without that action being judicially determined, he is deprived of his constitutional right to have his justiciable dispute decided in a fair public hearing before a court." [Paragraph 13]

The application was granted.

CIVIL PROCEDURE

MEDICAL NUTRITIONAL INSTITUTE (PTY) LIMITED V THE ADVERTISING STANDARDS AUTHORITY [2015] (15/30142) (ZAGPJHC)

Case heard 9 September 2015, Judgment delivered 18 September 2015

This was an urgent application for an interim interdict. Applicant, which manufactured and sold complementary medicines, contended that the respondent had no lawful basis to exercise jurisdiction over it, as it was not a member of the respondent and was not obliged to adhere to the advertising code. It contended that the respondent was acting unlawfully in purporting to be the regulator of the advertising industry, that it has no enabling legislation to execute a public function as regulator, and that it was acting in a manner which was inconsistent with its self-proclaimed limitations. The applicant further claimed infringements of its constitutional rights to freedom of association, freedom of expression and access to courts under sections 18, 26 and 34 of the Constitution. They alleged damages suffered in the region of R25 million due to the respondent's publication of adverse rulings to the credibility of the applicant's product AntaGolin.

Dippenaar AJ held:

"It would be undesirable at this stage to rule at this interim stage that there is no prospect of success on any of these issues. They are by their nature of such gravity and complexity that they cannot and should not be disposed of in the present interim proceedings ..." [Paragraph 71]

"If it is ultimately found that the respondent is not clothed with the statutory powers contended for, the applicant's contentions of infringement of their constitutional rights prima facie appear well

founded. … The applicants have in my view established at least a prima facie case (although open to some doubt) and there is substance to the applicant's contentions and they are not frivolous or vexatious, but constitute serious issues which must be tried in the proposed trial action. It would however be inappropriate to voice any final views on the ultimate determination of these issues. … As such I am satisfied that the applicant has succeeded in meeting the threshold that it has a prima facie right to relief, although open to some doubt." [Paragraphs 90 – 92]

"Having regard to the available facts and for purposes of determining this application, in which the respondent has failed to provide any factual information in defence of its rulings and decisions against the applicant and in relation to the AntaGolin product, it is not apparent that the respondent would have any sustainable defence and the respondent's adverse rulings are prima facie harmful to the reputation of the applicant or prevent any such harm from being irreparable." [Paragraph 104]

"In considering the balance of convenience, consideration must be given to the consequences which this will have on the business of the applicant if interim relief is not granted and it is ultimately found that the conduct and decisions of the respondent are unlawful and of no force and effect. It will be extremely difficult, if not impossible to undo the financial and reputational harm which will occur if the status quo is not preserved." [Paragraph 107]

An interim interdict was granted.

ADMINISTRATION OF JUSTICE

The application form discloses that Advocate Dippenaar was reprimanded for unprofessional conduct following a complaint regarding conduct in the case of State v Visser (1994), for failing to make timeous arrangements for a successor to take over a case following Advocate Dippenaar's withdrawal from the matter.

It is further stated there have been three other complaints to the professional committee relating to Advocate Dippenaar, all of which were dismissed.

MS SELEMENG MOKOSE

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Date of Birth: 25 June 1963, United Kingdom

BA (Law), National University of Lesotho (1980- 1984)

LLB, University of the Witwatersrand (1985 – 1987)

Certificate in Refugee Law, University of Cape Town (2008)

Property Development Programme, University of Cape Town (2013)

CAREER PATH

Acting Judge, Gauteng High Court (2016 – 2018)

Consultant, Mohamed Randera and Associates (January 2017 –)

Director, Bowman and Gilfillan Inc (2008 – 2016)

Founder and Director, Selemeng Mokose Inc (1996 – 2008)

Associate Director, Van Der Venter Meiring (1994 – 1995)

Associate, Edward Nathan & Friedland Inc (1991 – 1994)

Candidate Attorney, Edward Nathan & Friedland Inc (1989 – 1990)

Candidate Attorney, Dangor Attorneys (1988 – 1989)

Legal Adviser on Refugee Law, Pro.Bono.org

Chairperson, Upper Houghton Body Corporate (2008 – 2016)

Chairperson, Property Law Committee, Law Society of South Africa (2006 – 2016)

Chairperson, Property Law Committee of the Law Society of the Northern Provinces (2004 – 2016)

Independent Non-Executive Director, 1Time Holdings Ltd (2011)

Basic Aspirant Judges Course, South African Judicial Education Institute (2016)

Advanced Aspirant Judges Course, South African Judicial Education Institute (2017)

Judicial Skills Training, Law Society of the Northern Provinces (2015)

SELECTED JUDGMENTS

COMMERCIAL LAW

QBX CONSULTING SERVICES (PTY) LTD V MAFURI TURNKEY ACCELERATED CONSTRUCTION (25077/2016) [2017] ZAGPPHC 535 (16 August 2017)

The applicant claimed to be a creditor of the respondent (affected person), and sought an order in terms of sections 131 (1) of the Companies Act placing the respondent under supervision, as well as initiating business rescue proceedings. In the alternative, the applicant sought an order placing the company into liquidation.

Mokose AJ held:

"... [T]here is a factual dispute as to the locus standi of the applicant. The respondent's version is not far-fetched and untenable that it can justifiably be rejected merely on the papers. For this reason and on the papers before me, the applicant cannot be found to be an affected person". [Paragraph 11]

In respect of the order for supervision and business rescue, Mokose AJ considered two conflicting judgments in order to determine whether the respondent was in financial distress or not.

"There is no decided case in the Gauteng Division nor has it been decided in the SCA. I am, however, inclined to follow the decision of the Western Cape Division and order that the applicant must give concrete and objectively ascertainable details going beyond mere speculation. The applicant has failed to give such details in his application and for that reason, I order that the prayer that the respondent be placed under supervision and business rescue fails." [Paragraph 16].

"I am of the view that on the applicant's own version, the respondent is commercially solvent and able to pay its debts. The applicant has not presented sufficient information for this court to make a decision regarding the solvency of the respondent. The alleged debt which has caused the applicant to bring this application first needs to be proven at trial for the applicant to qualify to bring this application at all [Para 20]."

The application was dismissed with costs.

CIVIL PROCEDURE

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE V PRO-WIZ GROUP (PTY) LIMITED AND OTHERS; IN RE: PRO-WIZ GROUP (PTY) LIMITED V PRO-WIZ GROUP (PTY) LIMITED AND OTHERS (28890/2016) [2017] ZAGPPHC 542 (16 AUGUST 2017)

Applicant in the original application was seeking to convert a liquidation order into business rescue proceedings. SARS applied to intervene and have the application dismissed. The application was then withdrawn, applicant tendering costs of SARS but not of the liquidators.

Mokose AJ held:

"The general principle is that the party withdrawing is liable, as an unsuccessful litigant, to pay the costs of the proceedings. The court however, has the discretion to deprive the successful litigant of its costs but such discretion must be exercised judicially i.e have regard to whether, objectively viewed, the applicant acted reasonably in launching the main proceedings but was subsequently driven to withdraw it in order to save costs because of emerging facts or because the relief was no longer necessary or obtainable."[Paragraph 6]

"We are presented with two divergent views as to the correct interpretation of section 131(6) and the intention of the legislature … The objective of a business rescue application is firstly to facilitate the continued existence of the company in a state of solvency and secondly to facilitate a better return for the creditors or shareholders of the company in the event that the first goal proves not to be viable. In Richter v Absa Bank … it was held that the proper interpretation of "liquidation proceedings" in relation to Section 131(6) must include proceedings that occur after a winding-up order to liquidate the assets and account to creditors, up to the de-registration of a company. As such, I am inclined to follow the decision in the Richter v Absa matter. On a proper reading of Section 131(6) there is no suggestion that the administrative powers of the liquidators would be retained thereby enabling them to continue to perform their duties as liquidators in an insolvent estate. Accordingly, I dismiss the application for costs and order costs for the argument for costs in favour of the applicant." [Paragraph 15]

CRIMINAL JUSTICE

BONASE v S (A207/2007) [2018] ZAGPJHC 50 (16 March 2018)

Case heard 27 February 2018, Judgment delivered 19 March 2018

In this appeal, an issue arose whereby the record of the trial proceedings was incomplete.

Mokose AJ (Collis J concurring) held:

"Counsel for the appellant submitted that the record in this matter could not be located and despite several attempts at reconstructing the record, it was still incomplete. The affidavit of the trial Magistrate was brought to the court's attention wherein he confirmed that he was the presiding officer in respect of the matter and that the charge sheet and audio cassettes on which the trial proceedings had been recorded were missing. He confirmed further that he no longer has the notes for the matter and that he does not have an independent recollection of the facts of the case. Furthermore, the prosecutor who dealt with the matter was since died and the appellant's then attorney of record could not be traced as he was no longer a practising attorney." [Paragraph 5]

"It stands to reason that the record of proceedings in the trial court is of cardinal importance. This record forms the basis of the re-hearing by the court of appeal. Where the record is inadequate or unavailable for the consideration of the appeal, it could lead to the conviction and sentence being set aside. … Although the appellant and/or his legal representatives carry the ultimate responsibility to ensure that the record is in order, the courts have commented that the responsibility not only lies with them but also with the presiding officer, clerk of the court and the operators of recording machines. The absence of such a record hampers a just hearing of the appeal or review thereby constituting a "technical irregularity or defect in the procedure" … and renders the conviction and/or sentence liable to be set aside." [Paragraphs 10 – 11]

"In order to properly consider the issues, it is necessary to examine how the trial court came to the conclusion that the appellant was guilty of the charges laid against him. The summary of the evidence led as a whole, as well as the questions put to the appellant and all witnesses in both examination and cross-examination are of importance. In the absence of a transcript of the proceedings of the *court a quo* or any reconstruction of the record of the proceedings, an appeal court would never know the details of the matter. …" [Paragraph 13]

The conviction and sentence were set aside.

