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

OCTOBER 2014

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. The mission of the DGRU is to advance, through research and advocacy, the principles and practices of constitutional democratic governance and human rights in Africa. The DGRU's primary focus is on the relationship between governance and human rights, and it has established itself as one of South Africa's leading research centres in the area of judicial governance, conducting research *inter alia* on the judicial appointments process and on the future institutional modality of the judicial branch of government.

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, monitoring and commenting on the interviews of candidates for judicial appointment.[1] Such reports have been complied for JSC interviews in September 2009, October 2010, April and October 2011, April, June and October 2012, February, April and October 2013, and April 2014.

3. The intention of these reports is to assist the JSC by providing an objective 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. In this submission, we intend to explain the methodology of the report, and make brief submissions on what we feel are some of the key issues for the JSC in exercising its constitutional mandate. We do so particularly for the interest of new members of the JSC.

METHODOLOGY OF THIS REPORT

4. The report set outs summaries of the nominee's judgments, as far as possible in their own words. We do not advocate for or against the appointment, and do not provide analysis or criticism of the judgments summarised. Our intention in doing so has always been to attempt to move beyond the often partisan and personalised debates surrounding the suitability of candidates for judicial appointment. Instead, we hope to further a deeper analysis of the criteria in terms of which judicial appointments are made, and enable stakeholders to assess how a candidate's judicial track record matches up to those criteria. The report does not seek to advocate, explicitly or implicitly, for the appointment of any candidate.

5. We have searched for judgments on the *Jutastat, LexisNexis* and *SAFLII* legal databases. We have attempted to focus, as far as possible, on judgments most relevant to the courts to which candidates are applying. In this light, we have included only judgements relating to labour law

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

matters in our summaries of the Labour Court candidates. Regarding candidates for the Free State Judge Presidency, we have attempted to focus on decisions that might bear in some way on leadership and administrative qualities, where such judgements are available. Therefore, in respect of some of these candidates, there may not be as wider range of cases presented as in the case of other candidates.

6. It is important to remember that this report provides a sample (we hope a fair one) of each candidate's judicial track record - not a comprehensive summary of all their judgments.

7. In selecting judgments to include, we have continued to be guided by factors that have informed our previous reports. These include looking for evidence of the importance and ground-breaking nature of judgments; of independent-mindedness; of a depth of research and analysis; of the candidate's capacity for hard work; and of the development of a candidate's judicial philosophy.

8. We present the summarised judgements in thematic groups. Our aim in doing so is to try and make the report more accessible, and also to highlight more directly the candidates' track records on issues which we believe are relevant to their suitability for appointment.

9. We have developed these thematic areas based on our observations of the JSC's interviews, and on our own assessment of issues that are relevant in appointing judges to the court in question. We recognise that this process of categorisation remains a work in progress, and that it does not necessarily cover all the themes that may be relevant. There will also often be an overlap between different themes. The categories have in large part been informed by the judgements given by the candidates for these interviews, and may be varied in future reports.

10. The themes under which judgements are grouped are the following:
    - 10.1. Private law;
    - 10.2. Commercial law;
    - 10.3. Civil and political rights;
    - 10.4. Socio-economic rights;
    - 10.5. Administrative Justice;
    - 10.6. Constitutional interpretation (regarding structural provisions of the Constitution)
    - 10.7. Labour Law;
    - 10.8. Civil Procedure;
    - 10.9. Criminal justice;
    - 10.10. Childrens' rights;
    - 10.11. Customary law; and
    - 10.12. Administration of Justice, within which we deal with issues such as the exercising of appellate functions, dealing with professional misconduct by members of the legal profession, and the awarding of costs.

11. We list all of the categories we have identified – not all of which will necessarily be applicable to all the candidates in a particular session of interviews.

12. We hope that together, these themes will bring out a pattern that might be called a philosophy or theory of adjudication. We believe that analysing and engaging with a candidate's "judicial philosophy" ought to be a central feature of the interview process.

SUBMISSIONS REGARDING THE INTERVIEW PROCESS

13. Although we will avoid going in to extensive detail on issues that are covered in our earlier reports, we felt this would be a good opportunity to set out our views on some of the most significant general issues relating to the judicial appointments process. We do this as observers of the judicial appointments process, in a spirit of constructive engagement, which we hope will be helpful to the JSC in discharging its vital constitutional mandate.

Fair Questioning

14. One of the major issues we have had occasion to comment on while observing the JSC's public interview process is the fairness of the procedure followed in the interviews. This relates to the fairness of questions asked of candidates, the time allocated to the interviews of each candidate, and the equality of treatment of candidates generally.

15. We have observed several instances of similarly-placed candidates being subjected to interviews that differ, sometimes dramatically, in terms of both their length and the level of scrutiny placed on each candidate.

16. We are not suggesting that every candidate must be asked exactly the same questions. It would probably be neither feasible nor appropriate for the JSC to adopt the approach of modern 'good' human resources practice, by having the precisely the same template of questions put to each candidate for a position, because a judicial appointment should not be equated with the appointment of an employee. However we do submit that each candidate for a judicial vacancy should be given the same, or at the least a sufficiently similar or equivalent, opportunity to answer any question of importance and substance related to the specific appointment.

Transformation

17. The issue of the transformation of the judiciary is one that frequently attracts controversy. We acknowledge that the Constitution requires the JSC to recommend the appointment of people who are "appropriately qualified" and "fit and proper" (section 17(4)(1) of the Constitution), and in so doing, it has to consider "the need for the judiciary to reflect broadly" the racial and gender composition of the country (section 174(2) of the Constitution).

18. We believe that diversity in the judiciary is crucially important. An important aspect of this is transformation of the demographic transformation of the bench, to enable people to identify with the composition of the judiciary and thereby enhance the credibility of the judiciary. We believe that it is also important that diversity encompasses the presence of a wide variety of viewpoints and life experiences on the bench.

19. We also believe that it is clear from the constitutional provisions quoted above that no candidate can be appointed on the basis of their race or gender alone. They must be "appropriately qualified" and "fit and proper" in terms of section 174(1). Other pertinent factors that make an ideal judge must also be taken into account. Issues such as technical expertise, legal knowledge and experience, the ability to write judgements and manage the courtroom environment, as well as a candidate's potential, all play a fundamentally important role.

20. As to the section 174(1) criteria, we submit that the following criteria are relevant to determining whether a candidate is fit and proper:

    20.1. A commitment to constitutional values and to applying the Constitution's underlying values of human dignity, freedom and equality, with compassion and empathy and with due regard to the separation of powers and the Constitution's vision of social transformation.
    20.2. Independence of mind – the courage and disposition to act independently, free from partisan political influence and private interests.
    20.3. The disposition to act fairly, impartially and without fear, favour or prejudice.
    20.4. High standards of ethics and honesty.
    20.5. A judicial temperament, which includes qualities such as humility, open-mindedness, courtesy, patience, thoroughness, decisiveness and industriousness.

21. As far as the requirement of "appropriately qualified" is concerned, we submit that this ought to include a consideration of formal qualifications, experience and potential.

22. We do not believe that a sincere and rigorous attempt to implement section 174(2) will weaken the judiciary – rather, it will improve the quality of the bench by aiding the criterion of the diversity of mindset and life experience discussed above.

23. DGRU has previously raised concerns about the slow pace of gender transformation in the judiciary. It is encouraging to see that, by our count, nine out of thirteen of the candidates being interviewed in this sitting of the JSC are women. It is heartening that women candidates are indeed putting themselves forward for appointment. We hope that this will lead to an increase in the number of women appointed to the judiciary.

Separation of powers

24. We suggest above that one aspect of determining whether a candidate is fit and proper for appointment is whether they have due regard to the principle of the separation of powers. Whilst acknowledging that this is important issue, we have been concerned that in recent years some members of the JSC have focused so strongly on this issue that all discussion of important issues about a candidate's mindset and judicial philosophy has been collapsed into an enquiry into their views on the separation of powers. Whilst acknowledging that the issue is important, we are concerned that this approach risks overlooking candidates' approach to many other important constitutional and legal issues.

25. We have also been concerned that much of the questioning of candidates on their views on the separation of powers seems to focus on the perceived need for the courts not to "intrude" into areas of responsibility of other branches of government, without taking into account that the Constitution requires the courts to declare invalid legislation and conduct that is contrary to the Constitution (see section 172(1)(a) of the Constitution).

26. Whilst acknowledging that this issue is an appropriate one on which candidates can be questioned, we urge that such questioning should not serve to "weed out" candidate who might be perceived as independent-minded and committed to upholding the Constitution, but must take into account the mandate given to the courts by the Constitution to hold other branches of government to account.

Shortlist Timing

27. In our submission prior to the April 2014 interviews, we noted that there is effectively 3 weeks or less available for interested organisations to conduct research on shortlisted candidates' judicial track records (as well as any other pertinent aspects of their background),disseminate that research to other interested stakeholders, and draft comments on their views on candidates' suitability for appointment, based on that research.

28. We noted that many organisations do prepare carefully considered submissions within the time available, but submitted that the time available to prepare submissions is too short. The process of preparing this report, even though only thirteen candidates are to be interviewed, has reinforced that view. We urge the JSC to take any steps necessary to its timeframes to allow for a longer time period between the announcement of the shortlist and the interviews taking place.

29. Doing so would facilitate greater public participation in the judicial appointments process, especially by "grass roots" community organisations, whose clients are often regular users of the courts. It would also be to the benefit of the JSC, by facilitating the preparation of detailed and carefully considered submissions to place before the commission.

ACKNOWLEDGEMENTS

30. Under the guidance of Associate Professor Richard Calland, Director: DGRU, this research was conducted by Chris Oxtoby, DGRU researcher, and Sarai Chisala and Omowamiwa Kolawole, DGRU research assistants.

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DGRU

30 September 2014

SELECTED JUDGMENTS

PRIVATE LAW

MNQUBENI V RAF [2008] JOL 21842 (CK), CASE NO. 250/07

Case heard 21 December 2007, Judgment delivered 22 May 2008

The plaintiff sued the Road Accident Fund after her grandson (Xolani) was injured in a collision with a motor vehicle whilst riding his bicycle. She claimed damages in her capacity as her grandson's guardian for bodily injuries incurred by him. The parties agreed to separate from merits from quantum.

Cossie AJ held:

"In this matter we are dealing with two mutually destructive versions. The defendant has conceded being liable, but contends that Xolani also contributed to the collision, he having been negligent, *inter alia*, in riding into the path of travel of the insured driver at a dangerous and inopportune time. I must determine whether the collision occurred solely as a result of negligent conduct on the part of the insured driver or whether Xolani also contributed, through negligent conduct on his part, as well. Where a court is faced with two mutually destructive versions the rule as set out in the judgment of Eksteen JA in *National Employer's General Insurance Co Ltd v Jagers*... should be followed, namely, a plaintiff can only succeed if: '...he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version... is therefore false or mistaken and falls to be rejected'" [Paragraph 10]

"I prefer the version of the plaintiff to that of the defendant. There are a lot of improbabilities in the latter version, whereas the version of the plaintiff is clear and straightforward. The witness for the plaintiff was credible despite his age. He gave straightforward evidence and was not shaken in any manner under cross-examination. However, the same cannot be said about the witness for the defendant..." [Paragraph 11]

"On the defendant's version it is evident that reasonable care was not exercised by the driver of the insured vehicle and in the circumstances there can be no degree of contributory negligence on the part of the plaintiff and there is also no scope for damages on the plaintiff's version... I am satisfied that the plaintiff has discharged the onus resting on him to prove liability and that the insured driver's negligence was the sole cause of the collision. On the facts I cannot find that Xolani was negligent either in causing the collision or by failing to avoid it." [Paragraph 12-13]

The application succeeded and the defendant was to be held liable for the plaintiff's proven damages.

ADMINISTRATIVE JUSTICE

NTSHIBA V MEC, ECONOMIC AFFAIRS, ENVIRONMENT & TOURISM, EASTERN CAPE PROVINCE & ANOTHER [2008] JOL 21481 (Ck)

Judgment delivered: 14 February 2008

The applicant was appointed as Chairperson of the Eastern Cape Provincial Liquor Board, in which position he served for a period of about 4 years. Having not obtained any compensation, he sought compensation for rendering duties in that position. The issue in dispute was whether the applicant was entitled to be remunerated for services he rendered to the Liquor Board.

Cossie AJ first stated the material facts that were common cause in the matter:

"The applicant is employed as senior legal administration officer in the Shared Legal Services section in the office of the Premier of the Eastern Cape Province in Bisho… was appointed as Chairperson of the Eastern Cape Provincial Liquor Board ("the Liquor Board") on or about 19 June 2000 and served in that capacity continuously until August 2004…" [Paragraph 1-2]

"Before his appointment as Chairperson…the Chairperson then being one Mr Lukwango-Mugerwa ("Mugerwa") who was employed in a rank and post equivalent to his own and who had in addition been remunerated for serving as Chairperson…The applicant was not remunerated for his services as Chairperson…The applicant over an extended period of time made numerous representations to various functionaries and officials for him to be remunerated for services he rendered to the Liquor Board without success. Eventually…Mr Godongwana, the MEC then in office, approved the payment of such remuneration per memo dated 26 February 2002…" [Paragraph 4-6]

"Despite such approval and the legal opinion supporting such approval the second respondent, the Head of Department at the time these proceedings were instituted, ignored calls to pay the applicant for services rendered as Chairperson of the Board hence this application… The remuneration sought by the applicant, which in fact is "top up" payment, amounts to R799 199,27." [Paragraph 7-8]

Cossie AJ then held:

"The applicant's contention is that his claim is based on sections 41(1)(i), 41(3)(a) and 28 of the Public Service Act ("the Act") read together with Public Service Regulations …In terms of *B5* of Part VII of the Regulations an employee is entitled to compensation for acting in a higher vacant post. This is commonly known as 'top up'." [Paragraph 11-13]

"In the present case a decision was made by the respondents' predecessors that applicant should be remunerated for services rendered to the Liquor Board and that decision has not been withdrawn or cancelled…The decision was made by an executing authority within the powers delegated to him

both in terms of the Public Service Act and the Public Finance Management Act read together with prescripts applicable thereto." [Paragraph 35-36]

" There are no allegations made that the decision was unlawful or that steps were being taken to set it aside or that the approved remuneration purportedly due to the applicant constituted an unauthorised expenditure....In the absence of such allegations the decision to pay applicant the approved remuneration remains valid and enforceable. " [Paragraph 37- 38]

"In my view, the applicant is an employee in terms of section 8(1) of the Public Service Act ... and the prescripts that govern the public service are also applicable to him and is therefore entitled to rely on them. His appointment to the Liquor Board as a "serving office bearer" that is, a person in the employ of the State did not preclude him from such benefits." [Paragraph 39]

"There is no doubt that the applicant had a legitimate expectation that he would be paid as per approval by both offices of the predecessors of the respondents." [Paragraph 41]

"In reviewing the second respondent's decision not to pay the applicant the additional remuneration it is necessary to analyse her reasons for such a decision to determine whether they measure up to her powers as provided for in the statutes empowering her to do so, having regard to the fact that there is prior approval for payment of such additional remuneration by her predecessor and the then MEC responsible for Liquor Board matters. " [Paragraph 43]

"Furthermore it would be necessary to determine whether such decision constitutes an "administrative action". The second respondent's action falls squarely within the definition of administrative action as contained in section 1 of Promotion of Administrative Justice Act ..." [Paragraph 44]

"In the present case a decision was taken by the respondents' predecessors to pay applicant "top up" remuneration and that constituted an "administrative action". The decision was based on legal framework and delegated authority applicable at the time. I am of the view that applicant is entitled to have the decision of the second respondent judicially reviewed in accordance with the provision of PAJA" [Paragraph 46]

"For the reasons set out above, I have come to the conclusion that the applicant was successful in establishing a case for judicial review of the second respondent's decision not to pay the applicant such additional remuneration as he was entitled to, in terms of the applicable prescripts in the public service for performing duties as Chairperson of the Provincial Liquor Board." [Paragraph 49]

The decision taken not to pay the applicant such additional remuneration as he was entitled to in was reviewed and set aside and declared unlawful, unconstitutional, void and without legal force and effect. The respondents were ordered to pay to the applicant all outstanding remuneration plus interest that should have been paid to him *qua* Chairperson of the Provincial Liquor Board from 19 June 2000 to September 2004.

CRANKSHAW & OTHERS V MEC, DEPARTMENT OF EDUCATION, EASTERN CAPE PROVINCE & OTHERS [2008] JOL 22704 (Ck)

Judgment delivered 11 November 2008

As representatives of certain independent schools, the applicants instituted proceedings against the respondents, seeking the review of the respondents' decision to reduce the applicants' subsidy (originally granted in terms of section 48(2) of the South African Schools Act ("the Schools Act")) for the years 2003, 2004 and 2005 in contravention of the provisions of the National Norms and Standard published by the third respondent in the *Government Gazette* ("the Norms and Standards"). The amount of the subsidy had to be determined each year by reference to the variables set out in the formula provided in the Norms and Standards by the Provincial Department of Education. The issues for determination were whether the decision by the respondents to pay a reduced subsidy to the applicants constituted "administrative action"; and, if so whether the respondents were obliged to give the applicants a hearing prior to the decision to reduce the subsidy and whether the respondents did give the applicants a hearing before reducing the subsidy.

Cossie AJ held:

"The first issue, that is, whether payment of subsidies in terms of section 48(2) of the Schools Act constituted administrative action was considered by Leach J in *Ed-U-College* (*PE*) *Incorporated v Permanent Secretary*, *Department of Education & Welfare*, *Eastern Cape*... The conclusion reached by the Constitutional Court in this regard in the matter of *Permanent Secretary*, *Department of Education*, *Eastern Cape & another v Ed-U-College (PE)* was consistent with that reached by the court a quo. The Constitutional Court ... observed that section 48(2) of the Schools Act empowered the MEC to grant subsidies to independent schools from monies allocated for that purpose by the Legislature. The determination which schools should be afforded subsidies and the allocation of such subsidies were primarily administrative tasks....Accordingly, this Court following both decisions of Leach J and the Constitutional Court in *Ed-U-College* (*PE*) *Inc*, holds the view that the decision of the respondents to pay less subsidy to the applicants constitutes an "administrative action" within the meaning of section 33 of the Constitution." [Paragraph 30-32]

"The second question to be determined by this Court is whether the respondents were obliged to give the applicants a hearing prior to reducing the subsidy and whether the respondents gave the applicants such a hearing...The respondents argued that it is not the case of the applicants that prior to 2003 they were receiving full subsidy in terms of Norms and Standards...there is no basis for the applicants to harbour any legitimate expectation because the granting of a subsidy to an independent school is subject to the availability of funds from the provincial Department of Education. The applicants' legitimate expectation could not be based on the legislative framework and Norms and Standards promulgated by the respondents." [Paragraph 33-34]

"In the matter of *Premier*, *Mpumalanga* the concept of legitimate expectation was dealt with at length. Corbett CJ in *Administrator*, *Transvaal & others v Traub & others* considered in detail the origins and development of the concept of legitimate expectation in English law. He ruled that a legitimate expectation must have a reasonable basis and in considering what conduct would give

rise to a legitimate expectation, he cited the speech of Lord Roshill… *Service* as follows: 'Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.'" [Paragraph 35]

"Corbett CJ also recognised that a legitimate expectation might arise in at least two circumstances: first, where a person enjoys an expectation of a privilege or a benefit of which it would not be fair to deprive him or her without a fair hearing, and secondly, in circumstances where the previous conduct of an official has given rise to an expectation that a particular procedure will be followed before a decision is made." [Paragraph 36]

"In the present matter the applicants rely on the legislative framework and Norms and Standards promulgated by the respondents. However the granting of a subsidy to an independent school depends on the availability of funds in the Provincial Education Department and furthermore it is not the case of the applicants that prior to the 2003 financial year they were receiving full subsidies. There was also no promise or undertaking by the respondents that subsidies will always be paid in full." [Paragraph 37]

"In all these circumstances the applicants have failed to establish that they had a legitimate expectation that they would receive subsidies in the amounts claimed and calculated in terms of the formula applicable under Norms and Standards. This matter must be distinguished from the *Premier*, *Mpumalanga & another v Executive Committee*, *Association of Governing Bodies of State-Aided Schools*, *Eastern Transvaal…*matter. In that case the court was concerned with a retroactive termination of bursaries already granted whereas this Court is concerned with a decision to allocate subsidies in circumstances where the amount available for distribution has been reduced by the Legislature." [Paragraph 38]

"The next question that arises is whether the payment of less subsidy to the applicants was procedurally unfair because they were never given a hearing by the respondents prior to such decision being taken. In the *Premier*, *Mpumalanga* case it was held that:

'. . . if a legitimate expectation has arisen concerning the grant of subsidies then any decision to alter or vary subsidies granted must be taken with due regard to procedural fairness. Procedural fairness will not require that a right to a hearing be given to all affected persons simply because a decision is to be taken which has the effect of reducing the amount to be paid. Subsidies are paid annually and given the precarious financial circumstances of education departments at present, schools and parents cannot assume in the absence of any undertaking or promise by an education department that subsidies will always continue to be paid at the rate previously established or that they should be afforded a hearing should subsidies have to be reduced because the Legislature has reduced the amount allocated for distribution.'" [Paragraph 40]

"The other matter that has to be considered by this Court is the submission made by the respondents that it would not be appropriate for this Court to grant an order directing the respondents to pay to the applicants the monies set out in the notice of motion …I …conclude that this argument is not valid. If a court arrives at a conclusion that the government owes money to a

litigant, the fact that the government has not budgeted for such payment cannot deprive the court of the power to make an appropriate order…This conclusion is consistent with that reached by Leach J in the court of the first instance and O'Regan J in the Constitutional Court in the matter of *Ed-U-College*." [Paragraphs 41-42]

"The courts have also taken a decision in this regard, namely, that a person whose legitimate expectation has not been considered is limited to a procedural right to be heard and not a legal right to seek specific performance. …" [Paragraph 43]

The decision taken by the first and second respondents to decrease the subsidy to the applicants was reviewed and set aside. The matter was referred back to the respondents to give applicants a hearing.

SELECTED JUDGMENTS

CRIMINAL JUSTICE

MENZE V S (CA&R66/2014) [2014] ZAECGHC 75

Judgment delivered 10 September 2014

This was an appeal against a sentence of fifteen (15) years imprisonment imposed upon the appellant following his conviction on a charge of robbery with aggravating circumstances. The Judge President had ordered that at the hearing of the Appeal, submissions be made concerning the age of the Appellant at the time of commission of the offence and the applicability of Section 51 (2) of the Criminal Law Amendment Act in the light of the Constitutional Court's judgment in the Centre for Child Law v Minister of Justice and Constitutional Development and Others.

Jacobs AJ (Mey AJ concurring) held:

"The date of birth of the appellant, which appears on the criminal record system, was handed in by the state, as an exhibit, and is also confirmed by the appellants' submission, indicates that the appellant was 16 years old at the time of the commission of the offence. In Centre for Child Law … the majority per Cameron J declared that section 51(1) and (2) of the Criminal Law Amendment Act … are inconsistent with the Constitution and invalid, to the extent that they apply to persons who were under 18 years at the time of the commission of the offence. The relevant age to be considered of the accused is the age at the commission of the offence, and not the age of the accused at the time of the hearing. Minimum sentence legislation is therefore not applicable in this case." [Paragraph 3]

"In S v Fazzie and Others 1964 … the following was held: "This court will not readily differ from the Court a quo in its assessment either of the factors to be had regard to or as to the value to be attached to them. Where, however, the dictates of justice (my emphasis) are such as clearly to make it appear to this court that the trial Court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial Court will be regarded as a misdirection on its part entitling this Court to consider the sentence afresh" [Paragraph 4]

"The trial court, in applying minimum sentence legislation, therefore misdirected itself. …" [Paragraph 5]

"… The failure on the part of the Regional Magistrate to sentence the appellant without having regard to a pre- sentence report is an irregularity that requires the sentence imposed on the appellant to be set aside" [Paragraph 7]

The appeal was upheld, and the case remitted to the trial court to reconsider the sentence.

PIENAAR V S (CA&R439/2013) [2014] ZAECGHC 74

Judgment delivered: 10 September 2014.

This was an appeal with leave from the Judge President on petition against the sentence of eight (8) years imprisonment imposed on the appellant pursuant to a conviction on housebreaking with intent to steal and theft.

Jacobs AJ (Mey AJ concurring) held:

"… The approach of a court of appeal in considering an appropriate sentence is that it will be slow to interfere with a sentence imposed by a trial court. It may interfere in exceptional circumstances where the interests of justice require it to do so" [Paragraph 1]

"The court of appeal will determine an appropriate sentence it would have imposed had it sat as a trial court and compare it with the actual sentence that the trial court imposed. If the difference between the two sentences is too great and the inference is capable to be drawn that the trial court had acted unreasonably court will be justified to interfere". [Paragraph 2]

"In S v Baartman … Jones J held: "(a) The accused should be sentenced for the offence charged and not for his previous record; (b) The public interest is harmed rather than served by sentences that are out of all proportion to the gravity of the offence". The appellant must be punished for the offence he was convicted of and not for other crimes in the past. Previous convictions are relevant to sentence, but only in so far as they reflect upon the character of the accused. A person with a record such as that of the appellant is obviously less deserving of mercy than is a first offender; he is also probably less amenable to rehabilitation". [Paragraph 5]

"The sentence imposed must always fit the crime. A long list of previous convictions of a similar nature is indeed very important. It could however never serve to extend the period of sentence to the extent that it is disproportionate to the seriousness of the crime for which such a person must be punished. A sentence of eight (8) years' imprisonment in circumstances where there was no actual loss suffered strikes me as unduly harsh. In the light of what I have stated above I am of the view that this court is entitled to intervene and to substitute the sentence imposed by the court a quo. In my view the proposed sentence of five (5) years' imprisonment is appropriate and fair". [Paragraph 6]

WINDVOEL V S (CA&R51/2014) [2014] ZAECGHC 73

Judgment delivered: 10 September 2014

This was an appeal against the sentence of 10 years imprisonment. The appellant was convicted of housebreaking with intent to rape, and rape.

Jacobs AJ (Mey AJ concurring) held:

"The provisions of section 51 (2) (b) of the Criminal Law Amendment Act … are applicable. The appellant is a first offender of the nature and extent of this type of offence, and therefore the minimum sentence applicable is 10 years imprisonment. The magistrate wrongly held that the minimum sentence was 15 years imprisonment, but found substantial and compelling circumstances and imposed 10 years imprisonment. The sentence imposed was clearly a misdirection by the magistrate, which leaves this court to interfere with such sentence, and impose a sentence afresh". [Paragraph 1]

"In S v Malgas … it was stated "where a material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so it assesses the sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance." [Paragraph 2]

"The complainant did not suffer any physical injuries. Apart from the normal trauma associated with Rape she however suffered the indignation of being raped in her boyfriend's house. The trial court therefore correctly concluded that this is indeed a serious offence and that the interest of society can only be served if the appellant is removed from society for a considerable period of time". [Paragraph 5]

"The mitigating factors being that the appellant was employed and has minor dependent children viewed in the light of the seriousness of the offence and the interest of society does not constitute substantial and compelling circumstances which warrant a departure from the minimum sentence of 10 years." [Paragraph 7].

