D. PILLAY

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CALS
Centre for Applied Legal Studies

SONKE GENDER JUSTICE

24 April 2015
Ref: Nyembe/BHR

The Secretariat of the JSC
Constitutional Court
Private Bag X1
Constitution Hill
Braamfontein
Johannesburg
2017

Per email: Chiloane@concourt.org.za
Per email: Dube@concourt.org.za

Dear Commissioners

NOMINATION OF JUDGE DHAYA PILLAY TO THE CONSTITUTIONAL COURT

1. The Centre for Applied Legal Studies ('CALS') and Sonke Gender Justice ('Sonke') hereby nominate Judge Dhaya Pillay to the Constitutional Court for the reasons set out below.

2. CALS is a public interest law clinic and NGO founded in 1979 and based at the School of Law of the University of the Witwatersrand. It seeks to achieve the realisation of human rights through advocacy, strategic litigation and research across five programmes. The programmes are: basic services, business and human rights, environmental justice, gender, and rule of law. One of the ways CALS aims to achieve the realisation of human rights is through the transformation of the legal profession. We believe that the transformation of society demands that the people who adjudicate legal disputes are able to locate them within the transformative objectives of the Constitution and on the foundation of human rights. To this end, CALS has conducted research on the transformation of the legal profession, which is attached for your reference as "**Annexure A**".

3. CALS also instituted legal proceedings at the Constitutional Court on the issue of the extension of the then Chief Justice's term of office; the Constitutional Court agreed with CALS that this issue had to be determined based on the constitutional imperatives of the rule of law, the separation of powers and judicial independence. This decision may be found at the following citation: *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others,*

Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others 2011 (5) SA 388 (CC).

4. Sonke is a non-profit organisation that works to create the change necessary to attain gender equality in South Africa. The organisation does so by calling for human rights to be protected and fulfilled by the state and citizens. Sonke's Policy Development and Advocacy Unit ('PDA') specifically works to shape South African and international legal and policy decisions on gender equality. Through its gender transformation of the judiciary project, the organisation aims to strengthen South Africa's judiciary. Sonke works towards achieving these aims by engaging in advocacy to ensure that the judiciary is equitably comprised of women judges, and staffed with judges who uphold and advance the rights to human dignity, gender equality and freedom as espoused in the Constitution.

5. It is against this backdrop that CALS and Sonke nominate Judge Dhaya Pillay of the Pietermaritzburg High Court to the vacant seat at the Constitutional Court.

6. Judge Pillay has demonstrated a commitment to human rights, transformative democracy and upholding the law. She has also demonstrated commitment to the development of the law and legal education. This can be seen from the paragraphs that follow.

7. Judge Pillay was admitted as an attorney in 1982. She served as a Senior Commissioner of the CCMA, on a part-time basis, from 1996 until her appointment to the bench in 2000. As is the case for the current Constitutional Court judges, Judge Pillay was drawn to the plight of political detainees. Consequently, she went on to specialise in human rights and administrative law disputes based on the various emergency and security laws in force at the time.

8. Thereafter, Judge Pillay turned her attention to labour law and industrial relations. Judge Pillay was selected to be involved in the drafting of key pieces of national legislation, including the Public Service Labour Relations Act, the Labour Relations Act, and clauses of the Constitution relating to the Public Service Commission and Electoral Commission.

9. Judge Pillay's legal acumen has been internationally acknowledged, most recently through her appointment as a visiting professor for the Open University in the United Kingdom. She was recognised as a human rights' defender by the Amnesty International SA Durban Group in 2005.

10. Judge Pillay has written judgements that indicate a deep understanding of constitutional principles and human rights. In *Standard Bank SA v Commission for Conciliation, Mediation and Arbitration* (2008) 29 ILJ 1239 (LC), Judge Pillay said the following about people with disabilities:

> "Dignity, for employees with disabilities, is about being independent socially, and most of all, economically, about managing their normal day to day

activities with minimum hardship for themselves and others and about contributing to and participating in society. It is about self-respect and self-worth."

11. This decision reflects a nuanced understanding of the experiences and rights of people living with disabilities.

12. Judge Pillay's dedication to social justice can also be garnered from the op-eds and journal articles she has written. She has written more than 40 articles and papers on topics which meet the current needs of society.

13. In a journal article titled 'Giving Meaning to Workplace Equity: The Role of the Courts' (2003) 24 ILJ 55, Judge Pillay accurately articulated the role of the judiciary in our democracy when she wrote:

> "[O]ur Constitution now directs that the interpretation [of labour rights] must be based on values. Such values must also be those that underlie an open and democratic society based on human dignity, equality and freedom. The concept of values embraces equity as one of many universally desired ideals. As a contingent concept it also makes constitutional jurisprudence evolutionary. Each decision invokes an assessment of democratic values based on the contingencies then prevailing. Adjudication is dynamic and adjudicators fulfil a transformative role. The Constitution therefore provides the legal basis for the judiciary to make law in certain circumstances."