ADMINISTRATION OF JUSTICE

The application form discloses that Ms Mokose was sanctioned by the Law Society of the Northern Provinces for failing to furnish an auditor's certificate for the years 2004, 2005 and 2006. A fine of R10 000, suspended for five years, was imposed.

ADVOCATE MOKHINE JONAS MOSOPA

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 6 June 1971

LLB, University of Limpopo (1995)

B. Iuris, University of Limpopo (1993)

CAREER PATH

Acting Judge, Gauteng High Court (October – December 2016, April – June 2017, July – September 2017, October – December 2017, January – March 2018, April – June 2018)

Advocate (1996 -)

Presiding Officer, Private security Industry Regulating Authority (2000 -)

Member, African National Congress (2009 – 2013)

Member, South African Student Congress (1991 – 1995)

SELECTED JUDGMENTS

PRIVATE LAW

SCHEEPERS V ROAD ACCIDENT FUND 2017 JDR 1017 (GP)

Case heard 30 May 2017, Judgment delivered 20 June 2017

This was a claim for loss of support by the plaintiff, who had been married to the deceased, who was fatally injured in a motor vehicle collision. The plaintiff sued for loss of support.

Mosopa AJ held:

“Two witnesses were called to prove the Plaintiff's claim being the Plaintiff herself Mrs Scheepers and Mr Gert Pieter Scheepers being the biological father of the deceased.” [Paragraph 3]

“That she was involved with the deceased for 8 (eight) years prior to the death of the deceased but they were only married for 8 eight months leading to the death of the deceased. There were no children born out of the marriage between the Plaintiff and the deceased and also out of wedlock.” [Paragraph 3.2]

“The Plaintiff avers in the particulars of claim that she is unemployed. However I am alive to the fact that the date of the summons is the 30th October 2013, which is approximately 3 (three) years and 4 (four) months before the hearing of the matter.” [Paragraph 9]

“The Plaintiff never put forward any evidence before me which indicates what is her current occupation. Nothing was placed before me what type of lifestyle did the parties have before the death of the deceased and as to whether there was any deterioration of such a quality for the lifestyle since the deceased's death.” [Paragraph 10]

“The Plaintiff estimated the monthly salary of the deceased to be in the region of R50 000 00 without telling what informs her to come to that amount. More importantly, the Plaintiff's expert Munro Actuaries, in their report indicated that; "further investigation should be conducted to determine the true earnings of the deceased at the time of the accident" and this was despite the fact that the expert was provided with the list of invoices on which the Plaintiff relies that it was the deceased's income.” [Paragraph 17.4]

“The onus is on the Plaintiff to prove on a balance of probabilities that the deceased was contributing and provided the required support to her. Further that as a result of the death of the deceased she cannot support herself thus rendering her indigence.” [Paragraph 21]

“The Plaintiff failed to discharge the onus placed on her. There is no evidence that her financial situation deteriorated as a result of the death of the deceased, most importantly that during the lifetime of the deceased, the deceased was supporting herself.” [Paragraph 22]

The court granted the absolution from instance, with costs.

COMMERCIAL LAW

CHANGING TIDES 17 (PTY) LTD V OLIVIER 2018 JDR 0205 (GP)

Case heard 15 December 2017, Judgment delivered 15 December 2017.

This was an application for summary judgment. The issue before the court was whether the plaintiff was competent to enforce a credit agreement by issuing summons against the defendants where the defendant's debt review was in place; and secondly, where the defendants had not defaulted on the terms of the debt review application.

Mosopa AJ held:

"On the 26 June 2017 the defendant's debt counsellor informed SA Home Loans (Pty) Ltd of the debt review order that was granted. As such the notice in terms of section 86(10) of the Act was invalidly a[n]d prematurely sent and the defendants are protected by the provisions of section 86(10) (6) of the Act in that the application for debt review could not be terminated after it had been filed in court. Further that they have never defaulted on the terms of debt review application." [Paragraph 5]

"Where a defendant seeks to oppose summary judgment the defendant may do so either by furnishing security to the plaintiff to the satisfaction of the Registrar for any judgment including costs or satisfy the court by way of affidavit or in certain instances, with the leave of the court, by oral evidence, that he has a *bona fide* defence to the plaintiff's action. The defendant is required in asserting that he has a *bona fide* defence to fully disclose the nature and grounds of the defence and the material facts relied upon therefor. In *casu* the defendant filed an affidavit resisting the granting of summary judgment as envisaged in Rule 32(3)(b) of the Uniform Rules of Court." [Paragraph 6]

"The notice in terms of section 86(4)(b)(i)(ii) of the Act was sent by email to the defendant. The enforcement of credit agreement by action in his matter was done after the defendants applied for a debt review. It is common cause that the plaintiff did not serve notice for termination in terms of section 86(10) in respect of the debt review issued on the 20 June 2017." [Paragraph 20]

"The consequences thereof is that the debt review issued on the 20 June 2017 is operational. The defendants contended that since the issue of the second debt review the defendants have never defaulted in terms of their obligations to the plaintiff. It is trite that where a consumer is in default the credit provider is entitled to enforce the credit agreement, provided the consumer has not made application for debt review pursuant to section 86(1) and the credit provider has complied with the requirements of sections 129 and 130. In terms of section 86(2), an application for debt review concerning a particular credit may not be made if the credit provider has "proceeded to take the steps contemplated in section 129 to enforce the agreement." [Para 21]

"The purpose of summary judgment is to assist a plaintiff where a defendant who cannot set up a *bona fide* defence or raise an issue to be tried, enters appearance simply to delay judgment. The remedy provided by this rule has been described as dramatic and until recently not as extraordinary and that the rule must be applied properly. However it closes the doors of the court to the defendant. It must accordingly be approached with great circumspection ..." [Paragraph 24]

"I am satisfied that the defendants in their opposing affidavit showed that they have a *bona fide* defence to the plaintiff's claim and the notice of intention to defend was not given solely for the purpose of delay." [Para graph25]

The defendants were granted leave to defend the claim.

CRIMINAL JUSTICE

LESTER V THE STATE, UNREPORTED JUDGMENT CASE NO: A374/16

This was an appeal against a conviction for murder.

Mosopa AJ (Mavundla J and Mathunzi AJ concurring) held:

"I am alive to the fact that when assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibly that the explanation given by an accused is true." [Paragraph 9.7]

"Nobody can point to the person who shot and killed the deceased. Proved facts indicate that all State witnesses and the Appellant were present before the killing of the deceased. …" [Paragraph 9.8]

"I am well alive to the fact that Mr Cede is a single witness to the admission made to him by the Appellant. In such situation such evidence need to be treated with extra caution. However it is trite that corroboration is not the only way in which the cautionary rules can be satisfied but such evidence must be reliable. I find no material contradictions in the evidence of Mr Cede and his evidence was credible and trustworthy." [Paragraph 9.16]

"On the proven facts, the deceased was killed by the person who happens to be at the premises before the deceased was killed. There are tenants staying at the place where the murder was committed but there is nothing on record to indicate that any of the tenants had dealings with the deceased before he was killed." [Paragraph 10.1]

"The Appellant on his version admits that he was present at the scene before the deceased was killed. …" [Paragraph 10.2]

"It appears that the caring of his girlfriend was only for the duration before the death of the deceased. This is highly improbable and I am of the view that the trial court did not misdirect itself either on the question of law or facts and the Appellant was correctly convicted in respect of count 1 of murder." [Paragraph 10.4]

The appeal was dismissed.

MUNKHAMBE V THE STATE (A676/2015) [2017] ZAGPPHC 1274 (12 DECEMBER 2017)

Case heard 12 December 2017, Judgment delivered 12 December 2017.

Appellant was convicted of the rape and sexual assault of an a 11 year old child ("N"), and sentenced to life imprisonment. The appeal was against conviction and sentence.

Mosopa AJ (Rabie J concurring) held:

"In his judgment the magistrate accepted the evidence of N without applying cautionary rules to such evidence, despite the age of the complainant who was 11 years at the time of the alleged incident and the fact that she was single witness on the rape incident and the sexual assault charge." [Paragraph 19]

"When dealing with the contractions in N's evidence the magistrate acknowledge the fact that when the incident happened N was only 11 years and when she testified she was 13 years old. He further acknowledge that passing of time since the commission of the offence and the time when she testified as factors that can be attributed to such contractions as she testified that some of the things which happened to her she has forgotten about them." [Paragraph 20]

"It must be noted that when N was asked to explain what happened to her in examination-in-chief on that day she did not say that she has forgotten some of the things as the incident took place long time ago. She testified about the events of that particular day if they were still fresh in her mind until under cross-examination when the appellant's legal representative indicated to her that what she told the Doctor/Nurse who examined her is not the same as her testimony in court. …" [Paragraph 21]

"The magistrate erred in not making credibility finding on the evidence of the complainant. Instead the magistrate found that the complainant was persistent and consistent in her evidence." [Paragraph 26]

"There is also an important aspect which came out of the evidence relating to the family feud between the maternal and paternal grandparents of N taking into account that N's parent had passed away. This had led N moving from one grandmother's place to another. Even though her other grandmother denies any animosity between the families that has been confirmed by Ms M H who is also N's grandmother who testified on behalf of the appellant. The magistrate did not take proper consideration of the family feud having resulted in a false charge been laid against the appellant." [Paragraph 27]

"The appellant's version when viewed in the light of the totality of the evidence is reasonable possibly true looking at the fact that the complainant's report to Ms G H was not voluntarily made as she testified that she is the one who first probed N about this rape allegations. She also repeatedly asked the complainant as to whether is she sure that the appellant is the one who raped her. The manner in which the complainant was raped was not explained to her in detail, and only heard the detail explanation at the hospital." [Paragraph 31]

"The state evidence against the appellant was not of a magnitude which could have secured the conviction of the appellant and as a result the magistrate erred in convicting the appellant of rape and sexual assault." [Paragraph 38]

"The complainant was not a credible witness and her evidence was tainted with material contradictions." [Paragraph 39]

The appeal was upheld.