"There is in my judgment, no proper basis not to impose the minimum sentence of ten (10) years imprisonment". [Paragraph 8]

SELECTED JUDGMENTS

PRIVATE LAW

PATERSON OBO NZWANA V ROAD ACCIDENT FUND AND ANOTHER 2013 (2) SA 455 (ECP)

Case heard 19 April 2012, Judgment delivered 26 April 2012

Nzwana was injured in a motor vehicle collision on 27 June 2006 in Port Elizabeth while at work as a pipe layer on the roadside. On 8 June 2010 the Court ordered (by agreement) per Kroon J that the merits of the case be heard separately. The same order provided that the first respondent conceded the merits and agreed to pay Nzwana 100% of his proven or agreed damages. On 4 August 2010 the Court ordered, per Revelas J, that the Defendant furnish First Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, for the costs of future accommodation of Nzwana in a hospital or nursing home, or treatment of or rendering of a service to him or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision after such costs had been incurred and upon proof thereof. The first respondent provided the applicant with an undertaking purportedly in terms of Section 17(4)(a) of the Act as ordered by this Court, the problem being the insertion of a proviso that differed from the order by Revelas J. The issue for decision was whether the proviso amounted to an impermissible non-compliance with the order of Revelas J.

Malusi AJ held:

"The important fact to note is that it is the trial Court that is compelled to have regard to the compensation already paid and not the employee (applicant). It is thus not necessary for a certificate which is for the benefit of the patient (applicant) to include a reference to what the trial Court must consider." [Paragraph 12]

"The distinction that final judgment was still pending on the damages when the proviso was inserted is without merit. The trial Court would in due course have had regard to any payment made in terms of the certificate before deciding on the final award of damages. It is not for the patient to prove what compensation has been made by the Commissioner when he proves costs incurred as provided in Section 17(4) of the Act." [Paragraph 14]

"The fact that the order by Revelas J was by agreement is also an important consideration to bear in mind. The effect of the agreement being made a Court Order is that it is then binding on both parties. The first Respondent, cannot thereafter, unilaterally add any proviso to an undertaking directed by Court especially one that amounts to a qualification. The proviso further specifies an inception date of 22 October 2010. This date was not provided in the order of Revelas J and was certainly not with Applicant's consent" [Paragraph 15]

The applicant was ordered to provide an undertaking in compliance with the court order of 4 August 2010.

COMMERCIAL LAW

SOUTH AFRICAN NATIONAL TUBERCOLOSIS V PROVINCIAL GOVERNMENT OF THE EASTERN CAPE (581/12) [2014] ZAECBHC 3

Judgment delivered 11 March 2014

This was an application for payment of value added tax (VAT) and interest thereof on the purchase price of certain immovable properties. The applicant had entered into a sale agreement with the respondent in terms of which the former sold hospitals to the latter for a purchase price of R27 000 000,00. The parties could not agree whether the transaction was liable to VAT. The respondent contended that the transaction was exempt from the payment of VAT. The applicant held a contrary view. The sale agreement was drawn to accommodate the difference on this issue. The South African Revenue Services (SARS) later demanded VAT, penalties and interest payment from the applicant. After lengthy negotiations, the applicant settled the debt due to SARS with a portion of the penalties and interest being waived. The applicant in turn demanded payment of this amount with interest from the respondent. The respondent admitted liability for the VAT and made a part-payment thereof. The payment of the outstanding VAT was settled by the parties in a consent order of the Court. The respondent denied liability for interest payment for the period before it was informed by applicant of SARS demand i.e. before 1 March 2012.

Malusi AJ held:

"Mora has been described as delay or fault. It arises when a party to a contract fails to perform his/her obligations on time. When the contract fixes the time for performance, faults arises from the contract itself (mora ex re) and no demand (intepelatio) is necessary to place the debtor in mora. The contrasting position is when the contract does not provide time of performance. In those circumstances the debtor will not be in mora until there is a demand by a person. This is the reason it is called mora ex persona as an act by a person is required to place the defaulting party in mora." [Paragraph 10]

"It is apparent … that … the sale agreement fixed the time for the payment of VAT as the registration of the property in the respondent's name, which occurred on the 27 November 2009. As the respondent failed to pay the VAT on that date, interest accrued from thereon" [Paragraph 11]

"The respondent has argued "the exemption" from SARS precluded it from being in mora ex re. The argument was developed to say because of the exemption certificate the applicant was required to inform the respondent of the demand from SARS before the respondent could be in mora. I do not agree. The transfer duty certificate did not exempt the parties from the payment of VAT but only transfer duty. The entry in the certificate that VAT was not applicable was made by the conveyancer and not SARS. It was neither SARS nor the applicant that caused the alleged uncertainty but the respondent's own insistence that VAT was not payable." [Paragraph 12]

Respondent was ordered to pay the interest accrued.

ADMINISTRATION OF JUSTICE

ABEGAIL NONTUTHUZELO SIPUNZI V THE SUPERINTENDANT GENERAL, DEPARTMENT OF EDUCATION, EASTERN CAPE AND OTHERS, UNREPORTED JUDGEMENT, CASE NO. 722/2013 (EASTERN CAPE LOCAL DIVISION, MTHATHA)

This was an application for a final interdict to compel the respondents to reinstate the applicant as principal of the Waterfall Park Primary School, and continue paying her salary. Applicant also alleged that the respondents were in contempt of earlier court orders. Applicant had been transferred from that position to the Mthatha district office after a dispute with the school governing body, educators and members of the community [paragraph 7]. The transfer was carried out pending an investigation by the respondents.

Malusi AJ held:

"The application is the latest in an unfortunate and tortuous series of applications to this Court by the applicant which started in April 2004. The applicant has since then approached this Court on at least six diverse occasions either to have her employment reinstated or to have the respondents declared to be in contempt of court orders." [Paragraph 6]

"The relationship between the applicant and her colleagues at the district office broke down … The series of applications … began. The last of those ordered the reinstatement of the applicant n her position at the district office until the finalization of disciplinary proceedings which were then pending against her … The 2nd respondent promptly withdrew the disciplinary proceedings and instructed the applicant to report at Waterfall Park Primary School. This culminated in the applicant launching the present application. …" [Paragraph 8]

"Both the applicant and the respondents have since filed financial documents … It appears … that there has been no payment of the March 2013 salary in compliance with paragraph 2.3 of the interim order. …" [Paragraph 9]

"… In the application for reconsideration of the interim order the 2nd respondent admitted that the effect of the order was that the respondents will continue to pay a salary to applicant when she is not rendering any service. Implicit in that is the acknowledgement that the respondents have an obligation to continue paying the applicant's salary in terms of the interim order. The respondents simply disobeyed the interim court order when the application for reconsideration was unsuccessful on this aspect. On the evidence before me it appears that the respondents were intent on pursuing all avenues not to have to give effect to the interim court order." [Paragraph 10]

"Section 1(c) of the Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. Section 165(1) – (5) vests the judicial authority of the State in the Courts and requires other organs of State to assist and protect the Courts. A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to a breach of that constitutional duty. … " [Paragraph 11]

"The upholding of the rule of law and effective administration of justice can be ensured by civil sanctions other than contempt proceedings. These are drastic sanctions to be used sparingly. … The Courts have recognised that a party who has disobeyed a court order may be barred from being heard until he or she has obeyed the court order. … " [Paragraphs 12 - 13]

"Our Courts cannot tolerate the disregard of its orders. The court order must be obeyed even if it may be wrong. Disobedience may lead to self-help and a breakdown of the administration of justice. Indeed, obeying court orders by all litigants is a matter of fundamental importance in our Constitutional democracy." [Paragraph 14]

"I am of the view that the respondents' defence may not be heard until they have purged their disregard for the interim court order by paying the applicant. … I must express my concern that the applicant appears not to have taken any steps to have her purported discharge reviewed and set aside by the Court. It is a principle of our law that until an unlawful decision is reviewed and set aside, it is treated as valid. I am alive to the authorities that a discharge is not an administrative decision but the point is that the applicant ought to have the discharge considered by the Court." [Paragraph 15]

"The most disconcerting aspect of this matter is the brazen attitude of the respondents in disobeying the court order. … This attitudeharboured [sic] by senior State officials is inimical to the values, spirit and purport of the Constitution. The respondents were previously found … to be motivated by malicious intent against the applicant. … This has now been exacerbated by a disregard for the devastation visited upon the applicant. I find the conduct of the respondents unacceptable and reprehensible. A punitive costs order is warranted in the circumstances. This is the fifth such costs order against the respondents. They may consider themselves forewarned that if their donduct against the applicant persists, the punitive costs order may be payable *de bonispropris* in the future." [Paragraph 16]

The rule nisi was confirmed, and the contempt proceedings postponed for a separate hearing.

SELECTED JUDGMENTS

CIVIL PROCEDURE

MSINDWANA V KILI AND OTHERS [2011] ZAECMHC 6

Judgment delivered 6 May 2011

The plaintiff instituted an action for payment of a sum of R1 000 000.00 for damages arising from certain defamatory statements alleged to have been made by the defendants at various meetings and in the course of their duties. In her particulars of claim the plaintiff stated that as a result of the actions of the defendants she was removed from the school as principal and assumed duty at the Department of Education offices in an undisclosed capacity. That, according to her, resulted in her not being considered for promotion to higher positions and loss of better income opportunities. The alleged defamatory statements were made during 1995 but the plaintiff only instituted proceedings in May 1998.

Mjali J held:

"On a proper reading, sub-section (2) of section 67 of the Republic of Transkei Constitution Act No. 15 of 1976 not only requires the institution of proceedings within twelve months but in addition requires that notice in writing of the intention to bring such proceedings and the cause thereof be given to every defendant at least one month before the commencement of the proceedings. Mr Gagela, counsel for the defendants argued that the plaintiff's claim had expired as it was not instituted within the period of twelve months as required by the now repealed Republic of Transkei Constitution … as well as the subsequent Acts containing similar provisions, namely the Public Service Act … and The Institution of Legal Proceedings Against Certain Organs of State Act …" [Paragraph 4]

""I pause to mention that the Interim Constitution makes no mention of the repeal of the Republic of Transkei Constitution Act … Instead section 230 of the interim Constitution repealed laws specified in Schedule 7 that accorded the TBVC states —independent status, including the Republic of Transkei Constitution Act … and the Status of the Transkei Act." [Paragraph 8]

"In this matter there is neither an application for condonation for the inordinate delay nor have the reasons thereof been explained to enable this court to exercise its discretion. In the absence of any information it cannot be said that good cause exists for the inordinate delay as well as the failure by the plaintiff to serve the statutory notice. It cannot be assumed that the defendants will not be unreasonably prejudiced by such failure. The plaintiff flouted the legislative prescripts as well as the rules of court at its peril. I am in the circumstances unable to condone the plaintiff's failure to institute action within the prescribed period" [Paragraph 13]

On the issue of costs, Mjali J held:

"An order for cost is a discretion by the court, which discretion must be exercised judicially, having regard to what is fair to both parties. The general rule is that a successful party should be entitled to costs unless there are circumstances which should disentitle such a party to an order for costs. I can see no reason why I should deviate from the norm. Costs must follow the results" [Paragraph 14]

GOOSEN V MTETWA (LCC27R/2010) [2010] ZALCC 22

Judgment delivered on 18 August 2010.

This was an automatic review in terms of section 19(3) of the Extension of Security of Tenure Act ("ESTA") of an order granted by the Magistrate, Standerton, in an application for summary judgment, evicting the defendant from the property of the plaintiff.

Mjali AJ held:

"Whilst it may be argued that the Rules of the high court are applicable in ESTA proceedings in the magistrates court and that in terms of Rule 32 (1) the plaintiff may apply for summary judgment where a defendant has delivered notice of intention to defend, it stands to reason that such application may only be granted where the court is satisfied that the defendant has no bona fide defence. The court can only conclude that the defendant has no bona fide defence where he has failed to file his plea within the stipulated time or where his plea does not disclose a defence". [Paragraph 5]

"The question of failure to deliver a plea does not arise in this matter as the dies induciae had not expired at the time the application for summary judgment was launched. It could not be said at that stage that the defendant had no bona fide defence to the plaintiff's claim. In my view the application for summary judgment prior to the expiry of the dies induciae was pre-mature and the assertion that the defence was mala fide and a delaying tactic was pure speculation. This is a point that was taken by the defendant in his affidavit opposing the granting of the summary judgment. No attention was paid to the issue of the premature application for summary judgment in the magistrate court". [Paragraph 6]

"What is more striking … is that at the hearing of the application for summary judgment no attention was given to the glaring discrepancies as to the date of commencement of the residency of the defendant on the farm as well as the dates of dismissal. Except for the recommendation of dismissal in the record of the disciplinary proceedings there is no clear proof that the defendant was in fact dismissed as a result of the disciplinary hearing held in February 2009. There is further no proof that such dismissal was ever communicated to him. It would appear from the magistrate's reasons for judgment that the probation officers report was disregarded completely for being one sided. No attempt whatsoever was made by the magistrate to invoke his inquisitorial powers in terms of section 31 of the Act to obtain the information that he deemed lacking in the probation report. He merely read the "summons as well as other documents filed of record" and after listening to arguments by both counsel he then granted summary judgment". [Paragraph 7]

"I am inclined to agree with the defendant's submission that the determination of whether or not to grant the eviction order sought in this matter required a value judgement which could properly be made only upon consideration of all the relevant facts and circumstances. These were not before the court a quo. Summary judgment is a drastic remedy granted only where the defendant has no bona fide defence [paragraph 8]

"The right of residence may be terminated on any lawful ground provided such termination is just and equitable having regard to:

"(a) the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;

(b) the conduct of the parties giving rise to the termination;

(c) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated.

(d) the existence of a reasonable expectation of the renewal of the agreement from which the residence arises, after the effluxion of its time; and

(e) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence." [Paragraph 9]

"In addition to his failure to pay attention to the factors mentioned above, the order granted by the magistrate did not comply with the relevant provisions of ESTA. …" [Paragraph 10]

The summary judgement was set aside.

CIVIL AND POLITICAL RIGHTS

S V KHOHLISO 2014 (2) SACR 49 (ECM)

Case heard 12 December 2013, Judgment delivered 12 December 2013

Appellant, a traditional healer, had been convicted in the Tsolo magistrates' court on a charge of possession of two vulture's feet, in contravention of s 13(c) read with s 84(13) of Environmental Conservation Decree 9 of 1992 (Transkei). The appeal was against conviction and essentially against the constitutionality of sections 13(c) and 84(13), on the basis that s 13(c) violated the constitutional rights to equality (s 9) and dignity (s 10), and that s 84(13) infringed the right to a fair trial, in particular the right to presumed innocent until proven guilty.

Mjali J (Griffiths J concurring) held:

"The Decree was promulgated at the time when the Transkei was still a sovereign independent state, and continues to apply only in the erstwhile Transkei area almost two decades after the advent of our constitutional democracy. With the advent of our democracy, Transkei was incorporated into South Africa as part of the Eastern Cape province. In the remainder of the Eastern Cape province, legislation known as the Nature and Environmental Conservation Ordinance… is applicable. … [T]here is a considerable difference in what is viewed as an offence in terms of the aforementioned two forms of legislation." [Paragraph 2]

"[Appellant] was never informed of the existence of any prohibition with regard to possession of certain species of animal or bird. As such, she was in no position to know of any prohibition in law pertaining to possession of certain kinds of animal or bird, or their carcasses. … Ignorance of the law and lack of intention … are no defences, as s 84(13) creates strict liability … It was therefore not necessary for the state to prove mens rea. … " [Paragraphs 5 - 7]

"… [T]he appellant challenges her conviction on the constitutional validity of said sections, which in effect create inequality between the persons of the former Transkei and the rest of the Eastern Cape. …

[C]ounsel for the appellant argued that, in areas where the Ordinance applies, the appellant would have been prosecuted for possession of a carcass of what is defined therein as an 'endangered species' instead. … She has argued further that the Ordinance does not create strict liability in the same manner as the Decree. Accordingly in a prosecution under the Ordinance, more would be required of the state to secure a conviction … than in a prosecution under the Decree." [Paragraph 8]

"… [T]here are two pieces of legislation in the same province dealing with the same subject matter, namely nature conservation, but differing in their territorial application, definitions and the standard of proof that is required to found a conviction. … This then calls for a determination as to whether or not unfair discrimination has resulted from this state of affairs. … In doing so a two-stage enquiry set out by Goldstone J in Harksen v Lane NO and Others … must be applied. …" [Paragraphs 15 - 16]

"… I have no doubt that the provisions of ss 13(c) and 84(13) of the Decree differentiate between people living in the former Transkei area and those living in the rest of the Eastern Cape province. Both counsel for the state and for the MEC did not try to convince this court that such differentiation bore any rational connection to a legitimate government purpose. … That being the case, there can be no doubt but that the differentiation between people in the former Transkei area and the rest of the Eastern Cape bears no rational connection to a legitimate government purpose. It therefore amounts to unfair discrimination which cannot be justified under the provisions of s 36 of the Constitution. … I have no difficulty in finding that the provisions of ss 13(c) and 84(13) of the Decree offend against the provisions of ss 9 and 10 of the Constitution. The conviction of the appellant thus falls to be dismissed on this ground. …" [Paragraph 17]

"Even if I am wrong … the conviction of the appellant falls to be dismissed on another ground, namely that the strict liability created by s 84(13) of the Decree erodes her right to a fair trial, and in particular her right to be presumed innocent until proven guilty. As such it unjustifiably infringes the right to be presumed innocent contained in s 35(3)(h) of the Constitution … No attempt was made by the state or the MEC to prove that the presumption of guilt … is necessary if certain offences are to be effectively prosecuted in terms of the Decree. No good reason has been advanced by the prosecution to show that it cannot be expected to produce the evidence itself. It is trite that in criminal matters it is incumbent upon the prosecution to aver and prove its entire case, including the element of mens rea, against the accused beyond reasonable doubt. Our courts have repeatedly emphasised that the presumption of innocence is a fundamental principle of our law. …" [Paragraph 18]

"Not only does this subsection offend against an accused's right to a fair trial, its applicability in the geographical area of the former Transkei results in further unfair discrimination in that those citizens of the Eastern Cape who do not reside in the area of the former Transkei will not, in a criminal prosecution pursuant to the Ordinance, be subject to such strict liability, whereas those that do, will." [Paragraph 20]

The appeal was upheld and the conviction and sentence set aside. Sections 13(c) and 84(13) were found inconsistent with the Constitution and invalid, and the matter was referred to the Constitutional Court for confirmation.

SELECTED JUDGMENTS

PRIVATE LAW

ESKOM HOLDINGS SOC LTD V NORTON (464/13) [2014] ZASCA 94 (26 JUNE 2014)

Case heard 22 May 2014, Judgment delivered 26 June 2014

This case dealt with the interpretation and application of a clause in a Deed of Servitude, in terms of which the appellant was granted the right in perpetuity to convey electricity across property owned by the first respondent. First respondent successfully applied to the High Court for an order declaring the servitude to have been duly cancelled by her, and for the removal of the cables and wires traversing the property.

Mocumie AJA (Navsa, Lewis and Shongwe JJA and Hancke AJA concurring) held:

"That brings me to the change of ownership that did occur and which is material to the outcome of this appeal. Norton took transfer of the property … on 23 July 2010. She did not produce her title deed to Eskom as envisaged in clause 9. Nonetheless, on 8 October 2010 Eskom's attorneys … wrote to Norton [offering to capitalise the yearly lease amount of the servitude in full and final settlement of any monies payable to Norton in respect of the servitude] … Norton did not respond to the offer for more than a year. During that time the consideration due in terms of the deed of servitude was in arrears. On 30 April 2012, purportedly acting in terms of the notice clause … Norton gave notice of her intention to cancel the notarial agreement. … Eskom failed to pay Norton the rental which it did not dispute was due. …" [Paragraphs 7, 9]

"In opposing Norton's application Eskom adopted the view that Norton's failure to present to it a copy of her title deed, as required by clause 9, was fatal to her case. It was contended … that presentation of a copy of the title deed was required to enable the transfer of ownership t be recorded in its register for payment of the consideration due … [I]t was submitted that the acknowledgement of Norton's ownership of the property by Eskom's attorneys … was not one that could be construed as an acknowledgement for the purposes of clause 9 but rather for capitalization purposes only." [Paragraph 11]

"… [T]he clear purpose of clause 9 is to protect Eskom from being prejudiced by a change of ownership of which it is unaware. It places the burden of ensuring certainty on the new owner by way of the production of a title deed. I agree with the court below that when Eskom became aware, with certainty, of the identity of the new owner then the object of clause 9 was met. What is more, on Eskom's own version it had a copy of the title deed in its possession. Beyond that it addressed Norton as the property owner when it made an offer to capitalize the consideration. Eskom cannot be heard to say that the acknowledgement of ownership was one that can simply be regarded as an acknowledgement purely for the sake of the offer of capitalization. It cannot regard Norton as owner for one purpose but not another, especially when both relate to the servitude. … " [Paragraph 16]

"Norton's reliance on her registration with Eskom, as a consumer of electricity, is, however, unhelpful to her cause and counsel on her behalf did not contend that it could be said to strengthen her case nor could any correspondence addressed merely to the homeowner be of any assistance. But … the letter from Eskom's attorneys is pivotal as is the assertion that Eskom was in possession of a copy of the title deed. Whereas it might be said that Norton was opportunistic, she acted well within her legal ights and

Eskom … did little to protect itself. The cancellation was proper and Norton was entitled to the relief granted by the court below." [Paragraph 17]

"It is common cause that the electrical power lines in question have not yet been electrified. Furthermore, we were informed by counsel on behalf of Eskom that the power lines were intended to be back-up lines. There is thus no question that the local or national grid is at risk." [Paragraph 18]

The appeal was dismissed with costs.

DN V MEC FOR HEALTH, FREE STATE 2014 (3) SA 49 (FB)

Case heard 22 October 2013, Judgment delivered 23 October 2013

Defendant raised a special plea to plaintiff's claim. Plaintiff was a paediatric registrar employed by defendant at a hospital. While on duty she was attacked and raped on the hospital premises by a man who was neither a patient nor employee at the hospital, and was not authorised or permitted to be within the confines of the hospital. Defendant alleged that the attack and rape were not foreseeable, and argued that plaintiff was barred from instituting a claim against defendant by the Compensation for Occupational Injuries and Diseases Act (COIDA), arguing that the incident did not constitute an "accident" in terms of COIDA. The issues to be determined were whether the incident was an accident as contemplated by s 35 of COIDA, and whether the incident arose out of and in the course of employment.

Mocumie J held:

"In deciding whether an incident is an 'accident' which 'arose out of or in the course of employment' in the seminal decision of Minister of Justice v Khoza … the Appellate Division developed two tests. The first is posed by the majority concurring in the judgment of Rumpff CJ. It is that an injury from an assault at work is not an accident where the motive or reason for the assault is unrelated to the job. The second is posed by Williamson JA in a concurring minority judgment. It is that an injury from an assault at work is an accident where the fact of employment brings the employee within the range or zone of the hazard that gave rise to the injury." [Paragraph 8]

"The essence of the Khoza decision, and the cases that follow it, is the following: • an accident may be said to arise out of a workman's employment, when, in a broad sense, there is a causal connection between the employment and the accident; • as a general rule there is a causal connection between the employment and the accident where the accident happens at work; • it is not an injury arising out of and in the course of employment where an employee is injured as a result of criminal conduct such as an intentional and unlawful assault by another person, that is unrelated to the job of that employee — even if it happens at work; • this means an injury resulting from an assault that is unrelated to the job does not arise 'out of or in the course of' employment. …" [Paragraph 9]

"I am inclined to adopt the approach set out in Khoza, not only because the approach is objective, but also because this judgment has not been set aside by any court … The judgment is still good law." [Paragraph 17]

"Applying the guidelines set out in Khoza … I agree … that the incident was not an accident. Although the assault/incident was unexpected, it was also intentional and deliberate, which cannot be an 'accident' in

the ordinary and grammatical sense and as courts have interpreted it to mean. ... In relation to the second question, whether the incident arose out of and in the course of the plaintiff's employment as a paediatric registrar, again I have to agree … that there was no causal connection between the plaintiff's employment and the incident, because she was deliberately injured by another person who was not supposed to be or authorised to be on the employer's premises, 'and the motive for the attack bears no relationship to the duties of the workman'. (See Rumpff JA's qualified proposition in Khoza.) In any event, the risk resulting in the injury (ie the assault and the rape) was not a risk that was a usual from natural incident of the job or which came with the territory of the job. " [Paragraph 18]

Mocumie J declined to follow two High Court judgements, and concluded:

"I am accordingly satisfied on the facts, as presented, that the intentional criminal act of the perpetrator of the incident was not an 'accident' as contemplated in s 35 of COIDA, and that the plaintiff did not sustain an occupational injury that resulted in her injuries and damages. The provisions of s 35 of COIDA are accordingly not applicable, and the plaintiff is not precluded from claiming damages from the defendant." [Paragraph 22]

The special plea was dismissed with costs.

CRIMINAL JUSTICE

S V MKHIZE 2014 JDR 0771 (SCA)

Case heard 27 February 2014, Judgment delivered 14 April 2014

The appellant had shot and killed the deceased, and shot and severely injured the deceased's uncle, following an altercation at a bar. He was convicted of murder and sentenced to twelve years' imprisonment. On appeal, it was argued that he had been incorrectly convicted of murder.