14. In an op-ed published in the City Press, Judge Pillay, demonstrating an understanding of the racial and gendered impact of poverty noted that "internationally, the pool of unemployed women is greater than that of unemployed men; employment growth rates for women are below those for men; women endure vulnerable employment more than men; and women are more limited in their choices for employment across sectors". She also noted as a priority the protection of women against violent crime: rape and the threat and fear of it which impedes women's mobility and employment choices. Judge Pillay concludes the op-ed by saying, "the women's movement for social change must target the elimination of poverty. Anything less will subvert the movement away from achieving our constitutional goals of equality, dignity and freedom."

15. Judge Pillay also supports the legal profession, and aids in its transformation by teaching professionals. She prepared articles on the topic of writing effectively for the Kwa-Zulu-Natal Law Society. They may be accessed here: https://www.lawsoc.co.za/default.asp?id=1802.

16. It follows therefore, that the appointment of Judge Pillay will contribute to the Constitutional Court in addressing the gender disparities on the Constitutional Court bench as well as in her valuable gendered perspective. She is a woman of colour judge who understands how human rights violations affect women

differently to men; and, therefore will contribute to ensuring that the realisation of the ideals of the Constitution remains progressive and gender sensitive.

17. The Democratic Governance and Rights Unit at the University of Cape Town prepared a document summarising some of the judgements handed down and journal articles written by Judge Pillay. This document is attached and marked for your reference **"Annexure B"**.

18. Section 174(1) of the Constitution provides that *"any appropriately qualified man or woman who is a fit and proper person may be appointed as a judicial officer"*. We are of the view that Judge Pillay is indeed a fit and proper person and would be an effective and transformative jurist in the highest court of South Africa. Judge Pillay is a sound, informed jurist and stands out from her peers. Her appointment will be valuable to the bench. As stated in section 174(2) of the Constitution, the judiciary needs to reflect broadly the racial and gender composition of the country. Judge Pillay is more than fit and suited for the position. Her appointment is compelling on her merits and necessary in the interests of transformation of the judiciary.

19. We are aware that Judge Pillay has not acted at the Constitutional Court on previous occasions. Recently, great effort has been made to appoint women judges to the bench. This, however, is dependent upon the limited opportunities that arise for appointments as acting judge. The absence of Judge Pillay's acting experience should not be considered a hindrance in her abilities to perform the duties of a Constitutional Court Justice. Her 15 years' experience as judge at the labour court and at the high court and non-judicial activity demonstrate a commitment to the aspirations of the Constitution.

20. We therefore, nominate Judge Pillay to the Constitutional Court. This nomination letter will be followed by Judge Pillay's application and supporting documentation.

21. Should you have any questions, concerns or queries, please feel free to contact Nomonde Nyembe, Baone Twala or Cherith Sanger at the contact details set out below.

Yours sincerely,

Nomonde Nyembe
Attorney: Centre for Applied Legal Studies
Telephone: +2711 717 8606
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Reception: +2711 717 8600

Baone Twala
Candidate Attorney: Centre for Applied Legal Studies
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Cherith Sanger
Admitted Attorney: Legal Consultant for Sonke Gender Justice
Telephone:+2721 423 7088
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Fax:+2721 424 5645

Justice Z. M Yacoob

Retired Judge of the Constitutional Court of South Africa

64 Pomat Road,
Reservoir Hills,
Durban 4091
South Africa
South Africa
30 April 2015

I nominate Judge Dhayanthi Pillay for the position of Judge of the Constitutional Court of South Africa.

I trust that Judge Pillay will accept this nomination and furnish the relevant information to the JUdicial Services Commission

ZM Yacoob

Email: zak.yacoob@gmail.com

Postal address: 64 Pomat Road, Reservoir Hills, Durban, South Africa, 4091

Tel: 031 362 5800
Fax: 031 305 8883
Mobile: +27 83 555 5155
Email:dhayapillay@yahoo.co.in
Dhpillay@juciary.org.za

Judges' Chambers
High Court
KwaZulu-Natal Division
Private Bag X54314
DURBAN
4000

Department:
Justice and Constitutional
Development
REPUBLIC OF SOUTH AFRICA

THE HONOURABLE MADAM JUSTICE D.PILLAY

Date: 5 May 2015

The Secretariat of the JSC
Constitutional Court
Private Bag X1
Constitutional Hill
Braamfontein
Johannesburg
2017