ADVOCATE BRENDA NEUKIRCHER SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 31 January 1967

LLB, University of Pretoria (1990)

BLC, University of Pretoria (1988)

CAREER PATH

Acting Judge, Gauteng Division, Pretoria (2002 – 2018)

Pretoria Society of Advocates

- Senior Counsel (December 2006 -)
- Advocate Trainer (2004 -)
- Member, Silk Committee (2014 -)
- Member of Bar Council (February 2017 – February 2018)
- Member, Disciplinary Committee (2018)
- Member, Transformation Committee (2018)
- Junior Counsel (December 1990 – December 2006)
- Pupillage (July 1990-December 1990)

Arbitrator (2012-2016)

Vice Chair Disciplinary Committee, Independent Regulatory Board for Auditors (IRBA) (2011-2016)

Chair, Pharmacy Appeal Board (single matter) (2007)

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

Candidate Attorney, Hark Stupel & Ross Attorneys; Savage Jooste & Adams Attorneys; Jules Lewin Attorney, Pretoria (January 1988 - June 1990)

SELECTED JUDGMENTS

CIVIL PROCEDURE

KUNGWINI ESTATE (PTY) LTD AND JOHANN WALTERS V KUNGWINI MANOR HOMEOWNERS' ASSOCIATION NPC (A162/2016, 67684/2015) [2017] ZAGPPHC 374

Judgment delivered 9 June 2017

Respondent had launched contempt of court proceedings against Appellants. The 2nd Appendant, who purportedly also represented 1st Appellant in those proceedings, did not file an answering affidavit as he was looking for legal representation. The court a quo nonetheless proceeded to make a ruling. The Appellants then brought the present appeal.

Neukircher AJ (Murphy J and Crutchfield AJ concurring) held:

"[E]ntrenched in our Constitution is the observance of the fairness of proceedings before our courts which, it is trite, should be meticulously observed and protected whether the proceedings are of a civil or a criminal nature, failing which the judicial proceedings became tainted as the right to a fair hearing before a court lies at the heart of the rule of law" [Paragraph 2]

"At the hearing a quo, the second appellant stated that the appellants had not filed answering affidavits and that he had approached the Legal Resource Council to ask them for advice. They had, in turn, advised him '...to appear today in person here, to explain to the court that I cannot afford currently, legal representation and then the court will decide how the matter will...'" [Paragraph 7]

"The second appellant then, on a number of occasions, specifically informed the court that he wanted legal representation." [Paragraph 8]

"It is also important to note that, as to the issue of contempt, this he denies which, in effect, puts the allegations of the respondent in dispute and creates a dispute of fact on the issue of contempt." [Paragraph 9]

"There can be no doubt that part and parcel of the right to a fair hearing includes the right to be represented, if the party so chooses. ..." [Paragraph 10]

"The appellants were not afforded this courtesy and were not given an opportunity to seek representation to place their case properly before court because, as the second appellant so aptly put it: "...I do not know how to do it myself."" [Paragraph 11]

"In my view that should have been the end of the matter. It should have been postponed with directions as to the time periods for the filing of further affidavits. Instead what followed was the grant of the application and consequently a complete miscarriage of justice which, given the principles set out in Fakie NO v CCII Systems (Pty)Ltd … on the application as it stood with the appellants' denial, could not have withstood proper scrutiny at that stage." [Paragraph 12]

"Thus it is clear that the order granted a quo must be set aside" [Paragraph 13]

"However, the appellants seek not only an order that this appeal succeeds, they seek an order substituting the order a quo with one in which the application is dismissed with costs." [Paragraph 14]

"This issue is the one that then needs to be properly ventilated as it cannot be done on the papers before us. Proper affidavits must be filed." [Paragraph 18]

The appeal was upheld and the Appellants were ordered to file their answering affidavits in the original application within 20 days of date of the order.

KING CIVIL ENGINEERING CONTRACTORS (PTY) LTD V THE TENDER BOARD (MPUMALANGA) 2006 JDR 0417 (T)

Case heard 3 May 2006, Judgment delivered 03 May 2006

This was an application for condonation for failure to timeously serve Notice of Intention to Sue in terms of the Institution of Legal Proceedings Against Certain Organs of State Act. The Applicant was a successful tenderer for a road construction project. An unsuccessful tenderer successfully interdicted performance pending review of the tender, and applicant then sought to sue the respondent Tender Board for damages.

Neukircher AJ held:

"… Insofar as this is concerned there are three main prerequisites which have to be present before a Court may grant the application. These are: i) that the debt has not been extinguished by prescription; ii) that good cause exists for the failure by the creditor; and iii) that the organ of state was not unreasonably prejudiced by the failure." [Paragraph 16]

Neukircher AJ found that this application was served on Respondents during November 2004 and by doing so, prescription was interrupted. Thus the debt had not yet become prescribed when this application was instituted.

"The explanation for the failure to give notice timeously is that, after the order in the interdict application had been handed down, the Applicant had to find other work to satisfy the void left by the 'failed' tender. The Applicant submitted many tenders in the civil engineering

construction industry and eventually was awarded a tender, the work on which was eventually finalised in January 2004." [Paragraph 20]

"The Applicant then states that it contacted its attorney … in February 2004 and instructed him to proceed with the claim against the Respondents. It is also important that Applicant states that its claim against Respondents is complicated and extremely difficult to quantify. In answer to this deponent on behalf of the First Respondent has denied this allegation. However, it is interesting to note that there is no reason given for this denial, which I would have expected had the claim been a simple one and capable of quick and easy calculation." [Paragraph 21]

"Furthermore, it is also important that Applicant mitigate its damages, which it did by submitting other tenders and taking on other work. This will have an influence on any eventual claim instituted." [Paragraph 22]

"I therefore find that there has been 'good cause' shown for Applicant's failure to submit its claim timeously." [Paragraph 23]

"In the event that it is found that the Respondents may suffer unreasonable prejudice were the condonation to be granted, this application must fail." [Paragraph 24]

"However, I find this will not be the case: i) the Applicant must still make out and prove any claim instituted against anyone or more of the Respondents; ii) the Respondents main objection was aimed at the question of prescription and little attention was paid to the question of unreasonable prejudice. Accordingly, there is no record to show what potential prejudice may be suffered by any potential Defendant in the action to be instituted or why. iii) insofar as it may be alleged that the intended Defendants are entitled to notice of the action in order that the designated Minister may conduct investigations and then take appropriate steps … this is so. Counsel also submitted that another reason for notice is to decide whether to defend or settle legal disputes with which I also agree. However, notice was given to the Respondents and this application has more than adequately placed the Respondents in a position to consider their stance in respect of the potential action and decide whether they wish to settle or defend it." [Paragraph 26]

The Applicant was granted leave to institute action against the Respondent within three weeks of the order.

CRIMINAL JUSTICE

MOLEFI V S (A17/2016) [2017] ZAGPPHC 765

Judgement delivered 21 November 2017

This was an appeal against conviction and sentence of 15 years imprisonment for murder, the Appellant being accused of murdering his wife by strangulation.

Neukircher AJ (Mphahlele J concurring) held:

“It is quite clear from a reading of the record that the State's case is entirely circumstantial and the court a quo relied heavily on the report and findings of the pathologist, Dr Ramela, in convicting the appellant of murder as she was adamant that the only possible explanation for the wounds on the deceased body were those consistent with strangulation. …” [Paragraph 3]

“This appeal was set down before us and … the appellant launched an application to lead new evidence on appeal. […]” [Paragraph 5]

“The gist of the new evidence is that the appellant wishes to call Professor Gert Saayman from the Department of Forensic Medicine at the University of Pretoria. Prof. Saayman … was given Dr Ramala's report and in response he has filed a report of his own …” [Paragraph 6]

“This report calls into question not only the expertise of Dr Ramala as an expert … but it also calls into question her findings and as a result, her evidence as a whole.” [Paragraph 7]

“The reason that this new evidence is only being introduced now is that the appellant simply could not afford to pay for both a legal representative and an expert at the time of this trial. He has now managed to raise enough funds to appoint Prof Saayman and place this crucial evidence before us.” [Paragraph 9]

“In my view, all the requirements set out supra [for the admission of new evidence] have been met …” [Paragraph 13]

“Whilst it is certainly so that matters cannot be dragged out indefinitely and that there must be finality in all matters, that cannot come at the expense of justice or a fair trial. In my view this is tied up with whether the explanation given by the appellant for the lateness of this new evidence, is reasonable.” [Paragraph 14]

“The evidence before us is that neither the appellant nor his family were in a financial position in 2012 when this trial proceeded a quo to engage the services of an expert. The State has not taken issue with that statement and although there could have been more flesh added to that bone, given the exculpatory nature of Prof Saayman's evidence, I am inclined to accept the appellant's explanation.” [Paragraph 16]

“Furthermore, it is obvious that, given this new evidence, the matter will have to be remanded and the State given an opportunity to cross-examine Prof. Saayman.” [Paragraph 17]

“Given the fact that Prof. Saayman's evidence, if it holds up under cross- examination, may exculpate the appellant, it is clear that the only course of action is to set aside both the conviction and the sentence and to remit the matter to the trial court.” [Paragraph 18]

RAPHOLO V NATIONAL DIRECTOR PUBLIC PROSECUTIONS AND OTHERS (73576/16) [2016] ZAGPPHC 1108

Judgment delivered 27 September 2016

The Applicant was convicted and found guilty of culpable homicide. On appeal, his sentence was reduced and the appeal court issued a directive that the Applicant was to hand himself over at Voortrekker prison within 48 hours of that order. On handing himself over, the prison authorities told him that they were not in possession of his records and that as a result, they could not detain him. He was instructed to return home and was told that once the authorities had received the records from the High Court, they would send their officials to collect him so that he could start serving his sentence. Six years passed, and the prison authorities by warrant sought to have the applicant commence serving his sentence. This was an application to stay the implementation of the warrant pending finalisation of an application for the reconsideration of the appeal, and for preventing the arrest and detention of the Applicant pending finalisation of the reconsideration of the appeal.