Mocumie AJA (Maya, Shongwe, Willis and Saldulker JJA concurring) held:

"To secure a conviction, the State had to prove beyond a reasonable doubt that the appellant unlawfully and intentionally killed the deceased. The State must show that he did not act in private defence or in terms of a putative private defence. … The test that applies, and what was required to be shown by the appellant in order to avoid a conviction on culpable homicide is that a reasonable person in the same circumstances in which he found himself would have believed that his life was in danger and would have acted as he did. The only issue was whether the State had proved beyond reasonable doubt that the appellant did not, subjectively, entertain an honest belief that his life was in danger and thus not justified to act in putative private defence." [Paragraphs 13, 15]

"The trial court committed several material misdirections which, to my mind, led to the wrong conclusion that the appellant was guilty of murder. These misdirections were, furthermore, completely overlooked by the court a quo. Both the trial court and the court a quo found Mbanjwa to be a neutral, reliable witness. … [H]is evidence was that the assault on the appellant did not stop; he merely freed himself from his assailants. He stated further that the appellant shot the deceased at close range, within three to four metres, indicating that the deceased was right in front of the appellant. This was corroborated by Steyl's uncontradicted expert evidence that, judging from the gun powder residue on the deceased's

body; the gunshots were at close range. This was supported by the doctor's findings in the post mortem report that the gunshots were intermediate. Both Steyl's and the doctor's findings corroborated the appellant's version that the deceased was within very close range to him as he turned his back to flee. …" [Paragraph 17]

"A further aspect that remains for determination is whether, despite the appellant's subjective belief that if he did not react as he did he would have been killed, it was necessary for him to shoot the deceased three times. The first shot would, in all probability, have had the desired effect to ward off the unlawful attack on him. In my view, the appellant, especially as a long serving police officer with considerable experience in handling firearms, ought to reasonably have realised that he was using excessive force beyond the legitimate bounds of private defence. In the circumstances, he should have been convicted of culpable homicide. Counsel for the State fairly and correctly conceded that the evidence viewed in its totality, failed to establish that the appellant had the requisite intention to kill the deceased. The appeal against the conviction ought, for the aforesaid reasons, to succeed." [Paragraph 19]

"In my view, correctional supervision, which was recommended by the probation officer, although appropriate even in cases of murder in the right circumstances, would not be appropriate … The incident occurred some ten years ago. Thus, its rehabilitative element of punishment is no longer relevant and would not serve any purpose. A sentence based on principles of restorative justice … was also suggested. But much as it has been lauded and accepted in South Africa, albeit at a slow pace, to consider it under the circumstances of this case, where a life has been lost, in a country where the level of violence is so high would send the wrong message to society. Furthermore, it would be hollow as the appellant is unemployed." [Paragraph 21]

"Taking into account all the mitigating factors … a term of imprisonment, wholly suspended on appropriate conditions will adequately serve the interests of justice. It will serve as a deterrent on the appellant ad hang over him like a sword of Damocles. " [Paragraph 22]

The appeal was upheld, and the appellant was found guilty of culpable homicide and sentenced to five years' imprisonment, conditionally suspended for five years.

MPINDO V S (A317/2011) [2013] ZAFSHC 136

Case heard 29 July 2013; Judgment delivered 1 August 2013

The appellant challenged sentences of 15 years' imprisonment on rape and 5 years' imprisonment on assault with intent to do grievous bodily harm.

Mocumie J (Molemela J concurring) held:

"In his defence, the appellant had called his brother who informed the trial court that although the appellant was indeed young, at that young age, he was disrespectful towards his family, in particular his mother and brother. The brother depicted him as a person who did what he wished to do regardless of whether his own mother approved or not. For instance, as he made an example, the appellant came to his parental home at any time of the day including during the night with different girlfriends and slept with those girlfriends, that's why at his age he had already fathered one child. Thus, correctly so as

observed by the trial court, the appellant was not conducting himself as youthful as he wanted to portray himself during the trial and during the hearing of this appeal." [Paragraph 4]

"The aggravating factors of this case are the following:. The second complainant was badly injured to the extent that he sustained a fractured skull. The first complainant was raped repeatedly. An older man at the house where the first complainant fled to just after their encounter with the appellant, tried to persuade the appellant from forcing himself on the first complainant as was evident he had all the intention to do. He ignored this man and took the complainant away to his home. This means the appellant had at least two distinct opportunities to withdraw from proceeding with this unlawful conduct but he simply continued. The appellant was not remorseful throughout the trial. The appellant's conduct was so brazen that after raping the complainant the next day he took her to a house she pointed out as her home and threatened to deal with her if she reported the incident to the police." [Paragraph 5]

"What the trial court can be faulted on, perhaps, is the fact that it is not clear on record that it took into account the fact that the appellant had spent almost nine months awaiting trial. It is now settled that a sentencing court has to take this factor into account when it imposes sentence." [Paragraph 6]

"However, in my view, taking into account all the aggravating factors of this case, particularly the fact that the second complainant was assaulted so badly just so that his girlfriend could be taken from him and be raped repeatedly, justified the imposition of severe sentences in respect of both counts. The circumstances of this case are such that, even if the nine months awaiting trial period was taken into account, the sentence which was imposed was still appropriate not only to send the right message to the appellant but to society at large that in cases such as these, courts will not shirk their responsibility to protect society, particularly women, against rape and any form of violence. In my view, the sentence was not only appropriate but fitted the crime(s) and the appellant's personal circumstances." [Paragraph 7]

"It bears to be repeated that the prosecution as the *dominis litis* has a responsibility to ensure that charge sheets/indictments are properly drafted. The failure of the prosecutor in this matter to include the provision of s51 of Act 105 of 1997 left the trial court with no option but to avoid imposing life imprisonment in this case, which was a case that really justified life imprisonment to be imposed. The second complainant was seriously injured after being stabbed on the head with a knife and hit over the shoulders and head with a panga until he lost consciousness. That was clearly an attempt to kill the second complainant, yet, instead the prosecutor concerned, charged the appellant with assault with intent to do grievous bodily harm. That also restrained the trial court from imposing the appropriate sentence for attempted murder which could range between eight and ten years' imprisonment." [Paragraph 9]

GODLA AND ANOTHER V S (A140/2012) [2013] ZAFSHC 61

Case heard 15 February 2013; Judgment delivered 25 April 2013

The appellants challenged their 10-year sentences for robbery with aggravating circumstances on the ground that the trial court had under-emphasised their personal circumstances and over-emphasised the seriousness of the offence and the interests of the society, culminating in a sentence that was shockingly inappropriate.

Mocumie J held:

"It is settled law that a youthful offender should not be deprived of his or her liberty except as a measure of last resort and, if incarceration is unavoidable, then his incarceration must be for the shortest possible period …" [Paragraph 7]

"I am alive to the fact that the two appellants were not first offenders. They had a previous conviction which had an element of violence. Thus, they were not entitled to be treated as first offenders and the court *a quo* correctly took their previous conviction into account. This, however, does not detract from the fact that the second appellant was a juvenile at the time of commission of the offence. As for the first appellant, at 18½ years of age, he was indeed already an adult. Having achieved the age of majority a mere six months prior to commission of the offence, few can quarrel with the fact that he was still a youthful offender. I am of the view that all things considered, including the principles laid down in the afore-mentioned cases, as well as the value of the items the complainant was robbed of, a proper consideration of the triad of sentence ought not to have resulted in the sentence imposed on the appellants by the court *a quo.* The court *a quo* thus committed a material misdirection." [Paragraph 9]

"The misdirection committed by the court *a quo* is thus of such a nature as to warrant interference with the sentence it imposed, thus necessitating a fresh consideration of an appropriate sentence. Given the lapse of time between the conviction and the appeal, I do not deem it prudent to remit the matter to the trial court for purposes of acquiring a pre-sentencing report." [Paragraph 9]

The appeal was upheld, and the sentences reduced to 7 years.

S V MOCHOCHONDNO (2013) JDR 1583 (FB)

Case heard: 25 April 2013; Judgment delivered: 25 April 2013

The magistrate seized with the matter requested special review in terms of section 304 of the Criminal Procedure Act on the basis that she had exceeded the penal jurisdiction when sentencing the accused on a charge of contravening section 49(1)(a) of the Immigration Act.

Mocumie J (Molemela J concurring) held:

"Contravention of s49 (1) (a) is by its very nature a very serious offence. Lately it is an offence that is generally committed in conjunction with other serious offences such as trespassing, coupled with theft of minerals such as gold on old mines which have been shut down due to safety concerns on them or exhausted resources. It is also sometimes linked to stock theft or more serious offences such as murder and drug trafficking." [Paragraph 6]

"It has to be acknowledged upfront that the penalty prescribed in the Act can be quite frustrating for presiding officers as it limits them from imposing heavier sentences in appropriate cases in order to send the right message to society and illegal immigrants, taking into consideration the consequences that usually flow from its contravention as highlighted above: that entering the Republic of South Africa illegally is regarded in a serious light and will be dealt with severely. However, until the legislature intervenes by increasing the penal jurisdiction to suit the seriousness of this offence, courts are duty-bound to impose a fine or to imprisonment not exceeding three months." [Paragraph 7]

"It is therefore clear that the trial magistrate exceeded her jurisdiction when she imposed six months imprisonment instead of three months as the section prescribes and as she correctly acknowledged in

her request for review. However, in my view, this is not an error to be corrected as if it is a typing error. It is a material irregularity which vitiates the proceedings." [Paragraph 8]

"In the circumstances and based on that material irregularity the sentence imposed in respect of count 2 ought to be set aside and substituted…" [Paragraph 9]

The sentence was reduced accordingly to a fine of R 1 500.00 or three months imprisonment.

SELECTED JUDGMENTS

COMMERCIAL LAW

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

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

The plaintiff instituted action against the defendant for the payment of an amount of R2 251 017,00, being the proceeds of an insurance policy issued by the defendant. The life insured in terms of the policy was that of the erstwhile business partner of the plaintiff, who died on the 31st December 2005. The plaintiff and the deceased were business partners in a property investment business called JPJ Beleggings CC as well as co-directors and co-shareholders in an office equipment distributorship called Bloemfontein Minolta (Pty) Ltd ("Minolta"). At the 1999 year-end function of Minolta, the deceased announced that Ryno Opperman, Ronaldo Scholtz and Frans Potgieter had been appointed as directors of Minolta and that each of them was to be issued with 5% of the shares of Minolta. In November 1999, the plaintiff applied to the defendant for an insurance policy on the life of the deceased. These policies were on the life of the deceased (Mathyssen) and were intended to provide funds for Opperman, Scholtz and Potgieter to purchase Mathyssen's shares in Minolta in the event of his death. The commencement date of the policy was 1 March 2000. The plaintiff was stipulated as both the "owner" and "100% beneficiary" of the said policy. During January 2006 the defendant was notified of the passing away of the deceased. The defendant paid the death benefits of the policy to the estate of the deceased. The defendant filed a special plea in terms of which it resisted the plaintiff's claim on the basis that the plaintiff has no locus standi to institute proceedings against the defendant on account of a cession in terms of which the plaintiff ceded his rights, interest and title to the policy in favour of the deceased (first cession) and also on account of a cession in terms of which the plaintiff ceded all his rights title and interest to the policy in favour of one Opperman (second cession). The defendant paid the proceeds of the policy to the deceased's estate and with the assistance of the deceased's attorney, the proceeds were later accepted as consideration for Opperman's acquisition of the deceased's shareholding in Minolta. Opperman testified that both he and the broker confronted the deceased about his failure to register the cession concluded between the deceased and Opperman. The deceased showed Opperman the original policy together with the original cession document, thereby allaying his concerns about the ownership of the policy. Considering the deceased's tardiness, Opperman decided to circumvent the deceased and approached the plaintiff with the request that he (plaintiff) cede the policy in Opperman's favour. The plaintiff acceded to this request and signed this cession document. He subsequently submitted the cession document to his broker. Opperman later learnt that the plaintiff had showed up at the broker's offices under false pretences and then torn the cession document. The main issue to be decided was whether the plaintiff ceded his rights in terms of the policy to the life assured (deceased) during August 2002 and, if not, (ii) whether the plaintiff ceded his rights in terms of the policy to Opperman on or about 25 October 2003.

Molemela J held:

"It is noteworthy that, according to the evidence of the deceased's attorney, the deceased was very knowledgeable in insurance matters. … Being such an expert in insurance matters, his various attempts to register the latter cession despite being specifically informed by the defendant and his own broker

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

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

"The plaintiff came across as an honest and credible witness and his version bore no material contradictions. In my view, the probabilities in this case are overwhelmingly in favour of the plaintiff. Having considered all the facts and circumstances of this matter, I find that the defendant failed to prove that the plaintiff signed the first cession document. I further find that in terms of the provisions applicable to this very policy, which provide that a cession is only binding on the defendant if it has been recorded or been registered with the defendant, the defendant's reliance on the second cession is misplaced, as the second cession was never registered. In any event, in so far as this second cession was subject to a suspensive condition that was never fulfilled, it is invalid. I therefore find that as at the time of the deceased's death the plaintiff was still the owner and sole beneficiary of the policy. As such, the proceeds of the policy ought to have been paid to him and not to the estate of the deceased." [Paragraph 44]

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

LABOUR LAW

INDEPENDENT MUNICIPAL & ALLIED TRADE UNION ON BEHALF OF STRYDOM V WITZENBERG MUNICIPALITY & OTHERS (2012) 33 ILJ 1081 (LAC)

This was an appeal against a judgement of the Labour Court which had dismissed an application to review and set aside an arbitration award issued by the third respondent commissioner under the auspices of the second respondent. Strydom, a member of the appellant, had been dismissed by the first respondent following an inquiry into his incapacity on the grounds of illness. The commissioner found the dismissal to be procedurally and substantively fair. Strydom had been absent from the workplace for a

period of around 8 months, on the grounds of a mental condition. During this absence, the employer had not initiated any enquiry into his absence on the grounds of ill health, only doing so once an insurance company repudiated Strydom's claim for medical boarding.

Molemela AJA (Waglay DJP and Zondi AJA concurring) held:

"It is trite that the code of good practice [in relation to dismissal under the LRA] is binding on commissioners. … My reading of items 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. … [T]he conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee's work circumstances so as to accommodate the incapacity, or adapt the employee's duties, or provide him with alternative work if same is available." [Paragraph 6]

"… I have no doubt … that permanent incapacity arising from ill-health or injury is recognized as a legitimate reason for terminating an employment relationship … A dismissal would under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal. " [Paragraph 7]

"… J L Pretorius et al submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but 'is a duty that is implied in the concept of unfair discrimination in a general sense' and 'is one of the judicial and legislative tools for realising substantive equality'. I agree … Surely non-compliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?" [Paragraph 8]

"… At the [incapacity] enquiry, the employer relied on the medical report filed by a Dr van Niekerk (a psychiatrist) … The employer also relied on the assessment report submitted by Metropolitan in support of its decision repudiating the employee's application. … [A]t the time of the enquiry, Dr van Niekerk's report was six months' old. … [T]he chairperson … concluded that the employee's continued employment with the employer would be contrary to medical opinion and would not be viable. It is not clear … why the chairperson found that 'insufficient argument had been presented for me to conclude that the condition of the employee is directly linked to his work circumstances (sic)', when the undisputed medical evidence … actually stated that the employee's condition was indeed caused by work-related stress. Furthermore, he chose to finalize the enquiry on the basis of a medical report that was issued six months prior to the enquiry, despite the employee's having indicated that he intended seeking a second opinion from another psychiatrist. … Furthermore, the chairperson … seems to have used the enquiry for other purposes which had nothing to do with establishing the extent of the employee's incapacity, thus fortifying the appellant's contention that the enquiry was not only about incapacity but also about misconduct. …" [Paragraphs 11 - 13]

"… It is settled law that an arbitration hearing is a hearing de novo. … [O]ne would have expected that the commissioner would listen to evidence afresh and then make a determination as to the fairness or otherwise of the employee's dismissal. Instead … the commissioner sought to confine himself only to the evidence that was available as at the time of the enquiry notwithstanding the fact that new evidence was

adduced before him ... The latter approach was wrong as it equated an arbitration hearing with an appeal hearing of some sort ...” [Paragraphs 14 - 15]

“... [T]he commissioner failed to consider certain evidence that was put before him. If an arbitration hearing is a hearing de novo, then there is no valid reason why the additional evidence that was presented at the arbitration hearing was not considered. Failure to consider all the relevant evidence clearly resulted in the employer's failing to do a proper assessment of the employee's capability to continue working ... [T]he decision of the commissioner was one that a reasonable decision maker could not reach and thus fell to be set aside on review.” [Paragraph 25]

“The court a quo, however, dismissed the application for review, having stated that the question that needed to be answered was: 'Can an employee insist on being employed in the same workplace that he alleges has induced his depression?' ... [T]he question posed and the ... remarks made by the court a quo were misplaced ... [T]here was no basis for finding that the employee was permanently incapacitated or that he could not reasonably be accommodated by the employer. ” [Paragraphs 26 - 27]

“ In addition ... it is patently clear from the award that the commissioner did not pay due regard to items 10 and 11 of schedule 8 and thus failed to comply with s 188(2) of the LRA ... This is another reason why the award fell to be set aside, which the court a quo did not do.” [Paragraph 28]

“I am satisfied that the decision of the commissioner was not one that a reasonable decision maker could have reached under the circumstances and ought to have been set aside by the court a quo and substituted with an order that the dismissal of the employee was both substantively and procedurally unfair. The court a quo therefore erred in coming to the opposite conclusion. ...” [Paragraph 29]

The appeal was thus upheld. Molemela AJA held that reinstatement was not appropriate in the circumstances, but that the employee should be compensated for being dismissed [paragraphs 34 – 35]. Compensation of 12 months’ remuneration was ordered.

CRIMINAL JUSTICE

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

Case heard 4 August 2014, Judgment delivered 8 August 2014

This was an appeal against conviction and sentence on a charge of housebreaking with intent to rape and rape. The appellant (who was 24 years old at the time of the commission of the offence) was convicted of breaking in and raping the complainant who was 14 at the time of the incident. The appellant knew the complainant, having been romantically connected to her sister, with whom he had a child. The evidence also indicated that the appellant knew how to access the complainant’s house through a pantry window that did not close properly. The grounds of appeal were that the court a quo erred by finding that the State proved its case beyond reasonable doubt and specifically insofar as it found (i) that the identification of the rapist by the complainant was reliable, and (ii) that the DNA evidence served as objective evidence corroborating the complainant’s version despite the fact that the official who had drawn the appellant’s blood sample was not called as a witness.

Molemela J (Wright AJ concurring) held:

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

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

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

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

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

Judgment delivered 7 November 2013

This was a case for special review under section 304(4) of the Criminal Procedure Act. The accused, an 18 year old Malawian national, was charged with contravention of section 49(1)(a) of the Immigration Act in that he entered and remained in the Republic of South Africa without a valid passport or permit. He was also charged with the attempted theft of vouchers valued at R200.00. The accused pleaded guilty and

was duly convicted by the court a quo. The two offences were taken together for purposes of sentencing and the accused person was sentenced to four months' imprisonment. The court a quo further ordered that after serving his sentence, the accused person be deported to his country of origin. The trial magistrate referred the matter to the High Court on special review. The sentence had been imposed two years previously and the accused had since been deported.

Molemela J (Lekale J concurring) held:

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

"… I am of the view that the offences committed by the youthful accused person in this particular matter (contravention of the Immigration Act, for which the maximum sentence is three months' imprisonment and attempted theft of goods worth R200.00) clearly do not fall in the category of serious offences. Their prevalence does not, in my view, elevate them to the category of serious offences. The circumstances of this case thus cried out for the rehabilitation objective of sentencing to come to the fore. Instead, the court a quo sacrificed the accused person's personal circumstances at the altar of deterrence and failed to individualise his sentence. The zeal to send a message that commission of a particular sentence will not be tolerated must never be allowed to supersede the discretionary sentencing powers of imposing a sentence that fits the offence, serves the interests of society and is fully cognisant of the accused person's mitigating factors." [Paragraphs 10]

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

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

The conviction on both counts was upheld and the sentence was set aside and replaced with a fine of R600.00 or one month's imprisonment, wholly suspended for two years on condition that the accused was not again convicted of contravention of section 49(1)(a) of the Immigration Act or any offence with an element of dishonesty committed during the period of suspension.

CUSTOMARY LAW

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

Case heard 16 September 2013, Judgment delivered 24 October 2013

The first to fifth respondents were applicants in the proceedings at the court a quo. They sought an order setting aside an alleged customary marriage entered into on the 19th March 2005 between the late David Masakale Chali, who died on the 23rd of May 2005, and the appellant. They further sought an order for the removal of the 6th respondent as executor of the deceased estate. The first respondent was the mother of the deceased and the third, fourth and fifth respondents the children of the deceased. The second respondent was previously married to the deceased, but they were divorced on the 20th May 2002. Her interest in the application related to the unfinalised administration of the joint estate which subsisted between her and the deceased prior to their divorce. The appellant was the first respondent in the proceedings of the court a quo. She and the executrix of the estate (7th respondent) opposed the application on the basis that she and the deceased had entered into a valid customary union. In support of her version the appellant relied on an undated lobola letter, which was allegedly signed at Orkney on 19 March 2005 by the first respondent and three other people. The respondents disputed the authenticity of the lobola letter. Although the respondents had acknowledged that the deceased had, during his lifetime, cohabited with the appellant, the respondent's case was that no customary marriage had been concluded because no lobola negotiations had been entered into. In particular the respondents averred that no lobola was paid and that there was no delivery of the bride (appellant) to the first respondent's family in accordance with Sotho custom. The basis of the appeal was that since the respondent's allegations pertaining to the subsistence of a marriage between the appellant and Rasello were made for the first time in the replying affidavit, and thus constituted new evidence, such allegations should have been struck out by the court a quo, instead of finding that such evidence was foreshadowed in the founding affidavit but was not refuted by the appellant. The appeal was also directed at the court a quo's decision of the application on the papers, instead of referring it for oral evidence on account of the existence of factual disputes pertaining to some of the requirements of a valid customary union.

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

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

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

"It is clear from the papers that the appellant's reference to what she termed as "a ceremony union" held in Lesotho in 2002 was a red herring intended to either obfuscate issues if attention was not paid to the date of its occurrence, alternatively to create a dispute of fact in order to frustrate the respondents' application. As the appellant's reference to the Lesotho ceremony failed to raise a real, genuine or bona fide dispute of fact, the court a quo had no reason to refer the matter for oral evidence." [Paragraph 20]

The appeal was dismissed with costs.

SELECTED JUDGMENTS

PRIVATE LAW

FARMSECURE V STRAUSS (4994/2013) [2014] ZAFSHC 56 (25 APRIL 2014)

Case heard 17 April 2014, Judgment delivered 25 April 2014

Applicant sought payment of an amount of R 272,120.20 together with interest a tempore morae, and perfection of a notarial covering bond to enable it to take possession of the respondent's moveable goods as security for payment.

Moloi J held:

"The real argument advanced by the respondent was that the goods sought to be attached by the applicant had the value of approximately R 800 000.00 and it would consequently be unjustified that those goods be attached for an alleged debt of only R 272,120.20. … In my view the court shall have failed to deliver justice if such a draconian order is made in the circumstances of this case. The court has, however, a discretion to order partial perfection of the notarial covering bond to secure the amount owing, if proven … " [Paragraph 4]

"Mr. de Wet argued further that for the applicant to succeed and get a judgment for the amount of R 272,120.20 claimed as balance outstanding, it must prove that the amount is owing and that the amount is due and payable. The same would be required for the perfection of the notarial covering bond. As the application sought is a final relief it was a pre-requisite that the applicant prove a "clear right" which must be proved clearly on the balance of probability … In this case the applicant relied on a certificate of indebtedness to prove the respondent's liability to him based on the provisions of Clause 12 of the notarial bond …" [Paragraph 5]

"The applicant sought judgment against the respondent by way of application. The only basis for proving his claim was the certificate of indebtedness. Such certificate, as shown above, is invalid and cannot substantiate the claim. The claim, consequently, remains unproved. There is no onus on the respondent to rebut the claim. There should have been proof, at least prima facie, for the respondent to be called upon to say something. The applicant cannot, therefore, expect that judgment be given in his favour. The same goes for the perfection of the notarial bond. Such perfection can only be granted if the indebtedness of the respondent was proven. The applicant chose to approach the court by way of application as against the issue of summons where he would be allowed to adduce even evidence viva voce to prove his claim. The applicant made its bed and must lie in it." [Paragraph 6]

The application was dismissed with costs.

MINISTER OF LAND AFFAIRS V MPHUTI AND ANOTHER (3028/06) [2009] ZAFSHC 20

Heard 5 February 2009; judgment delivered 26 February 2009

Applicant sought an eviction order against the respondents. Moloi J held:

"While it is true that the High Court has no jurisdiction to hear the matters in which ESTA [Extension of Security of Tenure Act] is raised as an issue without consent of both parties, in this case the court can in view of the fact that the application was based on common law and 95% of the defence as well. Only a negligible part, in passing, referred to the provisions of ESTA though much was made of it during argument." [Paragraph 14]

"The respondents in this matter are farm owners and live adjacent to a farm they initially believed they had a lease over but realised, in due course, they did not. The initial occupation did not have a legal basis nor consent of the owner as this was based on a mistaken but *bona* fide belief that they had a lease over the land and it became clear, on their own admission, in April 2007 that the lease agreement did not relate to the disputed property. They utilised the property for residence, cultivation of crops, grazing of live-stock and exploitation of plantation. All these activities are generally conducted by commercial farmers and unquestionably are commercial farming activities as referred to in the definition of occupiers in section 1 of ESTA. The respondents can, as a result, not be the persons entitled to the protection of ESTA, simply because they belong to the so-called previously disadvantaged group." [Paragraph 14]

"The applicant has met all the requirements of proving entitlement to the relief sought under common law. The respondents have not been successful in proving their entitlement to the protection afforded by ESTA and have no defence against the relief sought." [Paragraph 15]

The eviction order was granted.

CIVIL PROCEDURE

COBRA TOWING CC AND OTHERS V OUTSURANCE INSURANCE COMPANY AND ANOTHERS (1535/2010, 2082/2010) [2010] ZAFSHC 157

Case heard 22 October 2010; Judgment delivered 25 November 2010

The applicant sought orders rescinding two judgments of the High Court, relating to a service agreement between the applicants and the respondent in terms of which the applicants would render roadside assistance to the drivers of the vehicles insured by the respondent. At termination of the agreement, it was agreed that the applicants would no longer render roadside assistance to drivers insured by the respondent. However, first applicant continued to offer roadside assistance to some vehicles insured by the respondent. The judgments were in respect of this assistance.

After reviewing the circumstances in which the roadside assistance was rendered, Moloi J held:

"In order to succeed with an application for rescission of a judgment or order made, the applicant should show good cause. The reliance by the applicants on the laxity and misinformation by their legal representative is not supported by the evidence and can safely be rejected … The court was asked to find the principles stated in that decision distinguishable to the facts of this matter. I cannot. The applicants

clearly participated in the negotiations leading up to the draft order agreed to and finally made an order of court on 29 March 2010." [Paragraphs 10 and 11]

"The defence put up by the applicants is not plausible and has no prospects of success. The defence is that the respondent was not using only the contracted operators and the drivers of the vehicles involved in collisions in most cases did not know who they were insured with and that authority to render roadside assistance was often given after the services had been rendered. At times the police gave them orders to tow away vehicles without knowing with which company the vehicles were insured. The court order is, however, clear, namely that the applicants and/or their sub-contractors are interdicted to tow vehicles insured by the respondent. The duty is thus on the applicants to verify the insurer of the vehicle before they render roadside assistance. If the police ordered them to do so, they could simply tell the police to ascertain the vehicle was not insured by the respondent, because they are forbidden by court order to tow vehicles insured by the respondent." [Paragraph 12]

The applications for rescission were dismissed.

CRIMINAL JUSTICE

S V SIPRIAN AND OTHERS (294/2008) [2008] ZAFSHC 44 (12 JUNE 2008)

After sentencing the eight accused, the magistrate referred the matter to the High Court as a special review. Moloi J held:

"This court cannot consider the matter under section 304 A … as the accused had already been sentenced. The said section authorises a review only after conviction but before sentence is passed when the magistrate [is] of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice. … If that is found to be the case by this court, the conviction would be set aside and the matter remitted to the magistrate for a trial *de novo*. [paragraph 3]

"In the present matter the conviction was made in accordance with justice, the accused, being duly represented, having pleaded guilty and admitted all the elements of the crime charged." [Paragraph 4]

"We dealt with the matter in terms of section 304 (2) of Act … and found that the proceedings are not in accordance with justice in that the sentence of twenty eight months imprisonment wholly suspended conditionally for five years imposed by the magistrate in respect of each accused person on the count of trespass was in excess of the maximum sentence prescribed in section 3 of the Trespass Act … The said section prescribes the maximum sentence to be a fine of R2 000.00 or imprisonment not exceeding two years. …" [Paragraph 5]

"That the sentence is excessive of the prescribed maximum is obvious and the attendant prejudice to the accused persons is equally obvious. The matter was referred to this court by the magistrate himself presumably on realising that the sentence is not in accordance with justice, it being in excess of the legislated maximum. He did so under the section having no application to the proceedings. However, requiring him to state the reasons would result in an unnecessary delay and prejudice to the accused." [Paragraph 7]

The sentences were reduced.

S v TSHOPO AND OTHERS 2013 (1) SACR 127 (FB)

Case heard 17 June 2012, Judgment delivered 17 June 2012.

The appellants, convicted of fraud in relation to a tender from the Provincial Department of Education to distribute books and other educational material to schools, appealed against both conviction and sentence.

In dismissing the appeals, Moloi J (Cillié J concurring) observed:

"It was argued that the Department … has not suffered any prejudice … as it paid moneys for services actually rendered, and no more. The state has an interest in keeping strict control over state tenders which are being unscrupulously used for self-enrichment by public servants. So does the general public whose funds are used to finance such projects, and also other tenderers. There is evidence that members of the public complain that employees of the state misuse their position to obtain tenders. The failure to reveal in a tender application the employment relationship with the state and the relationship with the MEC, the first appellant's wife, and the relationship between the first and second appellants, is prejudicial to other tenderers and the community at large, and frustrates the state's efforts to eliminate the favouritism the declaration of interest seeks to combat. The third appellant also knew or should have known what his business was involved with. Failure to reveal the relationship with the state is prejudicial to other tenderers as well, and renders the state incapable of administering public funds fairly and equitably. Prejudice is not only proprietary …" [Paragraph 7]

MOKHEMISE V S [2008] ZAFSHC 10
Case heard on 12 February 2008; Judgment delivered 21 February 2008

The appellant appealed against a rape conviction and sentence of 12 years' imprisonment. Moloi J upheld the conviction, and turned to deal with the sentence:

"In the present case the Regional Magistrate considered the appellant's personal circumstances, *viz* that he was a 30 year old unmarried and unemployed male having no children of his own but supporting his sister's children. He passed Standard 5 at school and has a previous conviction for attempted robbery and attempted rape for which he was duly sentenced. These factors were balanced against the nature and seriousness of the crime of rape and the interests of the community to arrive at a sentence of 12 years imprisonment which is an upward deviation from the prescribed minimum sentence of ten years." [Paragraph 16]

"This Court is of the view that the trial court did not take into consideration other factors that could have persuaded it to impose the prescribed minimum sentence e.g. the fact that the complainant did not suffer serious physical or emotional injuries and the close relationship the appellant had with the complainant prior to the date of the commission of the offence. The court must haste to add that these factors would not constitute substantial and compelling circumstances now after the enactment of section 51(3) of the Criminal Law (Sentencing) Amendment Act … which came into operation on 31 December 2007, but did then. A further factor not taken into account by the trial court is the state of intoxication the appellant was in during the commission of the offence and the fact that he had started drinking before the complainant made her appearance at the tavern. This suggests that he did not imbibe liquor in order to assault the complainant." [Paragraph 17]

"Although the aforesaid circumstances are not enough to constitute substantial and compelling circumstances which necessitate imposing a lesser sentence than the prescribed minimum of ten years, they do constitute mitigating factors which should have been taken into account by the trial court. In the circumstances this Court feels bound to interfere with the sentencing discretion of the court *a quo* and impose a sentence of ten … years imprisonment." [Paragraph 18]

MOTSEPE V S (A176/2011) [2011] ZAFSHC 173
Case heard 31 October 2011; Judgment delivered 10 November 2011

The appellant was convicted of the rape of a 7 year old girl, and was sentenced to 18 years' imprisonment. On appeal, Moloi J upheld the conviction and reduced the sentence, holding that:

"In this matter the trial court found that substantial and compelling circumstances were present entitling it to deviate from the prescribed minimum sentence of life imprisonment … This finding of the trial court is correct. I, however, agree with counsel for the appellant that 18 years imprisonment in the circumstances of this case is shockingly inappropriate. It should be noted that there was in fact no full sexual intercourse but only a slight penetration of the complainant, which would explain why she was not seriously injured. Nor was she assaulted. Besides, the influence of liquor is a factor to be taken into account. The appellant appeared to have been so drunk that he did not even notice the presence of the young witnesses and simply put on his pants in front of them. In addition, the appellant was a first offender, was gainfully employed and had spent a year in custody whilst awaiting trial … I am of the view that sufficient reasons exist to interfere with the sentence imposed and I think a sentence of 10 years imprisonment would be appropriate." [Paragraphs 6 - 7]

ADMINISTRATION OF JUSTICE

NONXUBA V SOUTH AFRICAN POLICE SERVICES (4479/2010) [2010] ZAFSHC 164

Case heard 25 November 2010; Judgment delivered 9 December 2010

The applicant, an attorney, was being investigated by the Commercial Branch of the South Africa Police Services in East London. The police obtained a warrant for search and seizure of certain specified files and computerised information in the possession of the applicant. The applicant's premises were searched by the police and certain files and computerised information were seized. The applicant sought an order that the police provide a detailed inventory of all documents and computerised information they removed from the applicant's premises alternatively the copies thereof. A dispute arose from the fact that the respondent had not provided the inventory as per court order but all the copies of the documents removed.

Moloi J held:

"Whilst it is true court orders must be obeyed … and that the courts should not tolerate the flouting of court orders, that it is vital to the proper administration of justice that court orders be obeyed … and that failure to comply with court orders by state officials having a constitutional obligation to support the courts may undermine the state itself … each case must still be decided on its own merits. In this case as his evidence shows, the applicant wanted to have copies of the documents seized and the computerised information more than the mere list of them. The reason he wanted copies was to enable him as practising attorney to respond to enquiries that may be directed to him in the time his files were in the

possession of the police. ... If the inventory was so important to him, he had everything at his disposal to draw it up himself or through a staff member. This does not in any way exenorate the police for their behaviour in refusing to provide the applicant with an inventory as ordered. ... I am of the view that even the court that made the order, thought that was the easiest part the police could do. Even if they provided more than what the court had ordered, they were still obliged to comply with the court order to the letter. ..." [Paragraph 8]

"I am taken aback and cannot comprehend why the parties acted as they did to the extent of dispatching two counsels from Port Elizabeth to come argue the matter before me in Bloemfontein on behalf of the applicant. Looked at objectively, the applicant was in the same position as before the search and seizure took place as all the copies of the documents and computerised information remained in his possession and could carry on with his work as though nothing had happened. An inventory, never mind how detailed it could be, would not place him in that position. The refusal by the respondent to provide the list of documents seized is equally incomprehensible. The conduct of both parties boils down to senseless power-play bordering closely on abuse of the legal process." [Paragraph 9]

SPAR GROUP LIMITED V KLEYN NO AND ANOTHER (5890/2008) [2008] ZAFSHC 121

Heard 16 October 2008, Judgment delivered 30 October 2008.

The applicant sought an order in terms of which a Trust was ordered to pay the applicant's costs of the application launched to perfect its security in terms of a notarial general covering bond, registered by the Trust in favour of the applicant.

Moloi J held:

"For the respondents it was argued that the applicant is not entitled to the costs as no order was obtained in terms of the application for perfecting the covering bond. It was further argued that an arrangement was made with the representatives of the appellant prior to the launching of the application and that the applicant had no reason to launch the application. It was also averred and argued in terms of that arrangement certain periodic payments were made to applicant before the application was launched. These facts were uncontroverted." [Paragraph 7]

"It is trite that the granting of cost orders is in the discretion of the court." [Paragraph 8]

"The order of 18 September 2008 stated that the costs of that day would be costs in the application. The order of 2 October 2008 stated the costs would stand over i.e. would be argued when the application is heard. The application was not pursued as the respondent had in the meanwhile discharged his obligations against the applicant as per arrangement referred to above." [Paragraph 9]

"Regard being had to the particular circumstances of this matter, I am of the view that it is fair and just to order that each party pay its own costs." [Paragraph 10]

MUGOTA V S (A244/2013) [2014] ZAFSHC 25

Case heard 10 March 2014; judgment delivered 14 March 2014

The appellant, an illegal immigrant, pleaded guilty to trespassing on mine property. While dismissing the appeal against sentence, Moloi J commented:

"It is common knowledge that the majority of the illegal miners in this country are foreigners that are illegally in the Republic. There is no law regulating the illegal mining activities. The most the State can charge the illegal miners with is Trespass and Theft or Attempted Theft as in our case. It is hoped that the legislature can enact a law that will have harsh punishment for these illegal activities which are assuming horrendous proportions." [Paragraph 6]

SELECTED JUDGMENTS

PRIVATE LAW

SAAIMAN AND OTHERS v MINISTER OF SAFETY AND SECURITY AND ANOTHER 2003 (3) SA 496 (O)

Case heard 26 October 2001; judgment delivered 24 January 2002

The plaintiffs were travelling in a motor vehicle on a national road when they stumbled onto an armed robbery. The prime target of the robbers was a cash carrier belonging to the second defendant, a provider of cash transportation services. During the robbery several shots were fired by the robbers at the vehicle, as a result of which plaintiffs sustained bodily injuries, as well as traumatic and emotional shock. First defendant raised an exception to plaintiffs' claim that they were owed a legal duty by first defendant.

Rampai J held:

"To succeed in an action for damages based on negligence, it is usually said that the victim has to show that the injurer owed him a duty of care and that the damages suffered as a result of the alleged conduct were not too remote. There must be some recognised relationship between the duty of care and the remoteness of the damages … In this case the answer as to whether a legal duty exists or not is neither obvious nor covered by authority. We have here a novel situation. [I]n *Ancell and Another v McDermott and Others* [1993] 4 All ER 355 (CA) Beldam LJ observed … that English decisions have established the inability of a single general principle to provide a practical test which could be applied to every omission situation to determine whether a duty of care is owed and, if so, what its scope has to be. It seems to me that the absence of such a single general principle is also true for our jurisprudence." [Paragraph 13]

"The relationship of the parties involved is one of the vital factors for consideration. … [W]here the relationship between the victim and the passive defendant is a general relationship, an ordinary duty of care exists, but no binding legal duty arises. Failure by the defendant to prevent harm is not regarded as wrongful conduct that translates into an actionable omission giving rise to delictual liability attaching to the passive defendant. … [W]here the relationship between the victim and the passive defendant is a special relationship, a particular duty exists. From this a binding legal duty arises: failure by the defendant to prevent harm is regarded as wrongful conduct that translates into an actionable omission giving rise to delictual liability attaching to the passive defendant." [Paragraph 14]

"The relationship between the actual and careless wrongdoer and the passive defendant who is sued for the misdeeds of another may be a vital factor during the judicial enquiry. Where a close and narrow relationship between the careless wrongdoer and the passive defendant existed at the time of the victim's injury it strengthens the victim's contention that there existed a special relationship between himself (the victim) and the passive defendant by virtue of the particular control authority the passive defendant had over the careless injurer. Where only a distant or remote relationship existed between the careless wrongdoer and the passive defendant at the relevant time it strengthens the passive defendant's contention that there existed no special relationship between the parties." [Paragraph 15]

Ramapai J then analysed decisions on delictual liability on grounds of an alleged omission, and continued:

"These decisions underpin the principle that when it comes to cases where an attempt is made to establish delictual liability on the grounds of an alleged omission, foreseeability is not the decisive factor." [Paragraph 16]

"The powers, functions and duties of the police are set out in s 13 of the South African Police Service Act … read with s 205(3) of the Constitution … In brief they boil down to maintaining public order, protecting the citizens, preventing crime and combating it. Failure to perform any of these statutory duties does not necessarily give rise to civil liability …" [Paragraph 17]

"… In all civilised nations of the world, it is reasonably recognised and accepted that every human endeavour under the sun has two inherent aspects: namely the possibility of success on the one hand and the possibility of failure on the other hand. These public servants who do their bit in very trying circumstances but fail, deserve our society's appreciation instead of condemnation and delictual anxieties for the slightest dereliction of their public duties. Moreover our society also recognises that our police service is an agency with limited financial and human resources expected to perform their policing duties with reasonable diligence and not absolute perfection. Singling out cash couriers, because of their supposed vulnerability to armed robberies, as preferential beneficiaries of the police escort services would ignore the real fact that the cash carriers are not unique victims of crime. … The risk of crime is shared by all the members of the general public. …" [Paragraph 18]

"I have carefully examined the triangle of the relationships in the circumstances of this case. I can find nothing special between the plaintiffs and the first defendant or between the criminal wrongdoers and the first defendant. There exists an ordinary relationship between the plaintiffs and the first defendant. It is the same kind of an ordinary relationship which exists between the first defendant and any other member of the general public. … The police service does not, without more, owe each and every member of the general public a duty of care. An omission on the part of the police to perform their general public duties does not impose any delictual liability on them. … [O]ur Constitution is a realistic mission statement of our nation. It does not expect the Minister or the police to perform or to function perfectly and to guarantee absolute safety to any member of the general public…" [Paragraph 19]

"Nothing extraordinary emerges from the circumstances of this case to evoke the legal convictions of the community to demand that, in the circumstances of this particular case, the Minister owed a duty of care to these three particular victims of crime and nothing suggests that the community is convinced the police could and should have prevented the crime. The risk of crime is not a particular risk. It is a general risk shared by all members of the general public. … Most women in this country are deeply concerned about the crime of rape which appears to be on the increase. Probably women and girls are more concerned about rape than any other crime in the country. If therefore, police escort service is to be provided to cash carriers, women and girls will certainly have a much stronger claim for the provision of such police escort service for every woman and every girl." [Paragraph 20]

Now if such a new category of delictual liability based on omission is recognised and such a type of general benefit liberally given to indirect victims of crime as in the present case, on what logical, legal or moral basis can any of these vulnerable classes of direct victims of crime be denied similar relief? It is very clear that recognition of this type of a new delictual action as contended for in this case can have crippling and adverse effects on the State *fiscus* to run a police service. …" [Paragraph 21]

The exception was upheld.

CIVIL PROCEDURE

SCOTT v HOUGH 2007 (3) SA 425 (O

Case heard 15 July 2005; Judgment delivered 18 August 2005

The parties were divorced parents living in different provinces. Applicant had launched an urgent *ex parte* application for the provisional custody of one of their children, but had faxed a copy of the application to the respondent's attorneys a few hours prior to bringing the application. A rule *nisi* was granted in the absence of the respondent. The day after the application had been heard, respondent launched her own application calling upon the Court to reconsider the order granted, on the basis that the applicant had not complied with the *dies induciae* required by the Supreme Court Act.

Rampai J held:

"The service of Court papers upon an interested party is premised on the fundamental principle of *audi alterem partem*. This basic tenet of our law requires a court approached by the one party for certain relief to hear the other party as well before granting the relief sought. In general a court will decline to grant the relief sought unless the party against whom such relief is sought has been fully and timeously apprised that relief in a particular form would be sought and that he has had the maximum benefit of the *dies induciae*, in other words the fullest opportunity permissible in law of considering his defensive options and practically dealing with the claim for the relief being pressed." [Paragraph 12]

"In … urgent applications, there are again two scenarios. The first scenario applies in a case where the respondent resides within the jurisdiction of the Court. This scenario is governed by Rule 6(12)*(a)*, which provides that the Court may dispense with the formal periods of service as prescribed in the Rules. However, where the respondent resides outside the jurisdiction of the Court, there is no similar provision in the aforesaid principal legislation or statute which empowers the Court in urgent matters to relax formal periods of service as prescribed in the principal statute. The mere absence of such a statutory provision *per se* does not mean that an applicant who resides within the jurisdiction of one Court cannot launch an urgent application out of such Court against a respondent who resides outside the jurisdiction of such Court. Here Rule 6(4) applies together with Rule 6(12)*(a)*. This is the second scenario. This uniform Rule applies throughout the country irrespective of the respondent's residence provided the matter is urgent and there is one or other jurisdictional factor which connects the respondent to the applicant's Court of residence." [Paragraph 14]

"The respondent's argument boils down to this: it is permissible in such an urgent application for the applicant to seek and obtain a rule *nisi* in secret, in haste and *in camera* against the respondent who is an outsider. But it is impermissible in such an urgent application for the applicant to seek and to be granted a rule *nisi* in haste *in camera* but in the absence of the respondent who had been given notice which in terms of s 27 was short or irregular service. Since a High Court is empowered, in urgent matters, to relax the rules of service in respect of a respondent who resides within its area of jurisdiction I cannot see any reason in principle or logic as to why, in urgent matters, involving respondents who reside outside its area of jurisdiction, a High Court should be precluded from doing so. If this is what the Legislature had indeed intended, the Legislature would simply have enacted a provision in the principal statute to the effect that in all urgent matters the applicant must follow the respondent's Court, in other words the applicant must initiate an urgent application for a rule *nisi* out of the High Court where the respondent resides." [Paragraph 15]

"As regards the applicant it was contended on behalf of the respondent that by faxing the application to the respondent a few hours before the application was launched … the applicant committed a fatal procedural blunder. The effect of such a telefax was that the matter thereby ceased to be an urgent application brought *ex parte* and became an ordinary application brought on notice to the respondent." [Paragraph 17]

"This application was launched as a matter of urgency. I cannot accept the proposition that its urgency simply evaporated into thin air the moment the applicant faxed it through to the respondent. …" [Paragraph 23]

"I understand Levinsohn J [in *Turquoise River Inc v McMenamin and Others*] to be saying that, once an applicant sets in motion urgent application Court proceedings in terms of Rule 6(4), then the atomic heart and soul of such Court proceedings remains the same unless the Court decides otherwise after hearing argument - often in Chambers and in the absence of the respondent. The Rule allows the applicant who seeks interim relief where the circumstances show that his interest or right is in imminent danger of being infringed to hasten to Court alone in the absence of the respondent. An applicant in terms of Rule 6(4) is ordinarily exempted from giving the customary notice to the respondent provided he makes out a proper case. The exemption is not there for the taking. The procedure in terms of Rule 6(4) is somehow *sui generis*. Its rigid foundation is a degree of urgency. Such a quick procedure designed to provide immediate but interim relief in emergency situations does not lose its intrinsic and genuine character as a fast vehicle on a fast track to access justice merely because the applicant gave an unnecessary notice to the respondent."

"Our civil justice system would certainly be defective if such a fast train can easily be derailed or brought to a standstill or slowed down because an applicant, who is under no legal obligation, for that matter, had informally notified or alerted the respondent beforehand of his intention to approach the Court urgently for interim relief. In my view, such informal notice as was given in the instant case was undue and unnecessary. It had virtually no adverse impact on the true character of an *ex parte* application. By alerting the respondent as he did, the applicant did not thereby extinguish or erase the urgency of his *ex parte* application. …" [Paragraph 26]

The application was dismissed.

CRIMINAL JUSTICE

S V DAIL 2014 JDR 1218 (FB)

Case heard 2 June 2014, Judgment delivered 12 June 2014

The appellant had been sentenced to 20 years imprisonment (greater than the prescribed minimum sentence of 15 years) following his conviction on a charge of murder. He appealed against sentence only.

Rampai AJP (Van Der Merwe J and Mbhele AJ concurring) held:

"Our judicial power to exercise appellate interference is limited and for sound reasons. Where the original sentence imposed by a trial court is in all circumstances shockingly severe and thus inappropriate, a court exercising appellate jurisdiction can also interfere with the sentencing discretion of

a trial court … A court constituted … to exercise appellate jurisdiction, is in essence called upon to oversee the fairness of the proceedings in the court a quo and to determine whether the ultimate outcome was underpinned by the dictates of justice or not. We have to ensure that the personal circumstances of an aggrieved individual offender have been properly taken into account and that his profile has been evenly balanced against the backdrop of the crime committed as well as the interest of society offended. The delicate balancing act demands careful and objective measure of restraint. Great care has to be taken in order to see to it that no cornerstone of the triad is overemphasised or underemphasised at the expense of another … " [Paragraphs 7 - 8]

"In considering the appeal we have to take into account the appellant's personal profile as an individual offender. The first component of the triad concerns the profile of an individual offender. The mitigating factors were: • that the appellant was about 37 years of age at the time he committed the fatal crime; • that he was 38 years of age at the time he was sentenced; • that he and the victim lived together as husband and wife in accordance with the customary regime of marriage; • that he had two dependent minor children who were eight years of age and three years of age; • that those children were in the custody and care of his mother; • that his formal education came to an end when he was in standard five; that beyond such level he could not proceed as a result of his learning difficulties; • that he was suffering from epilepsy; • that he was arrested on 24 August 2010; and • that he remained incarcerated until he was sentenced on 12 September 2011. " [Paragraph 12]

"The following circumstances constituted aggravating factors in this case: • The victim was a defenceless woman and the appellant's wife. • She was brutally attacked and knifed to death in the comfort of her own family sanctuary. • The appellant inflicted 38 stab wounds on the helpless woman. • The appellant had on a previous occasion attacked and assaulted the victim. • The victim feared the appellant so much that she even obtained a family violence interdict against him. • The appellant's aggressive conduct towards the victim seemed to have forced her to leave the common home. • The appellant's previous convictions are indicative of his violent nature." [Paragraph 17]

"In the light of the aforegoing and on the strength of a comparative analysis between the aggravating circumstances and the mitigating circumstances I am persuaded that the court a quo correctly found that no substantial and compelling circumstances existed in this matter to justify decremental deviation from the prescribed minimum sentence. …. I am not persuaded that the failure of the trial judge to record reasons that persuaded him to sharpen the punishment over and above the prescribed minimum sentence constituted a misdirection so material as to justify appellate interference. …" [Paragraphs 18 - 19]

"Notwithstanding the vicious and brutal attack of the victim, the appellant could not be properly described as a coldblooded murderer or an animal. Upon my reading of the judgment, the impression I got was that it was this characterisation of the appellant by the trial court which impelled the trial judge to punish the appellant in that way. In my view the punishment of 20 years imprisonment was retributively excessive." [Paragraph 20]

"What we do know about the appellant is that after this gruesome murder of his wife, he surrendered himself to the police. On his appearance in the court a quo he pleaded guilty. He could not go any further beyond standard 5 at school. It would seem that he was intellectually impaired. He had a learning disability. We cannot tell with certainty as to what adverse impact the ailment of epilepsy had on his learning ability or his ability to control his temperament. But above all these factors, it must not be forgotten that this unfortunate incident was a crime of passion criminis passionale. I think his brutal

actions were abnormal. The aggression he displayed by repeatedly stabbing his spouse, as he did, was probably a manifestation of deep-seated emotional turmoil and hurt. It may well be that his epileptic condition was implicated in the brutal force he unleashed on the victim." [Paragraph 21]

"Upon consideration of all these factors I am inclined to think that the court a quo committed a material and appealable misdirection by overstepping the mark of the prescribed minimum sentence to the extent of five years imprisonment. ... In a case of premeditated murder of a wife, which was not the case here, the sentence ultimately imposed on the guilty husband by the Appellate Division, now the Supreme Court of Appeal was 16 years imprisonment. See S v Di Blasi 1996 (1) SACR 1 (AD). Having considered all the relevant factors, I am of the view that a reduction of five years from the sentence imposed would be a fitting and appropriate punishment for the appellant for what he did." [Paragraph 22]

The appeal succeeded, and the sentence reduced to fifteen years of imprisonment.

S v KHOLOANE 2012 (1) SACR 8 (FB)

Case heard 10 February 2011, Judgment delivered 10 February 2011.

This was a special review matter in terms of s 304(4) of the Criminal Procedure Act. The accused was convicted on four counts of theft, taken together as one offence for the purpose of sentence. The district magistrate then imposed on her a fine of R5000 or 90 days' imprisonment in default of payment. The accused had pleaded guilty to all the charges, but was not questioned in terms of s 112(1)*(b)* of the Act. Instead she was summarily convicted on her plea and sentenced. The magistrate's explanation for dispensing with the questioning was that she acted in terms of ss (1)*(a)* and not ss (1)*(b)* in convicting the accused.