Neukircher AJ held:

"It is the most basic and fundamental principle of law that all orders of court must be complied with properly until they are set aside and that the most obvious reason for this would be that the integrity of the court system relies upon the upholding of and compliance with the judgments of our courts. …" [Paragraph 1]

"What is appalling in this matter is the fact that the Third and Fourth Respondents were seemingly unconcerned about the fact that the applicant presented himself to start serving his sentence and they had not received any documents from the court as yet. Instead of contacting the court to obtain the necessary documents to process the applicant so that he could start serving his sentence, the prison officials sent him home and said that they would send officials to fetch him." [Paragraph 18]

"It would this appear that from 10 March 2010 until 29 August 2016 the Third and Fourth Respondents did absolutely nothing." [Paragraph 20]

"This is, to say the least, not only reprehensible, but also immensely concerning: if they have left the applicant free on the streets how many other convicted criminals are similarly turned away from the prisons because officials have not "received their papers"? How many of those simply take advantage of that situation and disappear never to be found to actually serve their sentences? In this matter at least the appellant remained at the address he furnished to the prison authorities in 2010 which says much about his character in my view." [Paragraph 21]

"But it is now 6 years later. Had applicant served his sentence in 2010 he would probably have been released on parole during late 2010 or 2013 and it goes without saying that, by now, he

would have continued with his life. Instead, thanks to the shoddy manner in which his case has been handled, his life has been turned upside down. …" [Paragraph 22]

"As Mr Mntsweni put it, the sentence of incarceration is supposed to have a rehabilitative effect on a prisoner. In this matter, this rehabilitation occurred without the incarceration." [Paragraph 23]

"Whilst I agree with that submission I must be mindful of the fact that I must not lose sight of the public interests which are weighed so carefully in criminal matters. It is also in the interest of public policy and the proper administration of justice that sentences handed down should be carried out efficiently." [Paragraph 24]

"But what we have here is anything but a swift and efficient meeting out of justice and the question now is whether, as has been said by our courts in many contexts, "justice delayed is justice denied"" [Paragraph 25]

"This matter, and the relief I grant, however, must not be seen to be a carte blanche in all matters of this nature. Each case is unique and must be carefully weighed on its own merits. Perhaps had the Respondents elected to file answering papers the outcome may have been very different." [Paragraph 30]

"I also make no comment on the process to be followed in the so-called "application for reconsideration" or its merits - I leave that to the person or court hearing the matter." [Paragraph 31]

Neukircher AJ ruled that Applicant had 15 days within which to deliver his application for reconsideration of the appeal, and that pending finalisation of the application for reconsideration of appeal, the warrant of arrest authorising the arrest of the applicant be stayed, and the Respondents be interdicted and restrained from arresting the applicant and handing him over for the purpose of serving his sentence pending finalisation of the proceedings

MR MARCUS SENYATSI

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 14 April 1959

B Proc, University of Limpopo (1984)

LLB, University of Limpopo (1989)

CAREER PATH

Acting Judge, Gauteng High Court (October – November 2016; February – March, July – September, October, November – December 2017; April – June 2018)

Legal Manager, Industrial Development Corporation (2009 -)

Sole practitioner, Marcus Senyatsi Attorneys (2008 - 2009)

Executive Manager, South African Airways (2001 - 2008)

Senior Legal Advisor, Nampak Ltd (1999 - 2001)

Senior Associate, Deneys Reitz Inc attorneys (1997 - 1999)

Partner, Senyatsi Molepo and Ramotshela Attorneys (1994 - 1997)

Part – time lecturer, University of Limpopo (1990 - 1995)

Sole practitioner, M.L Senyatsi Attorneys (1993 - 1994)

Attorney, Meyer Pratt and Luyt (1992 - 1993)

Candidate Attorney, Meyer Pratt and Luyt (1990 - 1992)

Legal Advisor, Lebowa Development Corp. Ltd (1984 - 1989)

Member:

- Corporate Lawyers' Association of South Africa (2009 -)
- Law Society of the Northern Provinces (1992 -)
- Black Lawyers' Association (1990 – 2001)
- Association of Legal Advisors of South Africa (1984 – 1989)

Member, African National Congress (1999 – 2012)

SELECTED JUDGMENTS

PRIVATE LAW

STIRLING V FAIRGROVE (PTY) LTD AND OTHERS 2018 (2) SA 469 (GJ)

Case heard 6 September 2017, Judgment delivered 6 September 2017

This was an application for a declaratory order that the applicant was still the owner of immovable property known as Erf 85, Hurlingham Town, Johannesburg. The applicant further sought the expungement of two deeds of transfer in terms of which Erf 85 was first transferred to the third respondent (Alvares), who in turn transferred it to the first respondent (Fairgrove). The property was fraudulently sold without the consent of the owner. Fairgrove brought a counter-application for damages for the monies paid to Alvares and SARS. Alvares brought a claim against the alleged estate agent and a property company, which was consolidated into these proceedings.

Senyatsi AJ held:

"It is … clear that the Act confers upon the Registrar [of Deeds] significant powers and responsibilities to ensure the proper administration of the land registration system in South Africa. The Registrar occupies an important oversight role that requires her and the officials in her employment to scrutinise the documents placed before them… As stated herein-before it is clear that protection of land owners through security of title is a critical role played by the Registrar and her staff" [Paragraph 45]

"One critical aspect of the process of deed execution is to thoroughly examine all deeds presented before the Registrar by her staff. … This in my view is to ensure that all formal requirements are applied with. In so doing, the Registrar relies on the conveyancers." [Paragraph 46]

"I have seen from the Registrar's answering affidavit that while the Registrar may call for proof of these facts, proof will normally not be required of facts for which the conveyancer must accept responsibility unless the deed or document is obviously faulty. It is therefore understandable that the relationship between the Registrar and conveyancer is based on trust. That trust is premised on the fact that the conveyancer is indeed registered as such in terms of the law." [Paragraph 53]

"Notwithstanding the fact that Kekana is not a conveyancer, he signed preparation certificates not one but three separate documents, which were required to be certified by a conveyancer, namely the first power of attorney, the Regulation 68 affidavit and Deed of Transfer T54404/15. He also appeared before the Registrar to execute Deed of Transfer T54404/15. Since Kekana was not a registered conveyancer, he was not authorised to sign any of the documents he signed or to appear before the Registrar. That called for the rejection of the deed which the Registrar failed to do." [Paragraph 73]

"It is clear to me that the staff of the Registrar did not check if Kekana's name was on the register of conveyancers. They did not also properly examine the deed of transfer and the preparation certificate because if they had done so, they would have identified the numerous obvious errors there and rejected the deed or even investigate whether the preparer of the preparation certificate was a qualified conveyancer." [Paragraph 78]

"It is common cause that transfer to Alvares was done fraudulently. The registrar, as the custodian of security of title to property, breached her statutory duty to reject the deed. All the facts were before her

to do so, but her staff responded negligently to stop it. The subsequent transfer from Alvares to Fairgrove was effected procedurally correctly and I have not been asked to make a finding on it. The first fraudulent transfer and registration of ownership to Alvares were direct consequences of the negligence of the registrar. The registrar ought to have reasonably foreseen that losses were likely to be suffered as a direct consequence of her negligence. …" [Paragraph 87]

The applicant was declared the lawful owner of the Erf. Second and third respondent were ordered to pay damages to the first respondent.

MOJAPELO T/A JIKELEZA TAVERN V MINISTER OF SAFETY AND SECURITY AND ANOTHER (66553/13) [2018] ZAGPPHC 270 (26 JANUARY 2018)

Case heard 26 January 2018, judgment delivered 26 January 2018

This was a claim for damages arising out of allegations made by the police that the Plaintiff kept a human skeleton and an unlicensed firearm at his property. As a result of the allegations, the plaintiff argued that his safety was endangered in his community, and he was forced to relocate and to purchase another property.

Senyatsi AJ held:

"In my view the Plaintiff is entitled to a substantial damages award. He had to relocate his family from Siyabuswa as the insult was potentially endangering his live. We know in the Republic that someone accused of keeping for instance human skeleton at his house in some communities may be associated with the practice of witchcraft which may lead to such person being killed. This is why our law has made it a criminal offence to accuse any one of witchcraft. The injury suffered as a result of such accusation by the second defendant is understandable and cannot be under estimated." Paragraph 16]

The defendants were ordered to pay the plaintiff R850 000.00, and the costs of the lawsuit.

MONGATANE V PASSENGER RAIL AGENCY SOUTH AFRICA 2017 JDR 0323 (GP)

Case heard November 2016, Judgment delivered 22 February 2017

This was a claim for R2 million in damages which arose from the injuries sustained by the by the plaintiff as a result of allegedly being pushed out of a train. The court had to decide on whether or not the defendant owed duty of care to the plaintiff, and whether the defendant failed to take reasonable steps to ensure the safety of the plaintiff as a passenger in the train.