Rampai J (Fischer AJ concurring) held:

"The purpose of the subsection is to ensure that the accused really admits all the elements of the crime to which he pleads guilty. The questioning strives to protect the innocent from erroneous convictions based on their own ignorance of the law or improper influence. By compelling the courts to embark on this procedure the underlying idea was that the court should make doubly sure that a person who pleads guilty has indeed no possible defence to the crime he admits committing. ..." [Paragraph 5]

"Before the questioning in terms of ss (1)*(b)* can be jettisoned, before ss (1)*(a)* can be invoked and before an unrepresented accused can be convicted on her unexplained plea of guilty, a court has to form an opinion that the charge concerned is a minor crime, that the accused would have the option of paying a fine to stay out of a correctional facility and that such a fine would not exceed the statutory maximum limit. These then are the crucial segments of the jurisdictional facts. The court has to silently consider sentence before convicting the accused. Herein lies the uniqueness of the questionless or passive procedure. Therefore the sentence the court proposes imposing will determine which subsection the court should apply in the case at hand." [Paragraph 6]

"The request of the district magistrate ... is that the conviction be confirmed on special review and that only the sentence should be rescinded. The district magistrate was of the view that the accused had suffered no real prejudice because the excessive fine was easily and immediately paid for her release. The learned district magistrate obviously takes a narrow view of the problem. ... It is not a simple matter

of correcting the sentence only by downward adjustment of the excessive fine imposed on the accused. The issue is more complex than that. It fundamentally affects the very foundation of the verdict. It is the lawfulness of the conviction and not so much the unlawfulness of the sentence which is in issue here. The sentence flows from the conviction. Because it does, it would be wrong to simply adjust the sentence ex post facto without enquiring into the lawfulness of the conviction from which the sentence stemmed." [Paragraph 8]

"It has been held that, where a court deals with an undefended and unsophisticated accused and proposes to impose a sentence substantially in excess of the statutory limit as laid down in ss (1)*(a)*, it remains not only desirable but essential as well, for the sake of fair administration of justice, that the court nevertheless question the accused as if ss (1)*(b)* applies ... In my view, the configuration of the two procedures is undesirable. The important distinction between the two may thereby be blurred. If ss (1)*(a)* is not strictly complied with sentence-wise, then ss (1)*(b)* should not be used as a corrective procedure for a sentence which does not fully fall within the scope of ss (1)*(a)*." [Paragraph 15]

"The court has to decide whether to use ss (1)*(a)* or ss (1)*(b)*. There is no *via media* somewhere between the two for a hybrid procedure. I venture to say that the court which applies ss (1)*(a)* should only import the tool of judicial questioning into the subsection provided the fine component of the sentence it proposes imposing does not exceed the statutory limit. In other words, if the matter falls squarely within the ambit of ss (1)*(a)* the court is at liberty to pose certain judicial questions to the accused for the purpose already stated elsewhere. Conversely, if the proposed fine exceeds such limit, however marginal the excess may be, then the court should rather completely deal with the matter in terms of ss (1)*(b)* instead of using ss (1)*(b)* to perfect irregular use of ss (1)*(a)* procedure. In that way there will be no undesirable grey areas created." [Paragraph 16]

"The way the court below went about lacked procedural fairness and indeed substantive fairness. These are the two hallmarks of justice. In the circumstances it cannot be said that the guilt of the accused in this case was established beyond reasonable doubt by means of her dry and bare plea." [Paragraph 17]

The conviction and sentence were set aside, and the case remitted to the trial court.

S v MABITSE 2012 (2) SACR 380 (FB)

Case heard 6 September 2010; Judgment delivered 9 September 2010

This was an appeal against a sentence of 10 years for rape. Ramapi J (Molemela J concurring) held:

"It is so that the victim did not sustain visible, external physical injuries during the course of the incident. Counsel for the appellant contended that the absence of such injuries in itself demonstrated that the appellant used a minimal measure of violence to attain his criminal objective ... However, counsel for the respondent contended that the fact that the victim did not sustain serious physical injuries did not count in favour of the appellant." [Paragraph 9]

"Just as the courts should realise that emotional scarring is likely to differ in kind and degree from one case to the next ... so too must the courts realise that physical scarring is likely to differ in kind and degree from one rape case to the next." [Paragraph 17]

"The physical injury symbolises the measure of violence the perpetrator unleashed on a victim. The greater the degree of severity of the rape victim's physical injury, the greater the degree of the rapist's moral blameworthiness. I am of the firm view that dictates of justice demand that, in meting out sentence, differentiation be made, based on the degree of violent and brutal force used.

If the presence of physical injury is properly treated as a factor which aggravates sentence, then the absence thereof must necessarily be treated as a factor which mitigates sentence. If it can mitigate, then it qualifies, not singularly but collectively, along with other such factors, for inclusion in the melting pot of consideration in order to make a determination in terms of s 51(3) regarding the existence or otherwise of substantial and compelling circumstances …" [Paragraph 18]

"The absence of physical trauma in this case cannot be fairly treated as an irrelevant or neutral factor. It was an important mitigating factor for which the appellant should have been credited. The significance thereof lies in the fact that it indicated that the case we are dealing with does not resort under the most serious rape cases. By far, worst-case scenarios are conceivable. Injuries or no injuries, condoms or no condoms, rape strikes at the very core of the victim's femininity. This is true in all rape cases. However, it must also be accepted that lack of brutal force is a factor which diminishes the moral blameworthiness of a rape offender's actions. [Paragraph 21]

The sentence was reduced to 8 years' imprisonment.

ADMINISTRATION OF JUSTICE

MLENZANA v GOODRICK & FRANKLIN INC 2012 (2) SA 433 (FB)

Case heard on 14 May 2011; judgment 14 July 2011

The plaintiff sued the defendant law firm for damages relating to an alleged wrongful failure to lodge a claim with the Road Accident Fund within the prescriptive period. Defendant argued that the failure to lodge the claim was due to plaintiff's failure to provide certain information and sign certain documents.

Rampai J held:

"The critical question … was therefore whether the information the defendant had in its possession sufficed to enable the defendant to figure out an informed calculation and composition of the quantum of compensation to be claimed in order to satisfy the requirements of substantial compliance." [Paragraph 58]

"The defendant could, as knowledgeable practitioners often do, have performed a rough calculation of the compensation claimed in order to lodge the claim for the time being. Such a simple mathematical exercise would have sufficed to prevent the extinction of the claim by prescription. Doing this sort of estimation is a common practice. An inaccuracy does not invalidate a claim. …" [Paragraph 71]

Turing to the issue of how the defendant had sought to gather information, Rampai J noted:

"… Ms Smith wrote three more letters to her client between … asking her to furnish her with the documents she, the attorney, could readily get from the police and the employer. Her evidence was that it was the responsibility of her client to provide her with such documents. Therefore, so she testified, she

expected her to travel to Theunissen and Bethal, far away from Bloemfontein, to get the required documents. And the poor client did." [Paragraph 85]

"I was amazed. It begged the question: what was the point of appointing and paying an attorney if the poor client, a widow at that, still had to travel to such faraway places where she probably had never been before to investigate and to gather the required information. …" [Paragraph 86]

"Not a single statement by an eyewitness was obtained. ... The scene of the accident was never visited. There were no scenery photographs taken. The fact of the matter is that Ms Smith, on behalf of the defendant, did not take reasonable steps, not only to obtain the information she believed she required, but, and this is very important, also to exercise the skill, knowledge and diligence expected of an average attorney. As a result of such disturbingly shocking lack of skill, knowledge, diligence and care she failed to appreciate the value of the vital information her client had supplied almost three years before the expiry date of the prescriptive period."[Paragraph 92]

"Although the end of the prescriptive period was looming large on the horizon, Ms Smith did virtually nothing effective. She had enough information to lodge the claim. All she did in almost three years was to write to her client, who lived in an informal shack setting, asking her to provide information. Those letters failed to reach her client. ... In the circumstances Ms Smith acted negligently, having regard to what was at stake, the available information and the time she had at her disposal before the date of prescription." [Paragraph 98]

"The vagaries of postal deliveries to shack communities are well known. An ordinarily competent attorney would have foreseen that letters mailed to a shack dweller were quite as likely to be delayed as to go astray. But even if the plaintiff had received the last letter, Ms Smith's remissive conduct in allowing the prescription to run out could not be excused. There comes a time when a diligent attorney has to leave the comfort zone of his or her air-conditioned office and venture out to do some fieldwork in order to safeguard the interests of a client. In the light of all this I can see no sound excuse for Ms Smith's conduct." [Paragraph 99]

The court found that the defendant was liable to the plaintiff for damages proved or agreed.

SELECTED JUDGMENTS

TSHIDZIAMBI V UNIVERSITY OF VENDA (JS1145/12) [2014] ZALCJHB 125

Case heard 4 September 2013, Judgment delivered 28 January 2014

This was an opposed application for condonation for the late filing of the Applicant's statement of case. The Applicant's main claim was based on an alleged automatically unfair dismissal on the ground of sex as contemplated in section 187(1)(f) of the Labour Relations Act. Secondly, she claimed to have been discriminated against as contemplated in section 6 of the Employment Equity Act. In the alternative, she alleged that she was unfairly dismissed. On 6 December 2006 she was appointed by the Respondent as Professor in its Department of Teacher Education. On 1 February 2007 she was appointed to the Respondent's faculty of Human and Social Sciences (Education Department). On 1 October 2008, she was appointed as Dean of the Respondent's School of Education. She remained in that position until her dismissal on 1 November 2011. In her affidavit in support of the application, the Applicant had averred that the delay in filing her statement of case was approximately four months. In written heads of argument filed on her behalf, it was contended that the delay was only 49 days. On the other hand, the Respondents contention was that the delay was 150 days.

In dealing with the Applicant's explanation for the delay, Tlhotlhalemaje AJ held:

"It is my view that a lack of funds as an explanation for a delay in complying with time frames should not always be regarded as being reasonable and acceptable. Each case needs to be looked at in terms of its own circumstances, and an evaluation should be made as to whether that explanation should indeed be acceptable. It is not unusual for unrepresented parties, especially indigent and unsophisticated employees who have lost their jobs to directly approach this Court and lodge their claims by completing the standard Form 6. Some of these statements of claim might in the end appear incomprehensible, but at most, an attempt has been made to comply with the prescribed time frames. In most cases, where the statement of claim is found to be incomprehensible, this Court would normally direct the Applicant party to file supplementary affidavits or an amendment. In most cases where these unrepresented applicants appear before Court, they would normally be referred to the pro bono office which by all accounts is doing a sterling job in assisting needy litigants." [Paragraph 23]

"The Applicant … cannot by all accounts be described as needy or unsophisticated. In referring all her disputes to the CCMA, she had always been legally assisted, when at that stage there was no need for legal representation. In as much as her endeavours to secure the assistance of the Legal Aid, Law Society and Commission for Gender Equality are acknowledged, at the same time, her attorneys of record throughout had an obligation to advise her that she could have approached the Court on her own and timeously filed her statement of claim whilst pursuing other avenues in securing funds. It was not sufficient for her attorneys to simply inform her that her case could not be taken on account of lack of funds as there were other avenues open to her as directly pointed to on behalf of the Respondent." [Paragraph 24]

""[T]he Applicant could simply have been advised to approach the Court on her own and filed a statement of claim on time. Being a Professor, it is doubted that she would have encountered any difficulties in completing a simple standard Form 6. That Joubert attorneys insisted on some funds before the Applicant could be assisted is beyond comprehension. In my view, the delay in this case in filing a statement can not be attributed to the Applicant's lack of funds alone. It was purely due to bad legal

advise or no advice at all from her attorneys of record, who were more concerned with their fees than giving the Applicant proper advice that would cost her nothing. To this end, given the Applicant's personal circumstances, her explanation in regard to the late filing of the Applicant's statement of claim is not regarded as reasonable or acceptable." [Paragraph 25]

"The Applicant's case in the alternative rests on an allegation of automatically unfair dismissal, more specifically surrounding the allegations of sexual harassment. The Respondent is a public institution, and the allegations and counter-allegations between the Applicant and Mbiti are clearly now in the public domain. Whether the publication of these allegations was initiated by the Applicant or not is now irrelevant. If condonation is not granted, it would imply that these issues, which are of importance to the community of the Respondent and the public at large are not properly ventilated. In the eyes of the Respondents community, the Applicant will remain a criminal whilst Mbiti will always be viewed as "sex pest". It can thus not be in the interest of justice that these issues remain unresolved." [Paragraph 32]

"The contentions made on behalf of the Applicant that the importance of this case lie in the fact that the purpose in pursuing it is to protect the rights of the Applicant or those of other woman faced with discrimination and or sexual harassment should be viewed with scepticism. In fact, these submissions amount to red herring given the facts of the case and more specifically, the belated manner with which the Applicant had made allegations of impropriety against Mbiti. In my view, the importance of this case lies in the fact that the allegations and counter-allegations between the Applicant and Mbiti emanate within their relationship in a public institution. If there is any truth in any of these allegations and counter-allegations which are now in the public domain, it would not only be in the interest of justice, but also in the interest of the Respondent and its community that they be properly ventilated in Court by way of a trial" [Paragraph 34]

The application for condonation was granted.

AFRICAN BANK V MAGASHIMA AND OTHERS (JR2419/12) [2014] ZALCJHB 298

Case Heard: 5 December 2013, Judgment Delivered on: 5 August 2014

A commissioner had found that the dismissal of Magashima was substantively unfair and ordered that she be reinstated with retrospective effect, and be paid back-pay. Applicant sought an order that the award be substituted with a finding that the dismissal was fair. Magashima was responsible for reviewing loan applications before approving them. The control procedures provided for a separation of duties in order to prevent errors or fraud, hence a person responsible for reviewing loan applications could not capture loan applications. At a disciplinary enquiry, Magashima conceded having assisted sales consultants with the capturing of loan applications and using their passwords to do so. She denied that she was paid any commission by the sales consultants. She was subsequently found guilty of the charges and dismissed. A dispute was referred to the CCMA, and when conciliation failed, the matter was then referred for arbitration. The Commissioner accepted the concession made by Magashima that indeed she had shared passwords with consultants, and had completed loan applications on their behalf. However the Commissioner found that Magashima's dismissal was however unfair as she was treated differently from two other individuals.

Tlhotlhalemaje AJ held:

"It is not sufficient for an employee facing allegations of misconduct to simply shout; 'Inconsistency!', and automatically be absolved from the consequences of his or her acts of misconduct. Where an employee claims inconsistency, firstly, the onus is on that employee to demonstrate in what material respects employee X was treated differently from him or her, when both have committed the same or similar form of misconduct, and why that was unfair. Secondly, it is for the employer to justify the differentiation in the treatment of the two employees. In the absence of evidence to demonstrate that the employer had acted capriciously or was motivated by some irrelevant or unfair considerations in instituting disciplinary measures or handing out sanction between the two employees, it should be concluded that the employer's decision to differentiate between the two is fair." [Paragraph 22].

"In my view, the submissions made on behalf of Magashima are akin to an employee claiming inconsistency and expecting to be automatically absolved from the consequences of her misconduct. It appears that the Commissioner was clearly persuaded by this mere allegation and fell into the trap that *Sidumo* warned against, i.e. that Commissioners should not approach the matter on the basis of what decision they would have made had they been the employer. A commissioner's task as explained in *Sidumo* is not to ask what the appropriate sanction is but whether the employer's decision to dismiss was fair. It is apparent that the Commissioner from his reasoning and conclusions reached misconstrued his mandate and failed to take into account essential material facts, and came to a conclusion which a reasonable decision could not have come to on the material before him." [Paragraph 25].

"By solely relying on the claim of inconsistency, and also not applying or properly considering the principles surrounding the application of the parity principle, the Commissioner arrived at an unreasonable result. Nowhere in the award was it shown that in not dismissing Maphiri, the Applicant had acted capriciously and arbitrarily, or that the Applicant had other motives. The Commissioner failed to take into account the importance of the rules and policies breached, the operational risk posed as a consequence of Magashima's conduct; the fact that Magashima had conceded to breaking the rules but also sought to justify it, which in my view did not amount to a show of remorse; and that as a consequence of the misconduct and the position Magashima held, it could not be expected of the Applicant to trust her thereafter. Magashima had thirteen years of service, and for her to have denied knowledge of the rules was clearly improbable as correctly established by the Commissioner. In the light of these irregularities, the Commissioner arrived at an unreasonable result, rendering his award one which a reasonable decision maker would not have arrived at in the light of the material before him. Consequently, the award stands to be set aside." [Paragraph 26]

NGOBESE V SOUTH AFRICAN CHEMICAL WORKERS UNION (JS50/11) [2014] ZALCJHB 255

Case Heard: 11 June 2014, Judgment Delivered: 15 July 2014

The Applicant had filed a claim and sought compensation from the Respondent on the grounds that her dismissal by the Respondent constituted an automatically unfair dismissal. She had also alleged that the Respondent had committed an unfair labour practice. Applicant had been employed by the Respondent as Education Coordinator. On 11 November 2010, the Applicant together with other employees were served with notices to attend disciplinary proceedings to answer to allegations of gross insubordination, refusal to follow a legitimate instruction, deliberately acting to undermine union structures, and

dishonesty. The Applicant was found guilty of the charges and notified on 19 November 2010. On 22 November 2010, the Applicant had made written submissions, but was however dismissed on 6 December 2010. The matter was not refereed for conciliation and the main issue for determination in regard to the preliminary point raised was whether the Court had jurisdiction to adjudicate a dispute in the absence of that dispute first having been referred for conciliation as required by the provisions of section 191 (11) (a) of the LRA.

Tlhotlhalemaje AJ held:

"Amongst the purposes of the LRA … is the effective resolution of disputes. A process of conciliation is the first step in achieving that purpose, and it is inconceivable that conciliators would merely go through a charade and willy-nilly issue certificates of non-resolution without making a concerted effort to resolve disputes before them. If this is the case, conciliators would clearly be failing in their statutory duties as enjoined by the provisions of section 135 of the LRA. A conciliation process is designed to assist parties to amicably resolve disputes they are involved in and to prevent disputes being unnecessarily referred for arbitration or adjudication. In this case, the Respondent had lamented the fact that had the dispute been referred for conciliation, it had intentions to resolve it at that stage." [Paragraph 11].

"Even before this matter was heard, the Respondent had shown genuine intentions to resolve the dispute. The Court had notwithstanding the fact that the matter was heard, again granted the parties an indulgence to resolve the dispute. The Applicant however would have none of it and had insisted on an outcome. This obstinate attitude and belligerence on the part of the Applicant was clearly unwarranted and misguided in the light of the sustainable preliminary points raised. To this end, other than upholding the preliminary points, considerations of law and fairness also dictate that she should be ordered to pay the Respondent's costs." [Paragraph 12].

The preliminary point was upheld, and it was ordered that the court lacked jurisdiction to hear the claim.

IMATU V JOHANNESBURG METROPOLITAN MUNICIPALITY AND OTHERS (J1522/14) [2014] ZALCJHB 232

Case Heard: 26 June 2014, Judgment Delivered: 30 June 2014

Applicants sought, on an urgent basis, a declaratory order to interdict and restrain the continuation of a lock-out, which they contended was unprocedural and unlawful. The Applicants' main contention in regards to urgency was that they could not approach the Court sooner, as requests for a transcribed record of minutes of 14 and 31 March 2014 was made several times, and the transcript was only provided on 13 June 2014, and then only the transcript of the meeting of 14 March 2014.

Tlhotlhalemaje AJ held:

"Even if it were to be believed that a transcript of the minutes of the meeting was relevant, having received that transcript on 13 June 2014, the Appliants [*sic*] only filed this application on 20 June 2014, some seven days later. No explanation was proffered as to the reason this was the case other than the argument made from the bar that there was a holiday on 16th June 2014. This argument or excuse is not sustainable in that a holiday or weekend cannot prevent parties from drafting court papers, especially if it is alleged that a matter is urgent. Urgency also implies that a party should itself have acted in like manner. To this end, taking into account the chronology of events, more specifically the fact that the new

shift system was implemented from 12 May 2014; that the drivers were locked out with effect from 24 May 2014, and the fact that notices of disciplinary enquiry were issued on 2 June 2014, it is my view that the Applicants were dilatory in approaching the Court. To this end, the Applicants have not satisified [*sic*] the requirements of urgency, and in effect, and in the light of the conclusions reached above, the urgency alleged is clearly self-created." [Paragraph 20]

"It is my view that this application was ill-conceived for a number of reasons. Other than the dilatory manner with which it was launched, it was doomed from the start in view of the issues that are allegedly in dispute, which this Court have pronounce upon in the past. The refusal of the Applicants to work in terms of the new system clearly constitutes industrial action, moreso since they do not have any contractual right to chose how and where to work. This is a matter that falls within the prerogative of the employer, and Steenkamp J in *Johannesburg Metropolitan Bus Services (Pty) Ltd* made this point clearer by stating that as employees do not have a vested right to specific shift system in collective agreement or contract of employment, changes to the system is merely a change in work practice, and did not comprise a unilateral change to terms and conditions of employment. Thus employees have no vested right to preserve working conditions completely from the moment they are employed. Furthermore, it is unheard of that employees can chose where and how to work unless the employer agrees to the employee's preferences." [Paragraph 22].

"It follows that the Applicants cannot allege that they are not on strike by merely presenting themselves for service but on their own terms. In these circumstances, as the employees do not want to, or refuse to work in accordance with the specific instructions of the employer, i.e the third shift system, their conduct constitutes 'strike' as contemplated in section 213 of the LRA, which remains unprotected. In bringing this application, it was not for the purposes of ensuring clarity on the matter or asserting their rights. The application was brought merely to assert their own preferences as to how they want to work. The fact that some of IMATU members have complied with the changes whilst only the Applicants remain defiant speaks volumes about the folly of bringing this application. This court must in the circumstances, show its displeasure at such conduct, which … constitutes an abuse of the court process. In these circumstances, considerations of law and fairness dictate that the Applicants should be ordered to pay the costs of this application." [Paragraph 23].

The application was struck from the roll.

MODIBEDI AND OTHERS V MEDUPI FABRICATION (PTY) LTD (JS742/10) [2014] ZALCJHB 154

Case Heard: 26, 27, 28, 29, 30 August 2013; 2 and 3 September 2013, Judgment Delivered: 6 May 2014

The applicants were dismissed by the respondent on 30 March 2010 following upon their participation in unprotected industrial action. The vast majority of the applicants were employed as artisans (welders, boilermakers, machine operators and riggers). They fell under the category of core employees and commenced employment at varying times during 2009. They were employed in terms of project and task specific limited duration contracts. On 15 October 2009, the respondent called a meeting with the representatives of recognized unions to discuss the need to employ a limited number of expatriate artisans in order to boost production. The employees were assured that these moves would not in any way jeopardise their employment opportunities. On 17 October 2009 the majority of the applicants who were unhappy with these developments refused to commence the day shift, and insisted on being

addressed by management. After the employees went back to work, they were issued with final written warnings. Further, the respondent deducted a pro-rata portion of the applicants' bonus and also one hour's pay from their salaries. The respondent issued letters of caution to the employees. Disciplinary enquiries commenced and the employees raised certain objections at the commencement and during the disciplinary hearing. The applicants declined to present their case and walked out of the process. The chairperson recommended the dismissal of the applicants and management then informed the applicants of their dismissal on 30 March 2010. Following the non-resolution of the dispute at the Metal and Engineering Industries Bargaining Council, the applicants approached the court to challenge the substantive and procedural fairness of their dismissal. They sought retrospective reinstatement, or in the alternative, compensation equivalent to 12 months remuneration in the event that it is found that their dismissal was unfair.

Tlhotlhalemaje AJ held:

"Notwithstanding the supposedly contentious nature of the food issue, it was again raised as part of the general concerns surrounding the work stoppage of 7 and 8 January 2010. In an endeavour to attend to the problem, a meeting was arranged between management, employee representatives, and IPS, which was to be followed by an inspection of the catering facilities. The employees however did not attend that meeting or inspection, as they were 'tired' from attending other meetings pertaining to the work stoppage. The attitude of the employees indicated the seriousness with which they regarded the issue of catering. Be that as it may be, management had on its own, had a meeting with IPS and done an inspection. Nothing untoward was found, and it was established that there was no merit in the complaint that IPS did not serve name brand food." [Paragraph 64].

"Amongst other demands made by the employees was that the respondent must buy them groceries and that they would prepare their own meals. This notwithstanding the impracticalities with this approach. When the respondent refused to consider this option, like the bullies they were, the employees threatened retribution in the form of work disruption. Notwithstanding the problems with the grocery option, employees were told to compile a list whilst the respondent's board was to consider their demand. The grocery lists compiled by the employees according to their houses/units range from basics like mealie meal to luxuries such as prawns. In some instances, the grocery list included red wine, and toothpaste. Probably this was meant to be flippant." [Paragraph 69].

"The unreasonableness of the applicants' attitude in my view became abundantly clearer with the list of ten 'non-negotiable' demands tabled on 8 March 2010. Despite the respondent having acceded to eight of those demands, the employees were uncompromising nevertheless in respect of the other two, which the respondent could not yield to on the basis of practical considerations and the fact that to give in to them would clearly put the respondent in conflict with the provisions of the PLA. Nkosi and the other employees were aware of this conflict, but his view was that the respondent could go contrary to the provisions of the PLA in order to meet their demands. This sense of self-righteousness was to prove to be the demise of the applicants. In my view, whatever solution the employees were looking for was in respect of a problem which they had created themselves. They were unrelenting in respect of demands which were clearly unreasonable." [Paragraph 71].

"As already indicated, the employees were always looking for a fight, and ultimately, it was no longer clear what their grievances, if any were, as they kept changing their demands with little regard to the consequences of those demands or their actions. If ever there was any form of provocation, it was

instead on the part of the employees. In my view, they were looking for a reason for the respondent to terminate their services, and unfortunately, they got their wish." [Paragraph 72].

With regard to the procedural fairness of the dismissal, Tlhotlhalemaje AJ held that:

"Where the chairperson of the enquiry was presented with the undisputed version of the employer in circumstances where an employee failed to exercise his or her right to be heard, I fail to appreciate how that employee can present his or her mitigating factors in a vacuum. In my view, since the employee waived his or her rights to be heard, it would place an onerous burden on the employer to make a finding on 'guilt' and thereafter call upon that employee to plead in mitigation. There would be no logic in this approach as in my view, the employee has waived his or her rights for all intents and purposes, and that waiver cannot be merely in respect of presenting one's case. The waiver should be construed as being in respect of the disciplinary process as a whole. To this end, the applicants in this case by refusing to take part in the disciplinary enquiry waived their rights to be heard, including the right to plead in mitigation." [Paragaph 92].

It was held that the dismissals were substantively and procedurally fair.

NGOBENI V MINISTER OF COMMUNICATIONS AND ANOTHER (J08/14) [2014] ZALCJHB 96

Case Heard: 20 March 2014, Judgment Delivered: 3 April 2014

The applicant was a whistleblower who exposed malfeasance in his department, the disclosures revealed possible breaches of legal obligations and criminal conduct. He approached the court for a declaratory order, seeking that the disclosures he made during the execution of his duties be deemed to qualify for protection in terms of the provisions of the Protected Disclosure Act (PDA). He also sought an order prohibiting the Minister and the Director-General from subjecting him to occupational detriment in contravention of section 3 of the PDA. The respondents opposed the application and argued that the disclosures were not made in good faith; and that the applicant has not been subjected to any occupational detriment. The respondents further argued that there was no causal relationship between the disclosures and a pending disciplinary enquiry against him for alleged misconduct. Respondent further argued that the allegations raised by the applicant are presently the subject of investigation by the SIU, and that the alleged misconduct by the applicant was investigated and is the subject of a pending disciplinary enquiry.

Tlhotlhalemaje AJ held:

"...[F]actors such as lack of honest intention, malice, ulterior motive, a quest for revenge, reckless abandon, a quest for self or others advancement, and attempts to divert attention from one's or others' wrong doing and involvement in criminal or acts of misconduct will negate the requirement of good faith. In this regard, the onus will be on the employer to establish the lack of good faith. The absence of good faith however does not detract from the fact that a disclosure was made. Even if the disclosure was made in pursuance of ulterior motives, it is still incumbent upon the employer to investigate the veracity of the allegations and to take appropriate steps where required. Where however it is found that a protected disclosure was made in good faith, and it is still nevertheless established that the whistle-blower himself or herself is or might be involved in acts of impropriety, the question is whether he/she should be immune from answering to those allegations." [Paragraph 54].

In deciding whether the disciplinary action intended against the applicant constituted an occupational detriment Tlhotlhalemaje AJ examined whether the disciplinary action was to be instituted on account, or partly on account of the applicant having made a protected disclosure, and found that:

"[T]he intended disciplinary action against the applicant can be said to have been brought partly on account of the protected disclosures the applicant had made. It is said partly in that the other part to the instituting of the disciplinary action pertains to the actual allegations of impropriety on the part of the applicant. Notwithstanding the fact that the applicant had made a protected disclosure and in good faith, the allegations against him remain untested. It could not have been envisaged by the drafters of the PDA to exonerate whistle-blowers regardless of other prevailing circumstances including the fact that they themselves may be involved in acts of misconduct. Inasmuch as the PDA is intended to protect whistle-blowers, there is no provision for sacred cows." [Paragraph 70].

" [T]he mere fact that the disclosures were made before the investigations in respect of the Nkowankowa event does not absolve the applicant from having to answer to equally serious allegations against him. The applicant's brave action of exposing malfeasant in the department is commendable. However, he must also answer to the allegations against him, no matter how spurious and unsustainable they may appear." [Paragraph 71].

The application was dismissed.

FENI V PAN SOUTH AFRICAN LANGUAGE BOARD AND ANOTHER (J892/2014) [2014] ZALCJHB 133

Case Heard: 22 April 2014; Judgment Delivered: 24 April 2014.

This was an urgent application to seek an order that disciplinary proceedings initiated by the respondents against the applicant be stayed pending the resolution of a dispute of occupational detriment referred by the applicant to the CCMA, and after conciliation to the Labour Court. The Applicant was at the time employed by the First Respondent as its head of legal services. There was a history of acrimonious litigation between the parties dating back to June 2010, when the applicant was first dismissed by the first respondent. He had since been retrospectively reinstated in his position. He was involved in numerous other matters against the respondents that were before the court. On 15 March 2014, the applicant made what he deemed to be a protected disclosure by sending correspondence to the office of the Public Protector wherein he requested an investigation into allegations of abuse of power by the respondents, irregular spending and non-payment of contributions towards employees' benefits. On 20 March 2014, the applicant was served with a letter of intention to suspend him on the grounds of serious and substantial breaches. He was invited to make representations as to the reasons he should not be suspended, which he duly did. The allegations against the applicant pertained to appearances at this court on various dates. It was alleged that he had represented persons who had brought cases against the first respondent instead of defending the respondents against such claims. It was also alleged that he had committed serious dereliction of duties.

Tlhotlhalemaje AJ held:

"I took issue with the unsubstantiated contention that the intended disciplinary enquiry would be a sham or that the applicant had reason to believe that he may not be accorded a fair hearing. The applicant seems to rely on the events of June 2010 when he was dismissed by the first respondent in his absence.

Those events cannot be the basis for a conclusion to be made that the new disciplinary enquiry to be held on 25 April 2014, with a new chairperson and new set of circumstances, would lead to the same results. The applicant was furnished with a detailed “charge sheet” which spelt out his rights in clear terms and indicated who the chairperson and the initiator would be. He has had ample opportunity to prepare for that enquiry since the notice to attend the enquiry was issued. There are no urgent or special circumstances obliging the court to intervene or interfere with that process. As already indicated, the fact that the enquiry will take place on a particular date is not on its own a factor that can persuade the court to treat the matter as urgent. Inasmuch as an employee is entitled to fair labour practices, the employer is equally entitled to institute discipline in the workplace, and the courts should be weary [sic] to interfere with those processes." [Paragraph 24]

"Whilst it is acknowledged that this Court is a creature of the Labour Relations Act and designed to achieve the objectives of that legislation, its processes are nevertheless not there for the taking or abuse. But for the fact that the application under J439/2014 was struck off the roll, the applicant was unrelenting and had deemed it appropriate to bring a similar application within 14 days of the first application having been struck off. In arguing that the matter was urgent, he had in the words of Francis J, approached this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. Not only were the arguments advanced fanciful but they were so presumptuous and unreasonable that it is clear that the applicant is desperate to avoid or prevent the disciplinary enquiry from taking place. As already indicated, this court cannot be abused for those ends. Furthermore, it needs to be stated that the applicant has already referred a dispute to the CCMA. ... Thus other than the alternative remedy to be found in respect of that process, the applicant still has the option of the internal disciplinary enquiry which he is so desperately attempting to circumvent. Accordingly, the matter should be struck off the roll on account of lack of urgency." [Paragraph 27].

SELECTED JUDGMENTS

PADAYACHEE V INTERPAK BOOKS (PTY) LTD (D234-12) [2014] ZALCD 4

Case heard 7 January 2014, Judgment delivered 4 March 2014

The applicant tendered her resignation on 22 September 2011. The respondent requested her to leave immediately and to not work during her notice period, which she did. The respondent also informed her that she would be paid her October salary and all outstanding leave pay during the October salary run, which would be on 25 October 2011. A month after her resignation the respondent called on the applicant to attend a disciplinary hearing on to answer charges of insubordination and gross negligence. The applicant did not attend the inquiry. She pleaded that her resignation on 22 September and the respondent's response to this meant that her contract of employment was terminated on 22 September 2011. As a result, the respondent had no authority to discipline her. The respondent employer sought to make a deduction from the applicant's remuneration in respect of damage or loss caused by the applicant employee, the amount of damages was determined by the chairperson of the disciplinary hearing and the applicant employee did not consent to the deduction. The respondent advised her that the 'fine' had been set off, in terms of section 34(1)(b) of the Basic Conditions of Employment Act, against the amounts owed to her. The applicant sought an order declaring that the respondent was not entitled to deduct that sum (of R86,046.59) from her remuneration.

Whitcher AJ held that the respondent was not entitled to rely merely on section 34(1)(b) to make the deduction:

"In this case, an employer seeks to make a deduction from an employee's remuneration in respect of damage or loss allegedly caused by the employee. Section 34 specifically regulates this type of deduction. Section 34(2) confers a right on the employer to make deductions from an employee's remuneration in respect of damage or loss caused by the employee but stipulates that this right cannot be validly obtained unless the prescribed formalities set out in the sections 34(1)(a) and 34(2) are complied with. These prescribed formalities include a fair internal hearing to determine the liability of the employee and a written agreement by the employee to reimburse the employer in respect of the damage or loss. It is also clear that sections 34(1)(a) and 34(2) also require the damages to be liquidated through the process of a hearing and a written agreement which sets out the specific amount owed and due. The provision thus requires the existence of a liquid document. A further purpose of the provision and these formalities is clearly to protect employees against arbitrary conduct and to provide employers with a simple and quick method of obtaining relief without resorting to litigation. The construction and interpretation of section 34 sought by the respondent would essentially render sections 34(1)(a) and 34(2) and, consequently all the due process provisions and protections contained therein, aimless and superfluous." [Paragraphs 29 - 34]

It was held that the respondent was not permitted to deduct the sum of R86,046.59, which amount was to be repaid to the applicant.

NGCOBO AND OTHERS V CHESTER BUTCHERIES (D 268/2011) [2012] ZALCD 11; (2012) 33 ILJ 2932 (LC)

Case Heard: 10 April 2012, Judgment Delivered: 08 May 2012

The respondent operated a chain of butchery stores. In early 2010, the applicants' union recruited members at three of the respondent's stores: the Richards Bay Taxi Rank store, the Empangeni store and the Belvedere store. The applicants were employed at the Richards Bay Taxi Rank store which only opened in 2009. The respondent paid discretionary bonuses on an annual basis. The applicants were paid bonuses in January 2010 for the year 2009 and in January 2012 for the year 2011. No bonuses were paid to the applicants for the year 2010. The applicants linked the non-payment of this bonus to their having engaged in a protected strike in November 2010. The applicants pleaded that the respondent took a unilateral decision that all employees who had participated in the November 2010 strike would not receive a bonus while other employees of the respondent were paid bonuses. The key question was whether the respondent, by not paying bonuses to the applicants for the year 2010, discriminated against the applicants for participating in a lawful strike thereby contravening section 5(1) of Chapter 11 of the Labour Relations Act.

Whitcher AJ held that the applicants did not make out a *prima facie* case to even put the respondent to a defence and as a matter of probability, the respondent's explanation for the differential conduct (profitability of individual stores) accorded far better with the established facts of the matter than the applicants' explanation (as a punishment for striking).

"Section 5 (1) in Chapter II of the Act provides that no person may discriminate against an employee for exercising any right conferred by this Act. This section protects employees from victimisation for having exercised a right under the Act. The right to strike falls within the ambit of this provision. If the employer's conduct has the effect of discriminating, it will fall foul of the protections offered by section 5." [Paragraph 7].

"The burden of proof provision of section 10 in Chapter II of the Act stipulates that an employee who alleges that a right or protection conferred by section 5(1) has been infringed must prove the facts of the conduct and the employer who engaged in that conduct must then prove that the conduct complained of did not infringe the provisions of section 5(1)... In the present case, this meant that the applicants had an initial evidentiary burden to produce evidence which showed that they underwent differential treatment by the respondent on the ground that they had participated in the strike in question. In this regard, they were required to establish only a credible possibility that the non-payment of their bonuses was based on the fact that they had 'participated in the strike' in question. Only in that evidentiary event would a burden have come to rest upon the respondent to prove otherwise" [Paragraphs 8 - 9]

The applicants' claim was dismissed.

CTR PROTECTION SERVICES (PTY) LTD V WAINWRIGHT NO AND OTHERS (JR2901/2010) [2012] ZALCJHB 103

Case Heard: 17 May 2012, Judgment Delivered: 04 October 2012

The applicant sought to review and set aside an arbitration award issued by the First Respondent. The third and fourth respondents referred a constructive dismissal dispute to the CCMA. The commissioner

found that the applicant had constructively dismissed the respondents on 18 June 2010; alternatively had dismissed them before they resigned. He awarded the respondents compensation. The applicant contended that the CCMA did not have jurisdiction to entertain the dispute as the respondents were independent contractors and not employees of the applicant. This contention about the nature of the relationship between the parties was not raised as an issue for adjudication at the arbitration and was raised for the first time in the applicant's review application.

Whitcher AJ held:

"The record shows that the commissioner read and referred to the written contract between the parties. Had he applied his mind to the contract and other evidence that was led at the hearing, he would have been alerted to the fact that the relationship was an issue that needed to be pertinently raised and inquired into. A proper reading of the written contract clearly indicated that the respondents were independent contractors. Further, the fourth respondent testified that he had had another "private job"." [Paragraph 6.3]

"[Q]uestions of jurisdiction may be cognisable even if raised for the first time on review. This is more so where the parties were unrepresented laymen unfamiliar with the intricacies of labour law." [Paragraph 12]

"It is thus an exception to the rule that applicants for review are confined to issues raised during the arbitration in circumstances where the parties or the arbitrator proceeded on an incorrect interpretation of the law, in particular the law relating to the powers of jurisdiction of the arbitrator. Where that is the case, a party is free to raise the legal point on review. Indeed, the reviewing court is bound to apply the law even if the point was not raised by the parties."[Paragraph 13]

"The CCMA's jurisdiction over a subject matter and parties is conferred by the law. It cannot be acquired through waiver or enlarged by the omission of the parties or conferred by the acquiescence of the CCMA."[Paragraph 14]

Whitcher AJ accordingly determined that the applicant was entitled to raise the issue of jurisdiction at the stage of review.

With regard to the review of the constructive dismissal, Whitcher AJ held:

"[T]he respondents must show not only that the conduct of the applicant created an intolerable situation at the time of the resignation, but also that the future relationship was threatened to such a degree that it could be regarded as being objectively intolerable. Where an employee does not give the employer a chance to rectify the relationship "going forward", it cannot easily be concluded that the resignation amounted to a constructive dismissal. Furthermore, the respondents must demonstrate that the reason for the resignation was linked to the objectively intolerable conduct of the applicant." [Paragraph 28]

Whitcher AJ held that the evidence led at the arbitration did not demonstrate that continued employment would be intolerable for the respondents. The first respondent's award was reviewed and set aside, and substituted with an order that the applicant did not constructively dismiss the third and fourth respondents.

STRYDOM V T-SYSTEMS SA (PTY) LTD (2012) 33 ILJ 2978 (LC)

Case Heard: 17 April 2012; Judgment Delivered: 30 April 2012

The Respondent sought an order upholding its exception and ordering that the proceedings be stayed pending the joinder of Business Connexion (Pty) Ltd as the Second Respondent, failing which an order dismissing a part of the Applicant's claim. The Respondent argued that, in the event that it was ordered to pay the Applicant any of the claimed severance pay, it would become a statutory debtor, jointly and severally liable with the old employer. As the Respondent enjoyed a common law right to recover a *pro rata* contribution from the old employer, the old employer ought to have been joined in the matter. It was thus a potential financial interest in the outcome of the retrenchment dispute that was said to establish the necessity of joining the old employer. In response, the Applicant disputed that the old employer had a direct, substantial and/or legal interest in the matter such that it must be joined of necessity.

Whitcher AJ held:

"In the present matter, no order is sought against the old employer that directly and substantially affects its rights and interests *vis a vis* the Applicant employee. The Applicant is not seeking reinstatement to the old employer, nor a declaration concerning the applicability of section 197 to his move from old to new employer. The joint and several liability imposed, in principle, upon the old employer seems to me to be incidental to the relief that the Applicant employee claims from the new employer (the Respondent). Separate legal processes exist for determining whether in fact such liability exists and, if so, to quantify it." [Paragraph 13]

"... [I]t is by no means a foregone conclusion that an old employer will be held liable for any portion of the relief ordered against a new employer in subsequent proceedings between these two parties. The finding of joint and several liability is in principle and the apportionment of liability depends on whether "the old employer is able to show that it has complied with the provisions of this section" [section 197(8) of the LRA]." [Paragraph 16].

"In considering the question of joinder, one must also be mindful of the effects of its being too easily exercised. The facility provided to creditors of targeting one debtor among many potential debtors is an established part of our law and fulfills important social and legal functions. This facility functions through orders of joint and several liability. It seems important, particularly in labour law where employee litigants are often not on the same financial footing as employers when it comes to affording the costs of suit, to preserve the ability of an employee to elect to pursue a particular debtor. If the employee is successful, it is up to the targeted debtor to assume the administrative and financial burden of bringing any co-debtors to account. The new employer is the targeted debtor in this case and it may exercise its right of recourse against the old employer in a separate action, if it chooses to. In a similar vein, the facility of targeting a particular debtor means that, if the employee loses, he or she is not burdened with the costs of two legal teams." [Paragraph 19].

The exception was dismissed.

NATIONAL UNION OF MINEWORKERS AND OTHERS V COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION AND OTHERS (JR2278/2010) [2012] ZALCJHB 81

Case Heard: 18 May 2012; Judgment Delivered: 1 August 2012

The applicant employees were dismissed for being under the influence of cannabis, and another for being under the influence of alcohol. The second respondent ("the commissioner") found that the employees were guilty of these offences but that their dismissals were substantively unfair "for reasons of inconsistency". However, he found that re-instatement was inappropriate "taking into account the inordinate lapse of time between the date of the dismissals and the completion of the arbitration proceedings". He awarded the employees 12 months compensation each. This was an application to review and set aside the relief awarded the commissioner. The main question was about whether, in the circumstances, the decision on relief was one that a reasonable decision-maker would not make.

Whitcher AJ held:

"It is trite that the primary relief for a substantively unfair dismissal is reinstatement or re-employment. Section 193 (2) (a) – (c) of the Labour Relations Act envisages compensation as an alternative form of relief if the employee does not wish to be reinstated, circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or it is not reasonably practicable to reinstate the employee. ..." [Paragraph 9]

"The employees in this matter wanted reinstatement. For this to be denied them, the 'inordinate lapse of time' mentioned by the commissioner must either constitute a surrounding circumstance that makes a continued employment relationship intolerable or it must constitute a condition in terms of which it is not reasonably practicable to reinstate the employees." [Paragraph 11]

"The commissioner is perfectly entitled to take note of the delay in this matter reaching the CCMA, especially if the period of delay may be relevant to the retrospectivity of the relief of reinstatement. However, there is no indication in the award of any evidence being led that a continued employment relationship would be intolerable as a result of the delay. It could thus not be for this reason that the commissioner declined to reinstate the employees." [Paragraph 13]

"By denying the employees reinstatement solely because of an 'inordinate' delay, the commissioner in my view decided the question of relief in a manner not reasonably supported by the evidence before him. There does not seem to have been any other evidence before him that could have legitimised the substitution of compensation for the primary remedy of reinstatement. By relying on delay as a sufficient, stand-alone basis to deny reinstatement, he also committed a reviewable error of law in deviating from the provisions of section 193 (2) of the LRA." [Paragraph 23]

The order of unfair dismissal was reviewed and set aside, and substituted with an order that the third respondent must reinstate the applicant employees with retrospective effect including backpay from the date of their dismissals.

SOUTH AFRICAN BROADCASTING CORPORATION LTD (SABC) V COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION AND OTHERS (JR446/2011) [2012] ZALCJHB 78

Case Heard: 20 April 2012, Judgment Delivered: 7 August 2012

Ncala was employed by the applicant since 1995. At the time of his dismissal, he was employed as a National Sales Manager. In May 2010, following an investigation by a forensic auditor from the applicant's internal audit department, Ncala was charged with five acts of misconduct. He was found guilty of charge 1: non-disclosure of business interests or membership as prescribed in the SABC Personnel Regulations in respect of four enterprises; charge 4: contravention of the SABC electronic mail policy by soliciting and conducting private business using the employer's email facility; and charge 5: dishonesty, alternatively making a misrepresentation by submitting excessive claims for using his private vehicle for the employer's business. He was dismissed on 16 August 2010. The commissioner confirmed the findings of guilt in respect of charges 1 and 4 only, and found the sanction of dismissal to be substantively unfair, ordering reinstatement.

Whitcher AJ held:

"The onus was on the applicant to prove the allegations against Ncala by showing that, on all the evidence presented by both parties, its version is more probable or likely than Ncala's version. Where the evidence permits more than one reasonable inference, one pointing to guilt and the other to innocence, the selected inference must, by the balancing of probabilities, be the more plausible conclusion of the possible inferences. Initially, the employer need only establish a prima facie case of misconduct against the employee and, where this is done, the evidentiary burden shifts to the employee to provide a credible and probable explanation for his actions. In the absence of such, the arbitrator could reasonably infer that the employee is guilty of the said misconduct and the employer has discharged its onus. An employee is not entitled to the benefit of the doubt, as to the convincing nature of his explanation. On raising a particular defence, an evidentiary burden falls upon the employee to establish that his version is likely. In an assessment of the evidence, the issue of the credibility and probability or improbability of a version are not separate inquiries but part of a single investigation into the acceptability of a version – measured against each other – to arrive at a decision that one version is more probable." [Paragraph 19]

"[C]ommissioners enjoy a certain latitude of discretion flowing from section 138 of the Labour Relations Act to decide how to conduct arbitration hearings. Among others, it is a function of theirs to attempt to 'move things along'. Litigants are certainly entitled to a fair hearing and there are clear principles to be enforced by reviewing courts to ensure the legality of the adjudication process. These include that a commissioner must not ignore material evidence and must properly apply his mind. However, a fair outcome must be achieved speedily and with the minimum of legal formalities, lest one of the other purposes of the LRA, to facilitate the effective resolution of disputes [see section 1 (d) (iv) of the LRA], be sacrificed. A reviewing court must therefore allow certain essentially discretionary powers and functions of commissioners, especially as to the conduct of the hearing, to be exercised and recognise that, in some instances, what might constitute a legal irregularity in a court is but a legalistic quibble in the CCMA." [Paragraph 24]

With regard to the evidence of dishonesty or misrepresentation, Whitcher AJ held that:

"[I]t is an informal but practical need to persuade the commissioner that a party's version is sufficiently credible to mean that it should be believed and that the opposing party needs to introduce further

evidence or explanation in order to rebut it. In practice the evidentiary burden shifts back and forth between the parties as a case unfolds. This shifting happens independently of which party has the formal burden of proof, which is assigned as a matter of law. The reason for imposing an evidentiary burden is to ensure that the party alleging wrongdoing does not have to disprove all imaginable defences, only those properly supported by sufficient evidence. In dismissal proceedings, even though the employer has the overall burden of proof, once it has adduced evidence of sufficient weight to warrant a rebuttal, a dismissed employee needs to consider how he is going to meet the evidentiary burden. If, however, the employee's explanation appears sufficiently persuasive, the employer will be faced with a challenge to provide sufficient evidence and argument to negate the employee's version and so on. None of this means that a hearing is an open-ended affair with parties reopening their cases to add evidence. The way in which the evidentiary burden swings between the parties means that it is important for parties to assess in advance what evidence is available to support their version and how this evidence may be best adduced. A further opportunity to assess the sufficiency of its case is presented to the party leading evidence first, when its opponent's version is put to its own witnesses in cross-examination." [Paragraph 50]

"In the end, the question that I have to answer is whether the commissioner reached a decision that a reasonable decision-maker could not reach? The answer is no." [Paragraph 65]

The application for review was dismissed.

MUNSAMY V MINISTER OF SAFETY AND SECURITY AND ANOTHER [2013] 7 BLLR 695 (LC); (2013) 34 ILJ 2900 (LC)

Case Heard: 25 - 28 June 2012, Judgment Delivered: 3 April 2013

In early 2000, 195 vacant promotional posts were made available in KwaZulu-Natal at the level of Superintendent, to bring the total number of such posts to 479. The applicant applied for posts 459, 463 and 493 and was recommended for appointment to post 459 but was not appointed on the basis that Indian males were over-represented, and Africans were under-represented at the level of Superintendent. The second respondent pleaded that the applicant lacked relevant experience for post 463 and that the successful candidate, Ms Drotsky, a white female, was appointed on the basis of 'representivity' and that the candidate with the highest points, was appointed to post 493. The issues were whether the respondent's decision, which was based on affirmative action, was in line with a defensible employment equity plan, and, as such, constituted fair discrimination against the applicant and whether the respondent had a fair reason for not appointing the applicant to post 493.

Whitcher AJ held:

"Employers are obliged to make the workplace equitably representative and may use discriminatory affirmative action measures to do so. An employer may, however, not prefer one group of designated employees over another group of designated employees who are supposedly over-represented in the absence of proper proof of such representativeness and a valid employment equity plan which permits the action of the employer. The LAC recently affirmed this rule in *SAPS v Solidarity on behalf of Barnard* when it held that the failure by the SAPS to appoint a recommended white female candidate did not constitute unfair discrimination where white females were over-represented in the level of the

advertised post and the failure to appoint was in line with a rational, coherent employment equity plan intended to redress inequitable representation in the workplace." [Paragraph 18]

"Where an employer used affirmative action measures to prefer one designated group over another who were supposedly over-represented, the employer must prove the following to establish that its conduct was in line with a defensible employment equity plan: (i) that there was an over-representation of the discriminated against group and an under-representation of the preferred group in the level of the post in question: this requires the conduct of a proper workplace profile audit; (ii) that the measure is sufficiently coherent and not open to arbitrary application or abuse; (iii) that the measure is permitted by the Act; (iv) an equity plan that permits the disputed measure, either expressly or by clear implication; (v) that the measure is intended to correct inequitable representation in the workplace; and, (vi) that the measure arose out of proper consultations, i.e. there had been proper consultation on the particular measure." [Paragraph 29].

"The absence of material prejudice does not detract from a finding of unfair discrimination because, while prejudice is highly relevant, the main mischief guarded against in the right not to be unfairly discriminated and *solatium* awarded in unfair discrimination cases is the infringement of the right to dignity. The central role of dignity as a substantive test of process in unfair discrimination is relevant. The constitutional court has emphasised that a person's constitutional right to dignity is infringed where he or she is unfairly discriminated against on the basis of race or gender. In the circumstances, the use of such an arbitrary measure against the applicant constituted unfair discrimination." [Paragraph 33].

It was held that the application of affirmative action measures which resulted in the applicant being denied promotion to post 459 was not in line with a defensible employment equity plan and as such the conduct of the respondent against the applicant was unfairly discriminatory.

SELECTED ARTICLES

'WORKPLACE BULLYING LAW: IS IT FEASIBLE?', (2010) 31 ILJ 43

The article considers the case for the introduction of a concept of "workplace bullying" into labour law, and considers questions about its use and effects on dispute resolution. The article begins by examining the common-law source of a right not to be bullied.