Senyatsi AJ held:

"It can never be argued in general that the defendant, as a commuter rail carrier of passengers owes the duty of care towards its passengers to ensure that their safety is guaranteed when boarding its trains." [Paragraph 57]

"That duty of care would include ensuring that the coaches of its trains are not over crowded." [Paragraph 58]

"The court is not persuaded by the evidence of the train guard Mr Mashaba as to the volume of passengers in the coaches as he sat at the last coach of the train and was not, in my view, able to see the extent of volume of the passengers in the coaches. He was at pains to show that the train was carrying a normal volume of passengers and that as train guard; he had never seen a full train with passengers hanging on the doors. I am not convinced by his evidence on that assertion." [Paragraph 64]

"The case pleaded in the particulars of claim is that the plaintiff was pushed as she was disembarking the train and fell as the train was leaving the platform but in her reply to further particulars to the defendant, the incident took place whilst she was seated." [Paragraph 66]

"The evidence adduced by the plaintiff as to the reason for her fall, is not supported by any documentary evidence. On the contrary, the hospital records stated that the plaintiff advised that she slipped and fell due to the shoes was wearing. The hospital personnel had not reason to record the information as such and did so on the strength of what the plaintiff told them." [Paragraph 69]

"As a consequence of these material contradictions and failure to allege a consistent concise statement of her case in the particulars of claim, the Court is not persuaded that the plaintiff has discharged her onus to prove her case on the balance of probabilities that she was pushed from an overcrowded train and sustained injuries as a result." [Paragraph 71]

The claim was dismissed with costs.

CRIMINAL JUSTICE

NGWENYA V S (A573/17) [2017] ZAGPPHC 898 (14 DECEMBER 2017)

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

This was an appeal against a decision of the magistrates' court to deny bail to the appellant.

Senyatsi AJ held:

"The approach to bail by the court must be considered with the elements of the Constitution of the Republic. Section 35(1)(b) of the Constitution provides for a judicial evaluation of different factors that make up the criteria of the interest of justice. It is without doubt, important for judicial officers considering bail applications to harmonise Section 60(11) of the CPA with constitutional norms and imperatives." [Paragraph 9]

"As a consequence, the purpose of bail is to strike a balance between the interests of society and liberty of an accuse person. The basic objectives of bail, is to give effect to personal liberty in accordance with norm of the Bill of Rights enshrined in our Constitution." [Paragraph 10]

"The presiding Magistrate overemphasised the interest of justice and completely overlooked the spirit of the presumption of the innocent enshrined in our Bill of Rights in rejecting the bail application by the appellant. The court a quo was incorrect to refuse that although personal circumstances of the appellant were not disputed and that the State offered to rebuttal thereof, to find that the sworn statement was not sufficient to discharge the onus of exceptional circumstances justifying the release of the appellant on bail." [Paragraph 14]

"What was not disputed was that the appellant had a fixed residential and employment address. He was working for Eskom as a technician and lived in Springs with his family in a house worth R1 500 000,00. He was not a flight risk." [Paragraph 15]

"I do not agree with the finding by the learned magistrate that the likelihood existed that the appellant would attempt to evade his trial. There was no evidence before the court a quo to reach that conclusion. …." [Paragraph 16]

The court ordered the appellant to be released on bail, subject to conditions.

CHETTY AND OTHERS V S (A268/2015) [2016] ZAGPPHC 1165 (26 OCTOBER 2016)

This was an appeal by three appellants against a sentence of direct imprisonment for assault with intent to do grievous bodily harm. The appellants argued that the trial court should have ignored the J88 form as it did not comply with the provisions of section 212(4) of the CPA.

Senyatsi AJ held:

"A document purporting to be an affidavit or a certificate must have been prepared and the original thereof must be submitted to court. The person who made the affidavit (or certificate) must, at the stage when the examination was conducted or process followed, have been in the service of the state; in the service of a provincial administration; in the service of the of or attached to the South African Institute for Medical Research, in the service attached to any university in the Republic, or in the service of or attached to anybody designated by Minister of Justice for the purposes of subsection 212(4) of the criminal procedure Act, 1977 by notice in the *Government Gazette* and this fact must be alleged explicitly in the affidavit (or certificate)." [Paragraph 12]

"Evidence indicating that a factual finding was made by the deponent is allowed by section 212(4) but a fact must have been established by the deponent and such factual finding must be mentioned in the statement. Many section 212(4) statements received from state laboratories … currently express the conclusions of the deponents. Such conclusions indicate that the deponent formed an opinion with regards his/her analysis. Such opinion evidence is not sanctioned by section 212(4) and prosecutors and magistrates should resist the temptation to receive such statements. In cases where it is clear that the factual findings were not made by the deponent, *viva voce* evidence should be presented to prove the point in dispute. Many J88 forms, which can legally be submitted to a court in terms of section 212(4), not only mention the factual findings made by the medical practitioner … but, in cases of murder or culpable homicide, also contains the conclusion (or opinion) what the cause of death was. Such conclusion or opinion is, as was indicated above, not admissible in terms of the section 212(4) statement. If the cause of the death is in dispute in a particular matter, *viva voce* evidence should be preferably be presented to prove such." [Paragraph 14]

"In this case, there is no doubt that the elements of assault with the intent to do gross bodily harm were established by the admissions made by the appellants in their statements made in terms of the plea of guilty." [Paragraph 20]

"The intention of the legislature is clearly to ensure that production of evidence of a fact required to be proven by an expert is simplified by the certificate or the J88 form." [Paragraph 24]

"In proving such a fact intended in the section, the expert must be in the employment of the State or any organ referred to in section 212(4) of the CPA." [Paragraph 25]

"It is undisputed that Dr. I.R. Van der Merwe was neither in the employ of the State nor was he or she designated by the Minister when he or she completed the J88 form as contemplated in section 212(4)(iv) of the CPA." [Paragraph 26]

"As a consequence, the finding made by the trial court in determining the appropriate sentence, was based on a flawed certificate purported to be a J88. This in my view, constitutes irregularity and the appellants were prejudiced when their sentence was considered." [Paragraph 27]

"The trial court has failed to provide reasons as to what factors it took into account when imposing the non - parole order of six months." [Para 38]

The appeal against the sentence was upheld, and the non-parole order of the trial court was set aside. The trial court's sentence of three years imprisonment was substituted with one year's imprisonment wholly suspended for three years on condition that the appellants were not found guilty of a similar offence.

ADMINISTRATION OF JUSTICE

The application form discloses a caution for the late return of a trust account financial statement.

ADVOCATE JJ STRIJDOM SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 3 May 1995

Diploma Juris, University of South Africa (1979)

Senior Diploma Legum, University of South Africa (1983)

B. Juris, University of South Africa (1986)

LLB, University of South Africa (1993)

CAREER PATH

Acting Judge, Gauteng High Court (January – March 2013; January – April, May, December 2014; January – April, April – May 2015; July – September 2016; March, May – June, November – December 2017; January – March, April – June 2018).

Senior Advocate, Gauteng Society of Advocates (2018 -)

Society of Advocates, Pretoria

Senior Advocate (2010 -)

Advocate (1994 – 2009)

Department of Justice

Senior Prosecutor (1986 – 1993)

Chief Magistrate (1984 – 1985)

Magistrate (1980 – 1983)

Regional Court Prosecutor (1976-1979)

Clerk and Prosecutor (1975)

Society of Advocates Pretoria, training and lecturing pupil advocates (2008 -)

SELECTED JUDGMENTS

PRIVATE LAW

LANGA V MINISTER OF POLICE 2016 JDR 0291 (GP)

Case heard 2 December 2016, Judgment delivered 19 February 2016 [these dates appear in the law report, though clearly there must be an error].

The Plaintiff had instituted a civil claim against the Minister of Police, claiming damages for wrongful arrest and detention. The issue in dispute was whether the Plaintiff was arrested and detained and if so, the damages Plaintiff was entitled to.

Strijdom AJ held:

"During the course of cross-examination of the Plaintiff, the Plaintiff [sic] sought to amend the plea by admitting Plaintiff's arrest and detention, and claim that the arrest and detention was lawful. The application to amend was dismissed." [Paragraph 4]

"The evidence of Plaintiff was not seriously contested in cross-examination. The Plaintiff did not contradict himself on any material facts and there are no inherent improbabilities in his evidence. No evidence was adduced by the Defendant to gainsay the evidence of the Plaintiff. In my view the Plaintiff was a reliable witness." [Paragraph 7]

"It is common cause that the Plaintiff was arrested and detained in the police cells and in Dieploof Prison from 20 August 2010 to 30 August 2010" [Paragraph 8]

"An arrest and/or detention are prima facie wrongful. It is for the arrestor to allege and prove the lawfulness of the arrest or detention. The Defendant has the onus of establishing the lawfulness of the Plaintiff's arrest on a balance of probabilities." [Paragraph 9]

"No evidence was adduced by the Defendant to prove that the arrest was lawful." [Paragraph 12]

"In my view the Defendant did not discharge the onus to prove on a balance of probabilities that the arrest was lawful." [Paragraph 13]

"Plaintiff testified that the police concerned in the criminal case against him did not attend Court on numerous occasions when the case was postponed in the Magistrate's Court and subsequently the case was withdrawn against him. The inference can be drawn that after the arrest of the Plaintiff the police failed to give proper, if any, attention to the fact whether it was necessary to keep the Plaintiff in custody." [Paragraph 21]

"I am of the view that the Defendant did not discharge the onus to prove on a balance of probabilities that the detention of the Plaintiff was lawful." [Paragraph 23]

"Having considered the facts of this case and the principles and factors outlined in the aforesaid case, I am of the view that an award of damages in the amount of R120,000.00 would be appropriate in the circumstances." [Paragraph 31]

MODISANE V ROAD ACCIDENT FUND 2013 JDR 1300 (GNP)

Case heard 30 May 2013, Judgment delivered 30 May 2013

The Plaintiff claimed against the Road Accident Fund for loss of support. The Fund disputed liability on the basis that the minor in respect of whom loss of support was claimed was not legally adopted by deceased. The question was whether it was sufficient that the deceased had entered into a customary marriage with the Plaintiff, and expressed intention to adopt such child. The Plaintiff acted in her personal capacity as wife of the deceased, as well as her representative capacity as mother and natural guardian on behalf of her two children.