"If the notion of what, for ease of reference, may be termed 'unfair-dealing bullying', to distinguish it from the bullying that could be taken up in terms of existing statutes such as the Labour Relations Act (LRA) and EEA, takes hold in our law, it is likely to be a complaint, in whatever technical legal form it is taken up, that generates a host of hitherto impossible legal disputes. The main reason for this simply is that much of the conduct capable of being defined as bullying, does not 'attract legislative protection for employees'. And if the common-law duty of fair dealing or statutory anti-bullying is installed, clearly, the number of legal disputes will increase substantially. ..." (Page 45)

"Naturally, if workplace bullying is installed as an actionable wrong in labour law, one could expect the number of 'constructive dismissal' cases to diminish. This would be a consequence of employees being able to define and then legally do something about the 'bullying' behaviour of bosses before the situation became intolerable. The case load lost on the roundabouts will though be won back with interest on the swings. There are several reasons for this. First, constructive dismissal is only triggered by employer misconduct so serious that a resignation has occurred. Workplace bullying cases will, as a matter of definition, concern matters with far less odious a factual basis and therefore there will be, as a matter of logic, more of such cases brought forward. Unfortunately, in the second instance, one may also expect the misuse of this cause of action that has so bedeviled 'constructive dismissal' law to continue and possibly worsen. ..." (Page 45)

"The stringent 'intolerability' test applied in constructive dismissal cases would have to be loosened in the case of fair dealing or statutory bullying cases. After all, 'intolerability' is a standard against which to adjudicate the reasons for an employee resigning. A case of 'unfair dealing' or statutory bullying could not logically be decided on this high factual threshold but would have to use a less onerous basis ... " (Pages 45 - 46)

"... [O]ne must ask whether the introduction of statutory protections against workplace bullying (not to speak of the even wider obligation of fair dealing) will not saddle tribunals and courts with so extensive and subjective a wrong that it will embroil adjudicators in matters of which the LRA drafters had relieved them as well as massively adding to an already high caseload. ..." (Page 47)

"While interlocutory applications in disciplinary issues and unfair labour practices have recently attracted judicial disfavour, anti-bullying and fair dealing provisions would effectively permit interlocutory applications as far as disciplinary proceedings are concerned. While these already exist in respect of whistleblowers, it would be open to employees feeling bullied to put the employer through the defence of the bona fides of its ordinary disciplinary processes should the bullying allegation of abuse of disciplinary process be made. This is not ideal. .." (Pages 48 - 49)

"A further problem concerns the definition of bullying to include essentially subjective factors. What is humiliating and demeaning conduct by an employer? What is marginalization? These are highly subjective notions. Unlike sexual harassment law, which can draw on a more or less well-theorized set of

social and political mores to guide the adjudication of whether a subjective feeling of harassment is objectively justifiable, there is simply no such broad and objective set of mores to decide whether a feeling of humiliation, indignity or marginalization is objectively grounded. ...” (Page 49)

“While workplace bullying may certainly be problematic, respectfully, managerialism entails a certain level of pulling rank in a manner that objectively may appear and even be unfair. To expect the courts to entertain disputes about where the limits of such authority lie in cases where an employee has felt demeaned, marginalized or humiliated, for example, is impractical. Serious, objectively discernable acts of workplace bullying may largely be lodged within existing provisions of the LRA and this is a good thing. However, systematically to proscribe acts which flow from the duty to fair dealing or encompass the full range of bullying conduct defined above would probably open a Pandora's box of disputes which the machinery of our dispute-resolutions mechanisms would be ill-equipped to handle, procedurally and substantively.” (Page 49)

SELECTED JUDGMENTS

COMMERCIAL LAW

ABSA BANK LIMITED V MARIUS JULIUS TERBLANCHE AND ANOTHER, UNREPORTED JUDGMENT, CASE NO.: 17330/2012 (WESTERN CAPE HIGH COURT)

Judgment delivered 30 November 2012

This case concerned an application for summary judgment in which the plaintiff claimed payment from the first and second defendants, who were husband and wife married out of community of property, jointly and severally of an amount in respect of money loaned and advanced against three mortgage bonds. Defendants raised defences relating to (i) agency and (ii) securitization.

On (i), Davis AJ held:

"The defendants allege … that the agreements relied on by the plaintiff (i.e. the loan and mortgage bonds) are invalid … It is significant that the defendants do not in fact deny that the plaintiff advanced moneys to them. Nor is there any denial that they acquired the property on the strength of the mortgage loan. The gist of the defendants' complaint is that the plaintiff was not the institution which advanced the monies to them because the monies loaned belonged to the Reserve Bank, that it was the Reserve Bank which loaned the funds to the defendants, and that it is therefore the Reserve Bank, and not the plaintiff, which has the requisite locus standi to enforce the claim, because, so it is said, the plaintiff was at all times acting merely as the agent of the Reserve Bank." [Paragraph 7]

"The defendants provide no basis or support whatsoever for the bald factual allegations made in …their affidavit about complex matters of banking which one would not expect to fall within the ambit of the personal knowledge of the average consumer. Without a basis being laid for this specialist knowledge, I cannot but entertain serious doubts whether the defendants have the professed personal knowledge of these facts, and therefore whether the defence is put up in good faith. It seems to me that the defendants have simply latched onto the defences put up in the Tellinger case without any personal knowledge of or-sound foundation for: the material facts said to underlie the defence, which appears to be based entirely: on speculation. This seems to me, at best, to be opportunism on the part of the defendants" [Paragraph 8]

"Moreover, the allegation that it was the Reserve Bank, and not the plaintiff; who loaned moneys to the defendants, flies in the face of the clear wording of the written loan agreement and mortgage bonds attached, to the summons. These documents - the contents whereof have not been denied by the defendants - make it quite clear that the lender was the plaintiff" [Paragraph 9]

"I further consider that the agency defence rests on several flawed premises: and is not good in law … First, it is not correct that the Banks Act precludes the plaintiff from utilising its clients' deposits for making loans … the business of a bank as defined in the Banks Act specifically includes the use of deposits for the making of loan … Second, even if it could be established that the moneys which plaintiff used to make the advance to defendants did in fact emanate from funds loaned by the Reserve Bank to plaintiff … it is trite law that a loan of money, a consumable thing, is classified as a

loan for consumption *("mutuum"),* and that the borrower in terms of such a loan becomes the owner of the thing when it is delivered... Third, the contention that the plaintiff was acting as agent for the Reserve Bank in making the loan to defendants flies in the face of section 13(c) of the Reserve Bank Act, which expressly precludes the Reserve Bank from lending or advancing money on the security of a mortgage of immovable property. The plaintiff, on the other hand, is a registered credit provider in terms of section 40 of the National Credit Act... ("the NCA"). The effect of such registration is that plaintiff is duly authorised to provide credit and to enter into credit agreements in terms of the NCA, including mortgage loans such as the one in question in this matter." [Paragraphs 10-14]

On (ii), Davis AJ held:

"... As in the case of the agency defence, it seems to me that these allegations concern facts which do not fall within 'the personal knowledge of the defendants, and amount to nothing but speculation on their part. It is well known that securitization is a highly sophisticated commercial transaction resting on complex agreements, the preparation of which requires specialist legal and financial knowledge ... the important point ... is that there is simply no evidence on the papers to suggest that the plaintiffs claim; under the loan agreement and mortgage: bonds has been ceded to a third party." [Paragraph 17]

"Mr Zazeraj argued that the defendants should not be penalised for mounting a defence based on facts which fall within the exclusive knowledge of the plaintiff and of which they can therefore have no personal knowledge. He argued that they should be allowed to defend the action and to request discovery in order to ascertain whether or not the claims relied upon by the plaintiff have in fact been subject to securitization, I do not agree. Summary judgment, where a plaintiff is otherwise entitled thereto, ought not to be refused merely because the defendant wishes to embark upon a fishing expedition in the hope of coming up with a defence. To my mind this particular argument, which involves an implicit concession that the defendants do not have knowledge of the material facts said to underlie the defence, merely serves to underscore the fact that the securitization defence was knowingly put without any factual basis therefore, and that the defence cannot therefore be said to be advanced in good faith..." [Paragraphs 19-21]

"The defendants were legally represented at all material times and were duly notified in the summons of their rights in terms of sections 26(1) and (3) of the Constitution and in terms of rule 46(1) (a) (ii) .... Having had ample opportunity to do so, they did not allege that execution against the property would infringe their constitutional right to have access to adequate housing." [Paragraph 24]

"The defendants have failed to pay the installments owing on the mortgage bond for a period in excess of eighteen months. The arrears owing are substantial... There is no suggestion of any abuse on the part of the plaintiff bank in seeking to execute against the property. Nor would the results be disproportionate in my view. In the circumstances the plaintiff must be allowed to realise its security in terms of the mortgage bond ... I do not consider that the defendants have disclosed a *bona fide* defence to the plaintiff's claim. The plaintiff is therefore entitled to summary judgment as prayed." [Paragraphs 25-27]

GOBEL V GOBEL, UNREPORTED JUDGMENT, CASE NO.: 6935/13 (WESTERN CAPE HIGH COURT)

Case heard 11 June 2013, Judgment delivered 28 June 2013

This was an urgent application for the sequestration of the respondent's estate. The applicant and the respondent were engaged in divorce proceedings in which the applicant claimed, *inter alia,* payment of lifelong maintenance from the respondent. Applicant also sought interim interdictory relief preventing the respondent from encumbering or disposing of assets in his estate in the event that the application was postponed.

Davis AJ held:

"The respondent opposes the application for the sequestration of his estate on the grounds that the applicant lacks the requisite *locus standi* as a creditor, that he has not committed an act of insolvency, that he is not insolvent, and that the application has been brought for an ulterior purpose and is an abuse of process." [Paragraph 3]

On the issue of *locus standi:*

"Section 9(1) of the Insolvency Act requires that an applicant creditor shall have a liquidated claim against the debtor... The respondent argues that the effect of the November rule 43(6) application, which preceded the present application, is that the applicant does not have a liquidated claim against the respondent inasmuch as the *quantum* of maintenance payable by him … is as yet to be determined… The applicant's alleged claim against him is at best conditional and un-quantified, and does not, therefore, qualify as a liquidated claim for the purposes of section 9(1) of the Act." [Paragraphs 8-9]

'To be regarded as a liquidated claim the petitioner's claim must be fixed and determined. This Court, in the case of *Stephan v Khan* … held that "liquidated claim", as those words are used in sec. 9(1) of the 1916 Insolvency Act, mean a claim the amount of which has been determined by a judgment of the Court, by agreement or otherwise…. [T]he essential principle…. is that where the amount of the claim, or indeed its very existence, is subject to alteration and therefore uncertain, it cannot be said to be liquidated for the purposes of section 9(1) of the Act."….In *Van den Bergh v Kyriakou…* Caney AJ reasoned as follows in this regard: 'I find that, inasmuch as the quantum – and indeed the very existence – of the applicant's claim is undecided pending outcome of the rule 43(6) application, the applicant has failed to establish a liquidated claim as contemplated in section 9(1) of the Act. The application therefore falls to be dismissed on this ground alone.'"[Paragraph 15- 23]

"In the light of the conclusion which I have reached regarding *locus standi* and abuse of process, it is not necessary for me to deal at length with the questions of whether or not the respondent has committed an act of insolvency or is actually insolvent. … To sum up, it appears that the respondent's financial situation is in flux at this point in time and is likely to settle and improve in the next few months. It seems to me that his liquidity problems are due in no small measure to the acrimonious divorce and concomitant lack of co-operation and sound financial management between the parties. The respondent's ability to earn a living would likely be impaired were his estate to be sequestrated. In all the circumstances I consider that it would be premature and unduly

prejudicial to respondent to grant a provisional order for the sequestration of the respondent's estate at this stage…" [Paragraphs 25-43]

On the issue of abuse of process:

"It is trite law that sequestration proceedings are not designed for the resolution of disputes at to the existence or non-existence of debts, and that it is an abuse of the process of the court to resort to such proceedings to enforce payment of a claim which is disputed on *bona fide* and reasonable grounds." [Paragraph 44]

"On 3 April 2013, in the context of ongoing divorce settlement negotiations… the applicant sent an email to her attorney, which she copied to the respondent, in which she stated as follows: 'I am instructing you to continue with the sequestration procedure tomorrow 4 April 2013 after 12 noon, should our offer not be met. Three years of negotiating a reasonable settlement with the other side will come to an end. We are too far apart. Klaus is who he is, he will not change. My parents and I have peace with this decision.' To my mind the fact that this letter was copied to the respondent is indicative of an attempt to bully the respondent into giving in to her demands using the threat of sequestration as a weapon. The applicant candidly admits that she would not have brought the present application if the divorce had been settled and the respondent had complied with the terms of the settlement." [Paragraphs 52-53]

"In all the circumstances the conclusion is inescapable, in my view, that the applicant's objective in launching the present application was not a *bona fide* attempt to bring about a sequestration of the respondent's estate for its own sake, but a tactical manoeuvre aimed at pressuring the respondent into settling the divorce on her terms. The application was therefore brought for an ulterior motive, and falls to be dismissed as an abuse of process." [Paragraph 54]

"In her notice of motion the applicant sought an order that, in the event of the sequestration application being postponed, the respondent be prohibited from encumbering or disposing of his assets… The applicant did not make out a case in her founding affidavit that the applicant's conduct in disposing of certain of his assets was *mala fide.* It was apparent … that the respondent had for some time been contemplating the sale of assets with a view to reducing debts and releasing funds… I considered it appropriate to grant interim relief which was significantly narrower in scope than the relief sought by the applicant and was calculated to operate only until the finalization of the sequestration application….'" [Paragraphs 55-62]

"There is ample precedent for the granting of attorney and client costs against a litigant in circumstances where there has been an abuse of process. I have found that the application was an abuse of process on two scores, namely that the applicant's claim was, to her knowledge, disputed, and that the application was brought for an ulterior motive. The respondent was put to unnecessary expense in resisting the application. In all the circumstances I consider it both fair and appropriate to grant costs on the scale of attorney and client, as requested. In the result I ordered that the application be dismissed with costs, such costs to be paid on the scale of attorney and client." [Paragraphs 64-65]

CIVIL PROCEDURE

MANWOOD UNDERWRITERS (PTY) LTD AND OTHERS V OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED [2013] 1 ALL SA 701 (WCC)

Judgment delivered 5 December 2012

Plaintiff applied for leave to amend its particulars of claim under rule 28(4) of the Uniform Rules of Court. Second and third plaintiffs had entered into an investment contract with the defendant, and claimed for an amount alleged to be due to them in terms of the contract (the encashment value). Plaintiffs initially based their claim on the investment contract alone, and defendant denied that proper notice of encashment had been given in terms of the contract. Plaintiffs then sought to meet this by amending their particulars of claim, to the effect that, if the notice were found not to be valid, defendant had waived strict compliance with the notice requirements and was estopped from relying on them; alternatively that the defendant had breached the contract by making negligent representations to the plaintiffs. Defendant also argued that the claim had prescribed.

Davis AJ held:

"It is common cause on the pleadings that the investment contract is governed by the law of Guernsey. Given that Guernsey law is the proper law of the contract, it is necessary at the outset to consider what role, if any, the chosen foreign law has to play in the determination of this application." [Paragraph 12]

After citing SCA jurisprudence to establish that procedural matters were determined under the law of the country where the dispute was heard (*lex fori*), while substantive matters were determined under the law governing the underlying transaction (*lex causae*), Davis AJ continued:

"The characterisation of an issue as procedural or substantive has traditionally been done solely according to the law of the lex fori. In Price, however, the Supreme Court of Appeal endorsed the application of a via media approach to characterisation, which involves a consideration of both the rules of the lex fori and the lex causae pertaining to classification. What is advocated is the making of a provisional classification having regard to both systems of law, followed by a final characterisation which takes into account policy considerations and which enables the court "to determine in a sensitive and flexible manner which legal system has the closest and most real connection with the dispute before it."" [Paragraph 14]

"In the nature of things, the application of the via media approach requires that there be evidence before the court of the relevant foreign law rules. In this matter, however, there is no evidence before me regarding the content of Guernsey law ... In these circumstances, therefore, I must necessarily classify the relevant issues solely in accordance with the lex fori." [Paragraph 15]

Davis AJ then considered the law applicable to the prescription claim:

"A distinction has traditionally been drawn in South African law between those prescription statutes which operate to extinguish rights, and those which merely bar a remedy by imposing a procedural limit on the institution of action to enforce the right. Statutes of the former kind are regarded as substantive in nature, while the latter are regarded as procedural. Section 10(1) of the Prescription

Act makes it clear that prescription under the Act operates to extinguish a right. This means that prescription in South African law is classified as a matter of substantive law and not procedure, and as such is not a matter for the lex fori. Thus the Prescription Act does not apply in this case." [Paragraph 22]

"One must, therefore, look to Guernsey law in order to ascertain whether prescription is regarded as substantive or procedural in Guernsey. If it is regarded in Guernsey as substantive, Guernsey law will apply to determine the issue of prescription. If, however, prescription is characterised as procedural in Guernsey, one will be faced with the conundrum of the "gap" … where the lex fori, being substantive, does not apply, and the lex causae, being procedural, also does not apply." [Paragraph 23]

"I have already adverted to the absence of any evidence before me regarding the relevant content of Guernsey law. I am not in a position, therefore, to determine whether prescription in Guernsey is classified as a matter of procedure or substance and, if it is substantive, whether the claim contemplated in the negligence part of the amendment has prescribed under Guernsey law." [Paragraph 24]

"I am, therefore, faced with the situation where it is possible that Guernsey law governs the issue of prescription in this case, and that the claims sought to be introduced in terms of the negligence part of the amendment might be alive and enforceable under Guernsey law. In these circumstances, I consider that it would be wrong for me to close the doors of the court on the plaintiffs by disallowing the amendment. … I, therefore, consider that the objection based on the prescription point must fail and the negligence part of the amendment allowed." [Paragraphs 26, 28]

Davis AJ then considered the amendment regarding waiver and estoppel:

"It is recognised that waiver and estoppel are frequently relied upon in the alternative in litigation involving insurance contracts. In the present case, the plaintiffs seek to rely in their particulars of claim on waiver and estoppel, *based on the same pleaded facts*. … The waiver and the estoppel function as defences which negative the defendant's reliance on non-compliance with the notice requirements, and in this manner serve to establish the cause of action indirectly." [Paragraph 35]

"It is clear that there can be no objection to a plaintiff alleging in its particulars of claim that a condition or requirement in a contract, which would otherwise be destructive of any right of action based on the contract, has been *waived* by the defendant. I can see no reason why, in such a situation, estoppel cannot be pleaded in the alternative to waiver … It seems to me that where the same conduct is alleged to found both a waiver and/or an estoppel, it would be highly artificial … to insist that the plaintiff refrain from referring to estoppel in the particulars of claim and raise in in a replication instead." [Paragraph 36]

Subject to one deletion due to lack of particularity, leave to amend was granted. Applicants (plaintiffs) were ordered to pay costs [paragraph 47].

CRIMINAL JUSTICE

JACK V S, UNREPORTED JUDGMENT, CASE NO.: A385/2012 (WESTERN CAPE HIGH COURT)

Judgment delivered 26 October 2012

The appellant was convicted in the Regional Court of three counts of pointing a firearm in contravention of section 120(6) (a) of the Firearms Control Act. All three counts were taken together for purposes of sentence and the appellant was sentenced to 24 months direct imprisonment. This case was an appeal against sentence and conviction.

Davis AJ (Bozalek J concurring) held:

"The appellant's version essentially boiled down to a denial that he had had a gun on him on the night in question. During the course of cross-examination important elements emerged which had not been put to state witnesses, such as the allegation that Smith and the person who was with him in his car were carrying pangas. In short, the appellant's answers to the prosecutor's questions were riddled with inconsistencies and conveyed the distinct impression that he was fabricating the answers as he went along." [Page 4]

"The magistrate rejected the version of the appellant on the basis that the version which unfolded during his cross- examination was not even a distant cousin to the version put up in his evidence in chief and had not been put to State witnesses. Stanley Joseph also failed to make a good impression on the magistrate, who felt that he had been more under the influence of alcohol than he was prepared to admit. Elzane Josephs, Smith and Khane, on the other hand, all created a favourable impression on the magistrate. As regards the question of contradictions between the police statements of Elzane Josephs and Plaatjies Smith and their oral evidence, the magistrate found that these contradictions were not material and did not impair their credibility." [Pages 4-5]

"It was argued on behalf of the appellant that the magistrate had misdirected herself by failing to attach due weight to the appellant's evidence that he did not point a gun at the complainants and the fact that no gun was found…In my view these contentions are without merit. The fact that no gun was found does not in any way derogate from the overwhelming evidence presented by the State that appellant had a gun which he pointed at Stanley and Smith. The incident took place at night and the appellant fled from the police through various yards, giving him an opportunity to dispose of any firearm in his possession." [Page 5-6]

"Such contradictions as there were in the State's evidence related to peripheral issues and details which were irrelevant in the greater scheme of things. The approach which the magistrate took to the contradictions between the oral testimony and the witness statements was entirely correct … It is well established that an appellant court should be slow to upset the factual findings of the trial court which has enjoyed an advantage in seeing and hearing the witnesses and being steeped in the atmosphere of the trial. It is also trite that where there has been no misdirection on fact by the trial court, the presumption is that its conclusion is correct… An appellate court will only interfere when it is convinced that the trial court is wrong. … In the absence of demonstrable and material misdirections by the trial court, its findings of fact are presumed to be correct and will only be

disregarded if the recorded evidence shows them to be clearly wrong.'" [Page 6-7]

"In short, I can find no indication of a misdirection of any nature such as to warrant interference with the factual findings of the magistrate- Having regard to the totality of the evidence presented by the State, I am satisfied that the appellant's guilt was proved beyond a reasonable doubt. Thus, in my view, the appeal against conviction must fail." [Page 7]

"In arriving at the sentence the magistrate had regard to the appellant's previous convictions, to the ex parte submissions made by the appellant's attorney and to the aggravating circumstances raised by the State, namely that the accused had previously been declared unfit to possess a firearm, that he had committed the offences while out on parole and that he had violated the conditions of his parole by being at a tavern and consuming alcohol…. The State argued that a custodial sentence was the only appropriate sentence given the appellant's apparent contempt for the law…" [Pages 7-8]

"The Firearms Control Act… provides for a fine or imprisonment not exceeding 10 years for the offences with which the appellant was convicted. Furthermore, appellant's counsel did not refer to any cases suggesting that the sentence imposed was in any way out of kilter with sentences imposed in similar matters, I can find no indication that the magistrate misdirected herself in regard to the sentence … nor do I consider then sentence imposed was in any way unreasonable or excessive having regard to the appellant's previous convictions and the relevant aggravating circumstances. There exists no basis, therefore, for interfering with the sentence imposed by the magistrate on appellant. …" [Pages 8-9]

The appeal was dismissed.

SELECTED JUDGMENTS

PRIVATE LAW

JOHANNES MOUTON AND OTHERS V DR SIHLE MOON, UNREPORTED JUDGEMENT, CASE NUMBER: 2163/2014 (WESTERN CAPE HIGH COURT, CAPE TOWN)

Judgment delivered 14 March 2014

This was an application for an urgent interdict to restrain the respondent from making defamatory statements in respect of the applicants. Respondent was a former administrator of the second applicant, the Services sector Education and Training Authority, who was alleged to be responsible, together with one Ms Bogoshi (the Chief Operations Officer of the Second Applicant) for a letter e-mailed to various stakeholders which contained allegations of irregularities in the appointment of the first applicant as Chief Executive Officer of the Second Applicant. Applicants argued that the letter contained defamatory statements.

Salie-Samuels AJ considered various points in limine raised by the respondent, and the necessary causa underlying the relief sought was established (i.e. could the court find that the respondent had published defamatory statements in respect of the applicants). Salie-Samuels AJ first considered whether the second applicant, as a statutory body, was capable of being defamed:

"For reasons of public policy, a government department or local authority cannot sue for defamation or other claims under the action iniuriarum. The state has no action for defamation… However, a state official may individually have an action if the statement is defamatory of him or her … Although not relied on by the respondents in their papers, the court is essentially faced with the balancing of the right to freedom of expression, on the one hand, and dignity, including the right to protect one's reputation, on the other." [Paragraph 13.1.1]

Salie-Samuels AJ then considered judgements by the Supreme Court of Appeal, High Court and Supreme Court of Zimbabwe, and continued:

"When a defamatory remark or allegation is made against a statutory body, or an individual holding office therein, it can be seen as being made against the statutory body as a whole. The individual being named in the defamatory remark may then institute a separate action of defamation in his or her own name, and not funded by the statutory body in which he holds office. … There is sufficient case law it to establish [sic] that statutory bodies are incapable of being defamed. In the present case the applicant was specifically named in the defamatory letter and he is therefore still able to sue for defamation in his individual capacity." [Paragraph 13.1.1]

"An essential element when alleging and proving defamation is the requirement of publication." [Paragraph 13.2.1]

"… Although in the present matter this court is not faced with an action, the Applicants have not provided sufficient proof that the Respondent was in fact the person that sent the letter containing defamatory remarks. Merely establishing that the defamatory letter has been saved to the Respondent's computer is not sufficient to prove that he was the person that sent it and/or involved in the distribution thereof. … The requirement of publication … has therefore not been met." [Paragraph 13.2.2]

"The Applicant relies on Sections 8 and 10 of the Constitution … The Applicants contend that their right to human dignity has been infringed. The Respondent alleges that the interdict sought … is merely to take away his freedom of speech … The Constitution does not set out a hierarchy of rights. When competing rights are asserted it must be weighed while applying the principles applicable to interim interdicts. …" [Paragraph 13.2.3]

"… I find that if the defamatory statements are false and malicious and have resulted in actual damage or loss to the SETA, such loss can be recovered, but the action would not be one based on an injury to the reputation of the SETA, but upon a wrong done which causes loss. There is insufficient proof that the Respondent completed the act of publication of defamatory statements in respect of the Applicants. … " [Paragraph 14]

The application was dismissed.

COMMERCIAL LAW

ETRACTION (PTY) LTD V TYRECOR (PTY) LTD [2014] 2 ALL SA 90 (WCC)

Judgment delivered 5 February 2014

The applicant sought an interdict restraining the respondent from infringing the applicant's registered trade mark. The Applicant claimed that the respondent was infringing its rights by using, in relation to tyres and/or in relation to wheels and/or in relation to tyre and wheel combinations, the trade mark "infinity", or a mark so nearly resembling it as to be likely to deceive and/or to cause confusion. The respondent's main defence was that its predecessor in title, Falck Trading (Pty) Ltd, commenced the use of the trade mark during 2006, thus predating the date of registration of the applicant's trade mark. Respondent argued that such use provided it with a defence in terms of section 36(1) of the Trade Marks Act. The Respondent also made a counter application for partial expungement of the trade mark in respect of tyres.

Salie-Samuels AJ denied the application for an interdict:

"The success of the Respondent's defence in terms of Section 36 depends upon whether it is able to prove that it is to be regarded as the successor in the title of an entity that made bona fide use of the trade mark INFINITY prior to the date of registration of the applicant's trademark." [Paragraph 12]

Salie-Samuels AJ discussed the lack of formal transfer agreements regarding the takeover of the business:

"I am persuaded that there was a transfer or an assignment of rights and obligations between the predecessor and successor in relation to the import and sale in INFINITY branded tyres. That the Respondent appears not to have a written contract in its possession or that relevant provisions of the Companies Act have not been complied with, does not vitiate such a transfer of rights and the Respondent faces sanctions embodied in the Companies Act. However, it does not in my view affect the Respondent's defence available in terms of Sections 36 of the Act. … The upshot of my finding that the Respondent had a right to use, and its predecessor in title, Falck Trading (Pty) Ltd, had used the trade mark prior to the Applicant seeking registration of the trade mark INFINITY, is that the application for an interdict fails and the defence raised by section 36(1) of the Act succeeds with costs." [Paragraph 14]

Salie-Samuels AJ then turned to the counter-application for expungement. The Respondent in the main application counter applied for the partial expungement of the trade mark by the deletion of "tyres" from the Applicant's registration. The Respondent argued that from 2006 the Applicant was aware of its use of the trade mark in respect of tyres, and consequently when the Applicant sought registration of the trade mark in the Applicant's name, it did not have a bona fide claim to proprietorship of the trade mark.

"The Applicant's adoption of the trade mark INFINITY by applying for its registration two weeks after discussions with the Respondent considered in conjunction with the Applicant's delay from the time of registration of the trade mark until 17 August 2011 before instituting proceedings, as well as its use of the trade mark from 1995 until 2008 before applying for registration, constitutes conduct approaching "sharp practice"." [Paragraph 16]

"The Applicant's conduct in adopting the trade mark when it did not have a bona fide claim to proprietorship of the trade mark INFINITY at the time of its application for registration, because it was aware of the Respondent's use of the trade mark, and what I find as the absence of an intention on its part to use the trade mark INFINITY in relation to its goods, results in its application being completely vitiated" [Paragraph 21]

The counter-application was upheld with costs.