Strijdom AJ held:

"Plaintiff relies on the concept 'O e gapa le namane' as the basis for liability of the Defendant." [Paragraph 13]

"Reliance on the concept of 'O e gapa le namane', applies to children in the context of indigenous customs, practises and traditions. In that sense, it means 'Go nyala mosadi ka ngwana yo o sa mo tsaleng ka madi.' Loosely translated, it says 'To take a child born of another man into your marriage with its mother.' For all intents and purposes, it is equal to the customary adoption of a child." [Paragraph 14]

"A man who does not intend to take a child who is under the age of 14, born of another man into his marriage with the mother of that child, must express such intention during the negotiations and the entering into a customary marriage." [Paragraph 15]

"Nothing precludes a man from expressly manifesting a desire, during the negotiations and the entering into a customary marriage, to take the children into his marriage with their mother, and to assume the role of fatherhood for these children. Once there is such agreement, such children become the children of the spouse concerned, and the spouse concerned becomes the father of the children in full. This fatherhood amongst others attracts the duty to maintain each other. …" [Paragraph 17]

"I am satisfied that the Plaintiff has set out sufficient facts before me to conclude that the deceased took the child Kelebogile Modisane into his alleged customary marriage with the Plaintiff which is equal to the customary adoption of a child." [Paragraph 18]

"I am called upon to not only interpret, but also to be equal to the task of developing customary law." [Paragraph 19]

"When interpreting the Bill of Rights, a Court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom." [Paragraph 21]

"It follows that the Defendant is liable to compensate the Plaintiff and the two minor children for the loss of support suffered by herself as a result of the death of her late husband." [Paragraph 24]

CRIMINAL JUSTICE

S V DIALS 2013 (2) SACR 665 (GNP)

Case heard 28 May 2013, Judgment delivered 28 May 2013

The appellant was convicted in a regional magistrates' court of three counts of housebreaking with the intent to steal and theft, and sentenced to 12 years' imprisonment. He had a previous conviction for theft. He appealed against sentence.

Strijdom AJ and Dosio AJ held:

"The personal circumstances of the appellant, alluded to above, were taken into account by the trial court. However, pertaining to the personal circumstances of an accused in matters as serious as the crime in question, the following was stated in the case of *S v Vilakazi* 2009 (1) SACR 552 (SCA) B (2012 (6) SA 353; [2008] 4 All SA 396) in para 58:

> 'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background.'" [Paragraph 9]

"In assessing whether an appellate court should interfere with a sentence the disparity criterion is not always the appropriate measure by which to determine whether appellate interference is competent. The crucial factor which allows for the applicability of the approach is the appellate court's being able to arrive at a definite view as to what sentence it would have imposed. ..." [Paragraph 10]

"The trial court took all the relevant principles in regard to sentence, as well as the facts of the matter, into consideration. There is no reason to find that the trial court misdirected itself in any way or that the sentence imposed is unjust or inappropriate in the circumstances." [Paragraph 11]

"In assessing all the mitigating and aggravating circumstances I do not agree that the sentence induces a feeling of shock." [Paragraph 12]

The appeal was dismissed.

ADVOCATE REAN STRYDOM SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born : 17 December 1955

B Comm (1977) and LLB (1979), University of Stellenbosch

LLM (Constitutional Law) (1994), Rand Afrikaans University

LLM (Corporation Law) (2004), Rand Afrikaans University

CAREER PATH

Acting Judge, Gauteng & Mpumalanga High Courts (May – June, November – December 2011 ; May – June 2013 ; July – September 2014 ; February – March, October – December 2015 ; May – June, October – December 2016; May – June, August – September, October – December 2017 ; January – April, April – June, July – August 2018).

Advocate (1980 -)

Founding member, Mpumalanga Society of Advocates (2015 -)

Commissioner, Small Claims Court (1990 – 1998)

Member, General Council of the Bar Appeal Tribunal

Member and head of disciplinary committee, Randpark Golf Club.

SELECTED JUDGMENTS

PRIVATE LAW

MYHILL, ELE N.O (SWALIBE MINORS) V ROAD ACCIDENT FUND, UNREPORTED JUDGEMENT, CASE NO: 2009/30430 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 5 March 2012

This was an action for the setting aside of compromises entered into 13 years previously between two minor children as represented by their mother and the Fund.

Strydom AJ held:

"... Mrs Swalibe, according to the documentation referred to in evidence, accepted the compromises without an undertaking from the defendant to pay for future medical expenses. Provision for such an undertaking appeared on the printed forms she has signed, but was deleted. Considering her knowledge at the time that the children suffered from epileptic fits, she should not have, objectively considered, accepted these settlements without an undertaking from the defendant to pay for future medical expenses. By doing this she did not act in the best interest of the minors." [Paragraph 30]

"... The apportionment applied by the defendant for settlement purposes, by deducting 30% of the estimated value of the claims, was similarly not in the interest of the minor children. If the minor children's mother was contributory negligent in causing their damages, they would have had a claim against her to the extent that her negligence contributed to their injuries, alternatively, the defendant being liable for the full amount, would have had a counterclaim against Mrs Swalibe. On behalf of the defendant it was argued that the defendant was entitled to make an offer for settlement and it clearly was entitled to take into account that it had a counterclaim on its view of the merits." [Paragraph 31]

"The question is not whether legally some form of set-off could be applied in this kind of circumstance. It might be legally correct to do so, but is it in the best interest of the children when a mother avoids a counter-claim against her by reducing her minors' claims? I am of the view that set-off under these circumstances will not be in the best interest of minors. Considering that the amount offered is already an amount less than full value, such amount should not be reduced by 30%. The effect of the apportionment is that the minors only received 70% of that which was calculated to be the value of their claims. It would have been in the best interest of the minors to receive 100% of the calculated value of their claims. I find it difficult to understand why, under such circumstances, their claim should have been apportioned. Although possible litigation was avoided between the defendant and Mrs. Swalibe in her personal capacity, this should not have been done at the expense of the claims of the minor children. ... " [Paragraph 32]

"Once a finding is made that the compromises were not in the best interest of the children, the next enquiry should be whether these settlement agreements could legally be set aside." [Paragraph 33]

"The parties could not refer me to any decided cases on the issue ... Ultimately, the test should be whether the compromise was concluded in the best interest of the child at the time that it was concluded. In exercising the court's discretion as upper guardian, the court's paramount consideration is always the best interest of the child in question. ..." [Paragraph 37]

"... I have already come to the conclusion that the compromises were not in the best interest of the minors. In arriving at this conclusion, I have taken cognizance of the seriousness of the injuries and the evidence of epilepsy, the 30% apportionment applied, the lack of an undertaking given to pay for future medical costs, and the fact that possible litigation was avoided. I accept that a compromise should not be lightly set aside and that, in the words of Voet, 'manifest damage in a compromise is shown with difficult'. I am of the view again in the words of Voet, 'that a clear right of minor have been foregone in a compromise;. The 'best interests of minor children' standard tipped the scale, even considering that litigation was avoided, in favour of a finding setting aside these compromises. These compromises are prejudicial to the interest of the minor children." [Paragraph 41]

The compromise was set aside. On appeal, the decision was upheld by the SCA in **Road Accident Fund v Myhill NO (505/2012) [2013] ZASCA 73 (29 May 2013)**.

COMMERCIAL LAW

COSIRA NAMIBIA (PTY) LIMITED V AREVA PROCESSING NAMIBIA (PTY) LIMITED AND ANOTHER, UNREPORTED JUDGEMENT, CASE NO: 17248/2013 (SOUTH GAUTENG HIGH COURT)

Judgment delivered 16 July 2013

Applicant had contracted with first respondent to perform construction services, and in terms of the contract had to furnish a performance guarantee to the first respondent. Second respondent had issued a similar guarantee to the first respondent. First respondent called up the applicant's guarantee, alleging breach by the applicant. Applicant then sought to interdict the first respondent from receiving payment pursuant to the guarantee. The decisive issue was whether the guarantee was a "demand bond" or a "surety bond".