ADMINISTRATIVE JUSTICE

GOODHOPE PLASTERERS CC TA GOODHOPE CONSTRUCTION V INDEPENDENT DEVELOPMENT TRUST AND ANOTHER (5472/2013) [2014] ZAWCHC 67

Judgment delivered 29 April 2014

The case concerned a review of a decision to award a tender, and the subsequent decision to withdraw the tender. During July 2012, First Respondent invited tenders for the construction of a new court building, pursuant to which tenderers submitted bids, namely the Applicant and the Second Respondent. On 14 November 2012 the First Respondent notified the Second Respondent in writing that the tender had been awarded to it subject to certain conditions. The other tenderers were formally notified in writing of the outcome of the tender on 1 February 2013. On 19th February 2013 the First Respondent notified The Second Respondent in writing that the award of the tender to it had been withdrawn and reasons for such withdrawal and cancellation of the tender were given. The Applicant contended that the First Respondent was not entitled to simply cancel the award of the tender as it had in fact done and that upon an award of a tender to a bidder, such bidder is vested with a legitimate expectation and the functionary is not by any means free to unilaterally cancel the award. The Applicant sought the review and setting aside of the decision to award the tender to the Second Respondent, as well as the subsequent decision to withdraw the tender. It further sought an order that the tender be awarded to itself (Goodhope), together with ancillary relief as provided for in Section 8 of the Promotion of Administrative Justice Act.

Salie-Samuels AJ held:

"Taking account of the authorities directly in point, I am not convinced that the matter before me allows for this Court to usurp the repository's powers or functions. In my view a substantial deviation of the

original scope of works for the construction of the Plettenberg Bay Magistrate's Court compels that such revised works require a new tender process as contemplated in the PAJA." [Paragraph 22]

""... [R]emittal is almost always the prudent and proper course. The reasons for this are not only constitutional but also institutional in nature, since the administrator is generally best equipped by the variety of its composition by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. It follows therefore that this court is by no means qualified to make the decision to award the tender herein given the fact that the prevailing circumstances fall squarely within the authority in point." [Paragraph 25]

"The primary purpose of the project is not so much to vest a bidder with a contract, but indeed it was to provide the community of Plettenberg Bay a court building to function and serve the needs for which it was created and provided for in the first place. To restrict the Department to an original building project, for which upon revision, it no longer requires to the extent that the tender had been formulated, cannot by any stretch of the imagination be in line of the relevant principles of administrative law." [Paragraph 29]

The application was dismissed with costs.

CRIMINAL JUSTICE

JOHANNES J COETZEE V THE STATE, UNREPORTED JUDGEMENT, CASE NO. A374/12 (WESTERN CAPE HIGH COURT, CAPE TOWN)

Judgment delivered 5 December 2013

Appellant had been convicted in the Magistrates' Court on five counts of sexually assaulting his minor stepdaughters, and sentenced to seven years imprisonment. On appeal, the issue was whether he had been correctly convicted on the evidence of a single witness.

Salie-Samuels AJ (Fortuin J concurring) held:

"Each of the complainant's testimony was that of a single witness. The court must weigh up the testimony of the single witness against that of the merits and determine whether the testimony is satisfactory in all the circumstances. The question is not whether the appellant must be believed but whether his version could be reasonably possibly true." [Paragraphs 20 - 21]

"Even if the evidence of the state is not rejected, the accused is entitled to an acquittal if the version of the accused is not proven to be false beyond a reasonable doubt." [Paragraph 22]

"The appellant exploited his superiority in standing, age and familial power to manipulate and subordinate the complainant, as was described by Cameron JA in S v Marx ... The outdated cautionary approach in cases where children are witnesses in sexual cases is of course a well-known one. ..." [Paragraphs 30 - 31]

"The appellant's testimony was filled with a number of inconsistencies which simply does not make sense. There was no enmity between the appellant and the complainants before the incidents occurred.

There appears, from the evidence, to be no reason why the complainants would have falsely implicated the appellant in a serious crime and for bringing shame and hurt upon themselves." [Paragraphs 38 - 39]

"There is no onus on the state to prove that the accused's version is false beyond a reasonable doubt. All that is required by the state is to prove the accused's guilt beyond a reasonable doubt. … The court a quo was faced with two opposing versions which were conflicting. The evidence provided by the appellant did not differ from that of the complainants' in some respects, but in all. It therefore follows logically that if the magistrate found the complainant's version to be reasonably possibly true, then the appellant's version cannot also be reasonably possibly true." [Paragraphs 48 - 49]

"The court a quo correctly found that the evidence was clear enough to establish the guilt of the accused beyond a reasonable doubt. … " [Paragraph 50]

"… There is no reason to interfere with the sentence imposed. If anything more has to be said, then having regard to the continuous and relentless manner in which the appellant groomed the complainants into sexual conduct and the negative effects this has had on them and the family's life, the appellant should consider himself fortunate to have been sentenced to only 7 years' imprisonment." [Paragraph 53]

The appeal was dismissed.

SELECTED JUDGMENTS

ADMINISTRATIVE JUSTICE

ASLA CONSTRUCTION (PTY) LTD AND OTHERS V MINISTER OF HUMAN SETTLEMENT, WESTERN CAPE GOVERNMENT AND OTHERS (3159/2013) [2013] ZAWCHC 117 (20 JUNE 2013)

Case heard 22 May 2013, Judgment delivered 20 June 2013

Applicant sought to review and set aside three tenders awarded by the second respondent (the Department) to the third respondent (G5M) for the construction of various housing units, and to review and set aside the decision to disqualify the applicants' bids in respect of the tenders, as well as to set aside contracts concluded between the Department and G5M.

Savage AJ held:

"The applicants seek the review and setting aside of the decisions taken by the Department on the basis of material mistakes of law and/or fact and on grounds of the failure by the Department to properly to apply its mind to the matter under s6(2)(d) and (i) of PAJA. … In performing its task a review Court must not lose sight of the distinction between appeal and review. 'Review is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality…' … " [Paragraphs 33; 35]

"Section 5 of PAJA provides for reasons to be furnished by the administrator and the adequacy of reasons will depend on a variety of factors, such as the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action, and the nature of the functionary taking the action. The reasons must from the outset be intelligible and informative to the reasonable reader of them who has knowledge of the context of the administrative action. If the reasons refer to an extraneous source, that extraneous source must be identifiable to the reasonable reader. …" [Paragraph 40]

"The interpretation of the document is a matter of law whether it is a statute, a contract or a tender specification. … The tender specification clearly sought bids in respect of alternative, unconventional, non-standard systems not covered by conventional building standards or codes and not falling within the "deemed-to-satisfy" provisions of the NBR [National Building Regulations]. The applicants' system on their version was "not fully covered", or put differently was partially covered by these standards or codes, or the NBR, but was nevertheless alternative with non-standard foundations. It is the applicants' case that its bids were compliant in that a non-standardised system does not consist exclusively of non-standard components but requires that material elements be non-standard components." [Paragraph 45]

"The tender document was not a model of clarity in providing that alternative systems had to be approved by the "Agrement South Africa, NHBRC, City of Cape Town, PDHS and SABS" while "any unconventional system" required Agrément certification. There was no suggestion made by the Department that Agrement South Africa, NHBRC, City of Cape Town, PDHS and SABS approval had to be obtained and I tend to agree with the applicants … that their submission of a NHBRC approved rational design in respect of an alternative system was compliant. I am not persuaded that the fact

that NHBRC approval does not address whether the system is non-standardised, alternative or unconventional goes to compliance with the tender specifications which do not require that such approval determine a system to constitute an alternative one." [Paragraph 46]

"An assessment as to what constitutes an unconventional, alternative or non-standard building system requires a thorough understanding and analysis of the various systems available using expert knowledge ... I accept that the test must be one of materiality. However, given the technical nature of the subject-matter, the exercise of the discretion as to what system best meets the requirements of the tender is one that is properly vested in the administrative decision-maker. ..." [Paragraph 52]

"... I accept that it is permissible for an administrative functionary to provide further reasons for a decision after the fact, even in answering papers placed before the review Court, provided these elaborate on the reasons provided contemporaneously. ... [I]t must be noted that the functionary is often an expert in his or field but not necessarily a lawyer involved in crafting a careful defence to any later legal action that may ensue. While this does not however insulate a functionary from the requirement that different and unrelated reasons cannot be substituted after the fact in order to cure a defect, I am satisfied in this case that the BEC did consider the bids' compliance with tender requirements and that its reasons provided bear this conclusion out." [Paragraph 56]

"The degree of irregularity is therefore limited to the statement that the Agrément certificate was required in circumstances in which it was not and when it was apparent that the NHBRC rational design had been considered. The degree of irregularity is required to be weighed in balance. ... [W]hile I accept that the decisions taken by the Department to disqualify the applicants due to no Agrément certificate having been provided was not in compliance with the tender requirements, the conclusion that the rational design approval did not have reference indicated that it had been considered by the BEC. I am not persuaded that a material mistake of law accordingly arose in relation to the apparent reason that there was a lack of the Agrément certificate when considered in the context of the substantive content of the bids considered, or that it is illustrative unlawfulness in a material respect. ... [G]iven the technical nature of the subject matter of the bids and the assessment and consideration of these individual bids against the bid requirements, I am of the view judicial deference should be given to the administrative functionary to determine such substantive compliance with the bid requirements." [Paragraphs 57 - 58]

The application was dismissed.

CIVIL PROCEDURE

JC V DC 2014 (2) SA 138 (WCC)

Case heard 22 January 2013, Judgment delivered 19 March 2013

Applicant sought to have respondent held in contempt of court, and directed to return the three minor children of the marriage between applicant and respondent to South Africa. The parties had been divorced by order of the High Court, and respondent had subsequently removed the minor children to Zimbabwe without the permission of the applicant.

Savage AJ held:

"Ms Pratt contended for the respondent that this court lacks jurisdiction to hold the respondent in contempt of the order of this court … given that she resides in Zimbabwe and is no longer domiciled in South Africa … " [Paragraph 18]

"The crucial time for determining the jurisdiction of a court to entertain an action is at the commencement of the action … This court has the power to adjudicate upon, determine and dispose of a matter within its territory, with due regard to the nature of the proceedings or the nature of the relief claimed or, in some cases, both, and whether the court is able to give an effective judgment … Although effectiveness lies at the root of jurisdiction it is not necessarily the criterion for its existence …" [Paragraphs 20 - 21]

"Where a court has jurisdiction at the commencement of proceedings, a successful party is entitled to an order to the extent to which it can be made effective, even though it may not be possible to do so immediately. … Contempt proceedings are not new proceedings, but merely a continuation of proceedings previously instituted … Consequently, it follows that this court has jurisdiction … in respect of this matter, as a cause arising within the jurisdiction of the court. " [Paragraphs 23 - 24]

"With regard to the effectiveness of a judgment made in this matter, it is material that the applicant does not pursue an order for the arrest or committal of the respondent, but rather an order of contempt without sanction; an order that the removal of the children was unlawful; and an order that subject to the decision of the Zimbabwean court in proceedings instituted under the Hague Convention, the children should be returned to South Africa. The nature of the relief sought is therefore in essence declaratory" [Paragraph 25]

"The grant by this court of an order which is declaratory … is not a pointless exercise … [T]he order may be placed before the foreign court by the applicant in the pending Hague Convention proceedings so as to indicate the attitude of this court to the conduct of the respondent. … " [Paragraph 31]

"Even if I am wrong and this court's jurisdiction does not exist on the basis of the doctrine of continuance of jurisdiction, I am not persuaded that the respondent has acquired Zimbabwean domicile … The respondent has not been resident in Zimbabwe for a continuous period of two years and accordingly, under Zimbabwean law, is not domiciled in Zimbabwe. … [I]t is clear that this court's jurisdiction is therefore not ousted by virtue of the respondent's domicile … " [Paragraphs 33 - 34]

"It is a crime to unlawfully and intentionally disobey a court order, thereby violating the dignity, repute or authority of the court … Contempt proceedings are concerned with the unlawful and intentional refusal or failure to comply with the order of court." [Paragraph 35]

"… Ms Pratt conceded for the respondent that the removal and retention of the children in Zimbabwe by the respondent are unlawful. … Any argument … that the order has not been breached in this country but in Zimbabwe where the refusal to return the children took place, cannot be sustained. [Reference to Australian case law] … Nothing has been placed before this court to show that the respondent did not act wilfully in refusing to comply with the court order. I am satisfied that the respondent possessed the knowledge that her retention of the children in Zimbabwe was in

breach of the order of this court and yet she nevertheless wilfully retained the children in Zimbabwe. … " [Paragraphs 38 – 40]

"… [T]he facts bear testimony to a wilful and orchestrated plan on the part of the respondent … to remove the children from South Africa and retain them there in spite of the absence of the consent of the applicant and in breach of the court order. … The respondent has failed to advance evidence establishing a reasonable doubt that her non-compliance with the court order was wilful and mala fide. … I find that the respondent has accordingly acted in contempt of the order of this court …" [Paragraphs 41 – 42]

"… [T]here exists no reason as to why an order should not be granted to the effect that, subject to any finding and order of the High Court of Zimbabwe which is to hear the pending application brought by the applicant in terms of the Hague Convention on the Civil Aspects of International Child Abduction in regard to minor children, the children should not be returned to the Western Cape …" [Paragraph 44]

Respondent was found in contempt of court; to have unlawfully removed the minor children from South Africa; and subject to the finding of the High court of Zimbabwe in the Hague Convention proceedings, it was ordered that the minor children should be returned to South Africa. Respondent was ordered to pay costs on an attorney and client scale.

JM V LM AND ANOTHER 2014 (2) SA 403 (WCC)

Case heard 13 November 2013, Judgment delivered 20 November 2013

This was an urgent application to set aside a writ of execution. At issue was whether a high court writ of execution could be obtained to enforce a maintenance order granted by the high court, when the Maintenance Act provided for the enforcement of a maintenance order, including a maintenance order made by the high court, by the maintenance court. The parties were involved in "acrimonious divorce proceedings", and the high court had ordered applicant to pay maintenance pendent lite. Applicant failed to make payment ad first respondent obtained a writ of execution, issued by the registrar of the high court, and an emoluments attachment order.

Savage AJ held:

"The enforcement of court orders is a critical component of the exercise of judicial authority. The unlawful and intentional disobedience of a court order not only violates the dignity, repute or authority of the court … but also undermines the effect of the order. …" [Paragraph 14]

"As a general rule the court that grants an order retains jurisdiction to ensure that its order is complied with, although that jurisdiction is not exclusive. … Distinct remedies available to a party that seeks to enforce a court order entitle the party seeking enforcement to choose the remedy which is considered the most efficacious." [Paragraphs 18 - 19]

"The fact that a party is permitted to seek the magistrates' court to enforce a maintenance order of this court does not lead to a necessary implication that the high court is prevented from enforcing its

own maintenance order. To find this to be so, a conclusion would have to be drawn that ss 42(2), (3) and 43(1) of the Superior Courts Act had by necessary implication been amended to exclude the enforcement of maintenance orders granted by the high court. ...It is presumed that a statutory provision is not aimed at altering or abrogating the existing law more than necessary ..." [Paragraphs 20 - 21]

"No clear inconsistency exists between the provisions of the Maintenance Act and those of the Superior Courts Act, and such provisions are not irreconcilable with each other. Rather, the statutes entitle an election on the part of a party seeking to enforce a high court maintenance order as to the court out of which such order is to be enforced. ... The fact that a choice is introduced ... does not 'introduce an arbitrariness' that is 'difficult to reconcile with rationality and equality before the law'. The distinctions that exist in the enforcement mechanisms available between the courts in this regard, rather that introducing arbitrariness, rationality and inequality, are factors to be taken into account by a party in the exercise of their election." [Paragraph 24]

"Were no such choice available, this would have the necessary consequence that all high court maintenance orders would in all circumstances be subject to the moratorium and enquiry provisions contained in the Maintenance Act upon steps being taken to enforce such orders. Not only would this necessarily diminish the value of the order obtained but it would have the potential to cause prejudice to the persons that such an order ... seeks by its nature to protect ... Such a consequence could not have been intended by the legislature." [Paragraph 25]

"A litigant ... may exercise an election in seeking interim relief pendente lite in a matrimonial matter either from the high court or from the applicable magistrates' court. The relief granted in such an order is in many instances wider than maintenance only and includes that relating to the care of and contact with minor children. Were it to be the case that the maintenance component of a high court order pendente lite was only capable of enforcement in the maintenance court, whilst other aspects of the same order required enforcement in the high court, this would result in unduly complex enforcement mechanisms arising that could not have been intended by the legislature. ... " [Paragraph 26]

"... [F]irst respondent had obtained an emoluments attachment order out of the magistrates' court against the applicant's employer. It was argued that in such circumstances the first respondent had elected to enforce the order by way of the maintenance court and could therefore not, in addition, obtain a writ from the high court in order to enforce the maintenance order." [Paragraph 32]

"There is no provision in either the Maintenance Act or Superior Courts Act to prevent a writ being obtained from the high court in respect of arrear maintenance, even in circumstances in which an emoluments attachment order has been obtained ... through the maintenance court. ... [T]he first respondent is permitted to make use of the enforcement mechanisms available to her until the full amount of the maintenance debt is extinguished. ... A maintenance order is granted to protect the vulnerable and ensure their support. The Maintenance Act makes it clear that the law seeks to promote an effective and accessible maintenance scheme. An effective maintenance scheme exists where maintenance ordered is paid and received without undue delay. ..." [Paragraphs 32 – 33]

The application was dismissed with costs.

CRIMINAL JUSTICE

S V DE GOEDE (121151) [2012] ZAWCHC 200 (30 NOVEMBER 2012)

Judgment delivered 30 November 2012

The court was seized with two matters concerning the same accused. In the first, a special review, the accused had been convicted of the theft of two deodorant sprays, and committed to a treatment centre in terms of the Prevention and Treatment of Drug Dependency Act.

Savage AJ (Henney J concurring) held:

"Given that the proceedings in which the sentence was imposed in the second matter were brought to the attention of this court as opposed to the matter being raised by the accused, this matter is distinguishable from S v Taylor 2006 (1) SACR 51 in which a review referred by an accused was permitted in terms of the inherent power of the Constitutional Court, Supreme Court of Appeal and High Court in terms of section 173 of the Constitution "to protect and regulate their own process, and to develop the common law, taking into account the interests of justice". The fact that the accused was legally represented and had entered into a plea and sentence agreement with the state does not preclude the provisions of section 304(4) from finding application given that the matter was brought to the notice of this court in the circumstances contemplated in the section." [Paragraph 5]

"For this reason, the record of proceedings in the second matter was requested from the regional court ... From the record it is apparent that the accused entered into a plea and sentence agreement ... in respect of a charge of robbery with aggravating circumstances committed prior to the commission of the theft in the first matter ... In this agreement the accused consented to his conviction on one count of robbery with aggravating circumstances ... Consequently, the accused was convicted by the regional court of robbery with aggravating circumstances and was sentenced to an effective five years imprisonment." [Paragraph 6]

"The plea and sentence agreement signed recorded that the accused had no previous convictions despite the fact that the accused had been convicted in the first matter prior to signature of the agreement. The agreement also made no reference of the fact that the accused had following his conviction ... been committed to a treatment centre for treatment for drug dependency ... In the circumstances, given that this fact was not placed before the regional court magistrate it was not considered by the magistrate as a relevant fact in determining whether the sentence agreed to by the parties was just." [Paragraph 8]

"Furthermore, whilst the date of commission of the offence in the first matter post-dated the date of commission of the offence in the second matter, a conviction for a crime committed after the crime for which the accused stands to be sentenced in the second matter is indicative of the character of the accused and can therefore be taken into account. ... This is in spite of the fact that this conviction is not a previous conviction 'in the true sense of the word' ... The relevance of this earlier conviction is that for the court to satisfy itself in accordance with section 105A(8) that the sentence agreement is just, all other facts relevant to the sentence agreement must be stated in such agreement in order to enable the court to apply its mind appropriately to the issue. The earlier

conviction of the accused and his committal to a treatment centre, although not strictly a previous conviction given the date of commission of the offence, constitutes a fact relevant to the sentence agreement in the second matter in that the committal to a treatment centre in the first matter could not be implemented given the subsequent sentence imposed by the regional court. It follows that the practical effect of omitting mention of the prior sentence was that all facts relevant to the sentence agreement were not placed before the magistrate, as a consequence of which the magistrate lacked the relevant material before her to consider whether the sentence agreement was in the circumstances just." [Paragraph 9]

"The test as to whether the proceedings in which a sentence was imposed were just does not focus only on whether the proceedings were technically sound but also whether their practical effect was just. If not, the reviewing court will intervene. ... The determination as to whether a sentence agreement is just will therefore depend upon the circumstances of each case being directly related to the unique facts of a matter." [Paragraph 11]

"The mandatory provisions contained in section 105A provide protection to the accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both plea and sentence. Consequently adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain process in the context of the waiver of the accused's constitutional rights. It follows therefore that where section 105A has not been complied with, the proceedings are susceptible to review ... This does not imply that any failure to comply with section 105A in all its intricacies must necessarily result in a successful review. The success or otherwise of a review under section 304 is dependent on the unique facts placed before a court. Whether proceedings are susceptible to review requires a court to apply its mind to these unique facts within the context of the prevailing statutory provisions. Accordingly, where a sentence agreement does not contain reference to a prior conviction it does not necessarily follow that the sentence agreement is not just." [Paragraphs 12 - 13]

"The plea and sentence agreement did not comply with the provisions of section 105A(2)(b) insofar as the magistrate did not have all facts relevant to the sentence agreement before her. As a consequence the magistrate was not able to satisfy herself that the sentence agreement was just. ..." [Paragraph 15]

The conviction and sentence in the second matter was therefore set aside and referred back to the court a quo. The Director of Public Prosecutions was permitted to reinstitute proceedings against the accused afresh. The proceedings in the first case were held to be in accordance with justice, and it was ordered that the committal of the accused to the treatment centre be implemented immediately.

SELECTED ARTICLES

'A DUTY TO ANSWER QUESTIONS? THE POLICE, THE INDEPENDENT COMPLAINTS DIRECTORATE AND THE RIGHT TO REMAIN SILENT', 16 SOUTH AFRICAN JOUNAL ON HUMAN RIGHTS 71 (2000) [Co-authored with D. Bruce and J. De Waal]

The article identifies problems experienced by the Independent Complaints Directorate (ICD) due to the refusal of members of the South African Police Services (SAPS), whose actions are the subject of investigation, to answer questions put by ICD investigators. The article considers ways of compelling police co-operation in ICD investigations and internal disciplinary hearings.

"Members of the SAPS are public servants who exercise powers not available to ordinary members of the public, including powers to use force and arrest. In general, therefore, it appears reasonable to require that the police be fully accountable for their actions, particularly if these are performed in the course of their duties. This would appear to imply that members of the SAPS should be regarded as having a duty to answer questions during an ICD or internal disciplinary investigation or inquiry, particularly in instances in which death or serious injury arises. Any duty of accountability that is placed on SAPS members must, however, also accord with the provisions of the 1996 Constitution. …" (Page 73)

"An ordinary ICD investigation may … have consequences that are both criminal and disciplinary in nature, although this may not be determinable at the initial stages of the investigation. When findings or recommendations are handed over to the relevant Police Commissioner, with disciplinary action proposed, the ICD's investigation may be indistinguishable from an internal police investigation. However, ICD investigations may also be precursors to criminal prosecution. Due to this fact, members of the SAPS who are the subject of investigation should have at least the same rights as would any other person in the course of a criminal investigation and possible trial, unless there are compelling arguments to the contrary. …" (Page 75)

"According to the traditional approach to statutory interpretation, if the legislature intended to impose a duty to co-operate with the ICD, an explicit provision … should have been included in the Police Act. Instead, the power of the Executive Director to 'request and obtain the co-operation of any member' is open to the interpretation that … there is no obligation of police members to co-operate. Even if a duty to co-operate may be read into the Police Act, what appears to be absent is an effective sanction to ensure that members comply with this duty. …" (Page 76)

"The issue of co-operation by SAPS members with the ICD is broader than the duty of subject officers to answer questions and does not necessarily conflict with constitutional principles. … [T]here appears to be no real statutory mechanism currently in place that expressly enables the ICD to compel co-operation from members of the police service or other government institutions. Irrespective of the conclusions reached on the possible duty of SAPS members to answer questions put to them by ICD investigators, it is therefore recommended that the ICD be provided with the necessary powers to compel police cooperation in its investigations. The absence of such a provision clearly limits the capacity of the ICD to perform its functions effectively. …" (Page 77)

The article then considered whether SAPS members could be compelled to answer questions in internal disciplinary inquiries, noting that SAPS' internal regulations appeared to allow the subject of an inquiry to remain silent or refuse to answer specific questions:

"... [T]he internal police disciplinary regulations may be unnecessarily liberal and limit the potential for the SAPS to ensure accountability from its members. A preferable option would be for members to be required to answer questions in disciplinary proceedings, but for such evidence, in so far as it is self-incriminating, to be regarded as compelled evidence that may not be admitted in criminal proceedings, at least against the member concerned. ..." (Page 79)

The article then considered the impact of the Constitutional rights to a fair trial, to silence, and to freedom of the person:

"It is clearly possible, therefore, in relation to a body such as the ICD that is intended to ensure police accountability, to develop a mechanism that requires the disclosure of information without violating the constitutional protection against self-incrimination ... We suggest that there are grounds for imposing limitations on the right to remain silent under the general limitation clause. It would appear that the type of limitation proposed would not be understood as a limitation on the right against self incrimination as the latter right has been interpreted thus far by the courts." (Page 82)

The article then considered current statutory provisions that required the answering of questions:

"In the case of s 28 of the NPAA [National Prosecuting Authority Act], the limitation on the right to remain silent is justified under s 36 of the 1996 Constitution, for two reasons. First, no evidence regarding the questions and answers of the examinee in the investigative inquiry may be used against the examinee in any criminal proceedings. Second, there is a rationale for limiting the right that appears to be 'reasonable and justifiable in an open and democratic society'. Section 28 only applies to certain specified offences ... where the state will find it extremely difficult to conduct a proper investigation without the co-operation of witnesses, including possible offenders. ... The s 28 mechanism ... represents an attempt by the legislature to comply with the demands of the 1996 Constitution while ensuring that an investigation may be properly undertaken and the relevant information obtained. A similar mechanism could be incorporated into the Police Act or its regulations. ..." (Page 89)