Strydom AJ held:

"... This is a legal question and requires interpretation of the performance guarantee. A demand bond is a bond where there is no requirement of an obligation of liability on the part of the contractor under the construction contract. All the beneficiary needs to do is to demand payment and comply with the specified events mentioned in the bond. The only basis on which liability can be avoided is fraud on the part of the beneficiary. ... [A] surety bond, also often referred to as a conditional bond, requires from a beneficiary to establish liability on the part of the contractor in terms of the contract. It is in the nature of a suretyship and the liability is accessory to the principal liability. A contractor may raise any defence which it has in terms of the construction contract." [Paragraph 4]

"It is common cause that the demand was made within the time limit and was formalistically in order. ... The ordinary rules applicable to contractual interpretation should be applied. The words in

the bond must be given their ordinary grammatical meaning. Unless there is ambiguity when this is done the court will not have to go beyond the interpretation of the ordinary meaning to establish the intention of the parties. … " [Paragraphs 6 - 7]

"… On a proper interpretation of the wording of the performance guarantee it becomes clear that what is stipulated as a requirement for liability is nothing more than a statement that the principal (applicant) is in breach of its obligation under the contract. It is not required [to] go beyond a mere statement alleging that the applicant is in breach … I find that the performance guarantee is a demand bond as the undertaking to pay is not depended [sic] upon any condition or term other than receipt by the surety … of the first respondent's demand in writing … The mere statement that the principal is in breach is sufficient to create the obligation to pay. … " [Paragraph 8]

"… [T]he further issue for decision is then whether the applicant has shown … that it has a defence to prevent the payment of the guaranteed amount. The only relevant defence … is the allegation that the first respondent with full knowledge of the true situation misrepresented the facts by stating that the applicant was in breach of its obligations under the contract, whilst this was not the case. According to the applicant, the contract between it and the first respondent was terminated by agreement and consequently the applicant could no longer have been in breach …" [Paragraph 9]

"… [T]he question is … whether the applicant has shown, on a prima facie basis, that the first respondent's allegation, that the applicant was in breach of the construction contract, was knowingly false, as the construction contract was already terminated by agreement, when the statement was made." [Paragraph 11]

"… I am of the view that on the applicant's own version it has not established an agreement to terminate. …" [Paragraph 13]

"… On the contrary, on the papers before me a finding can be made that the contact was terminated as a result of the applicant's default by suspending its performance in terms of the contract. This action amounted to a repudiation of the contract which was accepted by the first respondent." [Paragraph 17]

The application was dismissed with costs.

CIVIL PROCEDURE

STAND 278 STRYDOM PARK (PTY) LTD V EKURHULENI METROPOLITAN MUNICIPALITY (23503/2014) [2015] ZAGPJHC 79 (27 APRIL 2015)

Case heard 11 March 2015, Judgment delivered 27 April 2015

Applicant sought an order declaring that it was not liable to the respondent for arrears and charges on the account held by the previous property owners, and declaring that the respondent was not entitled to terminate the supply of services on the grounds that the previous owners were indebted to it. Several aspects of the relief sought were conceded. At issue remained a counter-application by the respondent.

Strydom AJ held:

"…. First, the respondent requires form this court to interpret this section to mean that the municipal debt incurred in relation to property rates, taxes and charges for the provision of municipal services pertaining to all prior owners of the property ("the historical debt") constitute charges upon the property in terms of section 118(3) of the Systems Act. Second, the respondent asked the court to label the statutory right involved "a sui generis lien having the effect of a tacit statutory hypothec, created by operation of law, over the property". Thirdly, that these properties are, upon the granting of a monetary judgment against the historical owners, or any other person legally responsible for any such municipal debt, and subject to an order to such effect being granted, to be considered executable for the sum of such judgment." [Paragraph 11]

"What the respondent is now seeking is a declaratory that should it obtain a monetary judgment in future, which remains unpaid, then this court must now, at this stage, find that execution against the applicant's property can be effected." [Paragraph 12]

"The effect of granting such an order would be that if a judgment is obtained against anybody for payment of the debt for arrear municipal fees, rates and taxes in relation to the properties of the applicant, and the judgment amount remains unpaid, the applicant's properties may be sold in execution if the applicant fails to pay the debt of the historical owners. Without a doubt such order will have far reaching consequences as the judgment will be used to declare other properties executable should there be unpaid historical debt owing to municipalities." [Paragraph 13]

"The affidavits do not record that the respondent has taken any steps yet to recover the historical debt from the parties liable therefor. Indeed, it does not appear … whether the historical debt remains claimable or even if the respondent has a valid claim therefor. … [T]he respondent has not obtained a judgment against any one of the previous owners regarding their alleged outstanding debt. In fact, the wording … of the notice of motion in the counter application makes it clear that the relief is sought subject to the granting of a monetary judgment for payment of arrear municipal debt in relation to the properties of applicant." [Paragraph 15]

"Considering that the respondent has not obtained judgment against the debtors, the debt may be disputed by the historical owners. They may do so as they may still have a monetary interest in the existence and extent of the debt as they might have indemnified subsequent purchasers against outstanding municipal fees. These debts might have prescribed. …" [Paragraph 18]

"… What the respondent also concedes … is that it has not started to take steps against the previous owners that are responsible for the historical debts. It first wants this court to confirm the legal position and to declare the properties of the applicant executable. On the respondent's own version, the Supreme Court of Appeal delivered judgments to the effect that execution can be effected against the properties in relation to which the debts were incurred. If this is the respondent's contention, it remains unclear why it requires from this Court to re-state the law. I am of the view that to require from this Court to declare the properties of the applicant executable to recoup historical debt without any judgment that such debt is outstanding and payable is untenable." [Paragraph 20]

"I am of the view that before a court can declare property executable, the principle obligation, i.e. the principal debt must be established and a judgment obtained. ... Once a judgment is obtained relating to the principal debt, a party can proceed to obtain an order to declare the security in relation to that debt to be executable. Without the debt being determined, there is no dispute or *lis* that exists between the applicant and the respondent. ... [T]he applicant is not liable to the respondent for arrears or charges on accounts held by previous owners of the properties. Whether the respondent can execute against the property of the applicant to obtain payment of historical debts is another matter." [Paragraph 23]

"I am not convinced of the correctness of the argument ... to the effect that a municipality, pursuant to the terms of section 118(3), can execute against properties of a current owner in relation to previous owners' historical debt outside the ambit of a transfer of the property where a preference is provided over any mortgage bond registered against the property. I do not intend to decide this issue as it is my view that without a dispute or *lis* between the parties in this matter I should not exercise my discretion in favour of the respondent to grant declaratory relief. ... [W]here no *lis* exist between litigation parties a court should not exercise its discretion in favour of ordering declaratory relief. The relief that the respondent is seeking is sought in a vacuum as there exists no judgment debt to be enforced against the applicant's property. Once such judgment is obtained and the extent of the liability is established, the respondent can approach a competent court for a declarator in terms of which the properties are to be declared executable. ..."

The counter-application was dismissed.

CRIMINAL JUSTICE

BABULI AND OTHERS V NATIONAL DIRECTOR OF PUBLIC PROSECUTION AND ANOTHER (CC32/14) [2017] ZAGPPHC 64 (24 FEBRUARY 2017)

Appellants were convicted for conspiracy to commit murder and murder, and sentenced to 15 years, 18 years, and life imprisonment respectively. The appeal was against conviction and sentence.

Strydom AJ (Moshidi and Meyer JJ concurring) held:

"Before dealing with the evidence of Ms Tlako and Mr Mpandana to establish whether their evidence could be accepted to convict the appellants, the reliance of the court a *quo* on the extra-curial statement of the co-accused to convict the appellants should be considered." [Paragraph 8]

"The wording of this section [s 219A of the Criminal Procedure Act] cannot be interpreted to mean that admissions made extra-curially by a co-accused can be relied upon for the conviction of another accused. Further, our Constitution does not permit the admission of an extra-curial statement by an accused against a co-accused as it infringes upon an accused's fundamental rights which are protected by the Bill of Rights. ..." [Paragraph 10]

"... [A]ny reliance the court a *quo* placed on the extra-curial admissions and statements of accused 1 and 7, which were not confirmed by them in court, to convict the appellants was wrong in law and will not be considered by this court to ascertain whether the State has proven beyond reasonable

doubt the guilt of the appellants. This court will have to consider the admissible evidence to establish whether the convictions of the court a *quo* should be sustained." [Paragraph 13]

Strydom AJ found that the court *a quo* had erred in relying on the evidence of Ms Tlako and Mr Mpandana, and continued:

"The state relied on a common intention between the accused to kill deceased to convict them on the murder count. What the court has done was first to find that a conspiracy to kill the deceased was proven, then the court relied on the statement of accused 7, which is inadmissible against the appellants, to conclude that the appellants formed a common purpose to kill and in fact caused the killing the deceased. Without a finding that the state has proven the conspiracy, and without further evidence, a finding of a common purpose cannot be sustained. The court a *quo* relied on the extra-curial statements of accused 1 and 7 in support of its inference that the appellants and accused 1 obtained the services of accused 7 to commit the murder. Apart from accused 7's statement there was no evidence whatsoever which indicated that the appellants and accused 1 agreed with accused 7 that he should perform the act of killing the deceased." [Paragraph 29]

The appeal was upheld, and the convictions and sentences set aside.

Media Coverage

Quoted in a dispute whether the building of a church on private property was interdicted:

> "The owners of a farm overlooking the Hartbeespoort Dam have obtained an urgent interdict against a neighbour who is apparently intent on building an illegal church on their property.
>
> The Kenya-based directors of the company BobTrak, which owns the farm on the Magaliesberg Ridge, took Kosmos Ridge businessperson Sello Mogodiri to court after he started bulldozing large areas of grassland, claiming he had bought the farm and was planning to build a church.
>
> Advocate Rean Strydom, who manages the property on behalf of the owners – both international businessmen – said in court papers BobTrak had bought the property from the government in 1998 under their previous name, Sonnberg Rehabilitasie, and were still its legal owners.
>
> They initially planned to develop 12 hectares of the property, which fell outside the Magaliesberg protected greenbelt area, and obtained authorisation to establish a township and the approval of an environmental plan, but delayed their plans because of the economic downturn and were considering selling the property.
>
> Strydom said he first became aware of the excavation in April.
>
> Mogodiri claimed he had bought 42 hectares of the farm from a mining company.

He said he was the new owner and was building a 2 700 square metre church on the land, but was not prepared to tell Strydom from whom he had bought it or give him an address.

Strydom said it was impossible that Mogodiri could have bought the land, because it could never have been sold without him being involved in the sale. He alleged Mogodiri had given him a false email address and never answered his calls.

Even after Mogodiri was warned not to continue with his conduct, he again started bulldozing a further area."

- Ilse de Lange, "Owners get interdict against neighbour trying to build church on their land", *The Citizen* 8 June 2017 (https://citizen.co.za/news/south-africa/1536619/land-grab-build-church/)

ADVOCATE SEENA YACOOB SC

BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

Born: 19 June 1973

LLM, Vrije Universiteit Amsterdam (2006)

LLB, University of Cape Town (2000)

BMus (Bachelor of Music), University of Durban-Westville (1996)

CAREER PATH

Senior Counsel (March 2018 - present)

Acting Judge, High Court of South Africa, Gauteng Division (November - December 2013; November 2014; May 2015; August 2016, November - December 2016, May – June, October - November 2017; June 2018. August - September 2018 scheduled).

Acting Judge, Land Claims Court (April - July 2016, October 2016 - January 2017).

Advocate, Johannesburg Bar (2003 -)

Pupil, Johannesburg Bar (2003)

Researcher, Land Claims Court (2001 - 2003)

Researcher, Thornton & Morris Attorneys (2001)

Research Assistant, Law Race and Gender Research Unit, University of Cape Town (2000 - 2001)

Project Co-ordinator, University of Durban-Westville Music Education Action Research Project (1997 - 1998)

Advocacy training, Johannesburg Bar (2017 -)

Representative, National Efficiency Enhancement Committee (2015 -)

Member, Johannesburg Bar Council (2011-12, 2014-15, 2016-17, 2018)

Secretary, Professional Committee of the Johannesburg Bar (2011 - 2013)

Deputy Secretary (National), Advocates for Transformation (2010-13)

Honorary Secretary, Johannesburg Bar Council (2008 - 2009)

Deputy Honorary Secretary, Johannesburg Bar Council (2006 - 2007, 2007 - 2008, 2008 - 2009)

Member and occasional member of branch exco., National Association of Democratic Lawyers (2004 -)

Member, Advocates for Transformation (2004 -)

SELECTED JUDGMENTS

SOCIO-ECONOMIC RIGHTS

MDAKANE AND ANOTHER V COLCHESTER ZOO SA PROPERTIES (PTY) LIMITED, UNREPORTED JUDGMENT, CAE NO. LCC157/2015 AND 159/2015, 13 JULY 2017 (LAND CLAIMS COURT)

Judgment delivered 13 July 2017

This was an application for relief, including the restoration of running water and a declaration that the applicants were labour tenants in terms of the Land Reform (Labour Tenants) Act (LRLTA). There was also a counterclaim for the eviction or relocation of the first plaintiff under the Extension of Security of Tenure Act (ESTA).

Yacoob AJ held:

"… All that had to be established [to be classified as a labour tenant] was that the parents or grandparents of Mr or Mrs Maduna [the second plaintiff] had worked in similar circumstances on any farm." [Paragraph 34]

"Unfortunately for Mrs Maduna, that was the fatal flaw in her case. There was no evidence whatsoever regarding previous generations. The evidence led before this court started with Mr and Mrs Maduna, and did not extend to their ancestors." [Paragraph 35]

"The labour tenants who are protected in terms of the LRLTA are those whose families have for at least two generations lived on farms, providing labour in exchange for the right to crop and graze. In the absence of any evidence at all regarding previous generations, I am unable to find that Mrs Mdakane is a labour tenant as defined, even if I find that she has fulfilled the other requirements of the definition." [Paragraph 36]

Yacoob AJ further held that the second applicant [Mr Maduna] did not meet the requirements to be classified as a labour tenant. Yacoob AJ then proceeded to consider the counterclaim for eviction or relocation:

"The first defendant … has attempted to rely on the contention that it did not give Mrs Mdakane consent to live on the farm. This contention has no merit. Mrs Mdakane was given consent … when she arrived with Mr Mdakane in 1985. ESTA provides … that consent is binding on successors in title. Section 24(1) also provides that an occupier's rights are also binding against successors in title. Mrs Mdakane's consent to remain on the farm has never been lawfully terminated." [Paragraph 47]

"There is therefore no basis on which Mrs Mdakane may be evicted. For this reason, I do not consider whether other requirements of ESTA regarding eviction have been fulfilled …" [Paragraph 49]

"However, it is clear that the current state of affairs is not sustainable. … Mrs Mdakane's rights of cropping, grazing and other use of the land have been gradually but definitely reduced. …" [Paragraph 50]

"ESTA defines "evict" to include depriving a person against her will "of the use of land … which is linked to a right of residence in terms of [ESTA]". The gradual but unmistakeable transformation … into a dedicated game farm on an increasingly ambitious scale has done exactly that to Mrs Mdakane. … The first defendant has, on its own version, spent millions of rands on game and on land, in pursuance of its conservation plan. This plan ought also to provide for dealing lawfully with people who have a right to reside on and use the land, such as Mrs. Mdakane." [Paragraphs 54 – 55]

Yacoob AJ held that neither Mrs Mdakane nor Mr Maduna were labour tenants, but that both were occupiers in terms of ESTA. Whilst there were no grounds for evicting Mrs Mdakane, the first defendant was entitled to relocate her, subject to the retention of her rights. Mr Maduna could only be evicted under ESTA [paragraph 84].

ADMINISTRATIVE JUSTICE

ARGENT INDUSTRIAL INVESTMENT (PTY) LTD V EKURHULENI METROPOLITAN MUNICIPALITY [2017] ZAGPJHC 14; 2017 (3) SA 146 (GJ)

Case heard 6 December 2016, Judgment delivered 13 February 2017

Applicant challenged an invoice issued by the respondent for water consumption, based on a reading of a water meter which had not been read since September 2009. The relief sought would have the effect that applicant would not pay for consumption that occurred more than three years before March 2015, on the basis that the obligation to pay for that consumption had prescribed. Applicant also sought to prevent applicant from terminating its water and electricity supply for non-payment of the amounts alleged to have prescribed. The respondent argued that prescription did not start running until the applicant was billed for that consumption, and that the fact that the applicant had regularly paid monthly amounts for its estimated consumption amounted to an acknowledgment of liability which interrupted prescription.

Yacoob AJ held:

"The respondent relies on s 12(3) of the Prescription Act for the contention that the debt only became due when the meter was read and the invoice issued, contending that it is only when the meter was read and the invoice issued that the respondent, the creditor, became aware of the facts giving rise to the debt. … I disagree that the prescription could not start running until respondent had taken these steps. This would be inconsistent with the very reason why the law recognises the concept of prescription. It would also entitle the respondent to ignore its constitutional duties, which include debt collection, indefinitely. It is worth noting that the respondent's duty to take reasonable steps to collect what is due to it are for the benefit of both the respondent and the applicant." [Paragraphs 11 – 12]

"… [T]he respondent had knowledge of the relevant facts. At all times, the respondent was aware that it was supplying water to the applicant. It was aware of the applicant's identity. It was clear from the fact that the applicant was paying an estimate each month, if from nothing else, that the respondent had not read the meter on the applicant's property. These are the facts giving rise to the debt. The only 'fact' of which the respondent did not have knowledge was the exact consumption of the applicant, and this was knowledge within the respondent's reach, had it simply fulfilled its functions. … Even if, as the respondent contends, it did not have the necessary knowledge of the facts giving rise to the debt, it is in my view clear in this particular case that the respondent could have acquired it by exercising reasonable care, that is, by reading the meter or meters on the property and issuing an invoice for consumption within a period less than that which did in fact elapse." [Paragraph 13 – 14]

"Had the respondent read the meter and informed the applicant of the indebtedness, the applicant's regular payments from that date without raising a dispute would have constituted acknowledgments of debt. However, a debtor cannot be considered to have acknowledged a debt of which it knows nothing, when either the details of the debt are particularly within the knowledge of the creditor, or only the creditor has the ability to quantify the debt, and does not do so." [Paragraph 19]

The respondent was ordered to reverse all charges for water consumption, legal fees and interest, and to calculate the applicant's average monthly consumption over the relevant period to be billed. Leave to appeal has been granted, and the appeal was heard by the SCA on 18 May 2018 (see http://www.justice.gov.za/Sca/roll/2018-02-amended.pdf).

CIVIL PROCEDURE

GREGORY AND OTHERS V MATHEBULA AND OTHERS [2016] ZALCC 13 (18 AUGUST 2016)

This was an automatic review in terms of section 19(3) of ESTA. The defendant's attorney had attempted to amend the plea submitted which was subsequently disallowed by the Magistrate due to the document not containing the amended pages.

Yacoob AJ held:

“The matter proceeded, with the defendant being prevented from testifying in any way that was at all inconsistent with the plea that he had already disavowed, and sometimes, even where the consistency of the evidence with the plea was open to doubt, to the extent that, in my view, all relevant matters were not properly ventilated before the Magistrate. The defendant was even prevented from testifying as to whether he had lodged an application in terms of Chapter III of the Land Reform (Labour Tenants) Act ...” [Paragraph 7]

"It is also my view that the Magistrate could, and ought to, have exercised his discretion to permit the amendment of the plea to stand. This would have permitted the defendant's contention that he was a labour tenant to be dealt with, and would also have prevented the unusually constraining approach that was taken in the proceedings, which prevented the defendant from testifying fully about issues which were, on a generous interpretation, consistent with the plea that both he and his attorney disavowed.” [Paragraph 8]

“Had the Magistrate permitted the amendment, this would have been in the interests of justice. ..." [Paragraph 9]

Yacoob AJ set aside the magistrate's order, and ordered that the defendant's plea be deemed to be amended.

PUBLICATIONS

Yacoob, S and Pillay, "Licensing" in Thornton et al, *Telecommunications Law in South Africa*, STE Publishers, 2006. Published online also.

Yacoob, S, "Shopping for Justice: The (Non-) Enforcement of an Arbitral Award Set Aside in its Country of Origin" in *Griffin's View on International and Comparative Law*, Vol 8, No 1, January 2007.