Per email: Chiloane@concourt.org.za
Dube@concourt.org.za

Dear Sirs

RE: APPLICATION FOR POSITION OF CONSTITUTIONAL COURT JUDGE

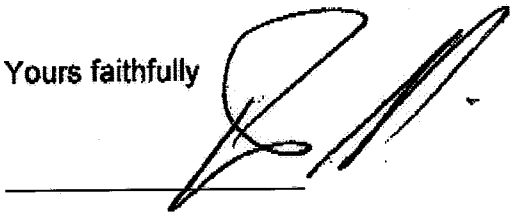
I accept with thanks my nomination for appointment to the Constitutional Court from the Centre for Applied Legal Studies (CALS) Sonke Justice Centre and Emeritus Judge Z. Yacoob. Please find attached my application form incorporating my *curriculum vitae* together with my judgments in the following matters:

1. S v Mabaso 2014 (1) SACR 299 (KZP) also reported at (AR 250/12) [2013] ZAKZPHC 32 (KZP).
2. Venter v Khan and Others (14185/2011) [2014] ZAKZDHC 48 (3 November 2014).
3. Standard Bank of South Africa Ltd v Dlamini 2013 (1) SA 219 (KZD); also reported at 2877/2011) [2012] ZAKZDHC 64.

4. Makwickana v Ethekwini Municipality and Others (11662/13) [2015] ZAKZDHC 7 (17 February 2015).

Kindly acknowledge safe receipt.

Yours faithfully



Dhaya Pillay
Judge of KwaZulu-Natal High Court, South Africa

G.P.S. 003-9058

JUDICIAL SERVICE COMMISSION

Tel: (011) 359-7537/7570
Fax: (086) 649-0944

Private Bag X1
Constitutional Court
Braamfontein
2017

Constitutional Court
1 Hospital Street
Braamfontein
2017

QUESTIONNAIRE FOR JUDGES

SECTION 1: PERSONAL

1. What are your full names and surname?

1.1 Surname Pillay
1.2 Full names Dhayanithie
1.3 Maiden name Pillay

2. What is your address?

2.1 Residential

26 Delaware Avenue
Durban North
4053

2.2 Postal

P O Box 131
Hyper by the Sea
4053

2.3 Telephone

Code (031)362 5800 **Fax:** (086) 644 7752 **Cell:** 083 5555155

3. What is your date and place of birth?

Date of birth

Y	Y	Y	Y	M	M	D	D
1	9	5	8	0	1	0	5

3.2 Place of birth

Durban

3.3 Citizenship

South African

3.4 Identity number

5	8	0	1	0	5	0	0	6	4	0	8	4

4. What is you marital status?

4.1

~~Married~~	Single	~~Divorced~~	~~Widower~~	~~Widow~~

(Please delete which is not applicable.)

4.2 Particulars of children:

Number and ages of children

None

5. Please furnish particulars of you tertiary education.

5.1 Qualifications:

a. B. PROC. (UNISA) 19 May 1982

b. LLM (LABOUR) (UND) March 1993

c. Certificate in Constitutional Law (UND) August - October 1994

d. LLB (UNISA) October 2002

e. Certificate for participation in Legal Writing Program for Judges issued by Seattle University School of Law 21-22 April 2007

f. Certificate for participation in Legal Writing Program for Trainers issued by Seattle University School of Law end June 2008

g. Admitted as Attorney 12 December 1982

h. Admitted to appear in the High Court (1996)

i. Admitted to Independent Mediation Services of South Africa (IMSSA) Panels as
   i. Arbitrator (July 1992)
   ii. Mediator (July 1994)
   iii. Trainer (July 1995)
   iv. LRA Training (1995)
   v. Dispute Resolution Design (August 1996)

j. Arbitrator on panel of Arbitration Foundation of South Africa (AFSA) (October 1997 to October 1999)

5.2 Name of institution(s):
See above

5.3 Dates acquired:
See above

6. Please furnish chronological particulars of employment since leaving school or university.

Name of employer	Position Held	Period
Bon Bon Sweets and Florist	Florist	During holidays 1975-1977
Self-employed	Modern dance instructor	1978
Audrey's Florist	Florist	November- December 1978
House of Delegates Department of Education	Locum Teacher Westcliff High, Chatsworth	January –March 1979
M C Moodliar and Co, Durban	Articled Clerk	April 1979 -1982
M C Moodliar and Co, Durban	Professional Assistant	January 1983 -June 1984
David and Company, Verulam	Professional Assistant	July 1984 - August 1985
Yunus Mahomed and Associates, Durban	Professional Assistant	September 1985 - 1987
Yunus Mahomed and Associates, Durban	Partner	1987 – July 2000
Department of Justice	Judge of the Labour Court	September 2000 – June 2010
Department of Justice	Acting Judge High Court KwaZulu-Natal (civil)	August 2005
Department of Justice	Acting Judge High Court KwaZulu-Natal (crime)	November – December 2003
Department of Justice	Judge of the High Court, KwaZulu-Natal, Pietermaritzburg and Durban	July 2010 to date

Academic appointments

Seattle University School of Law	Adjunct Professor	October 2004
New York Law School	Visiting academic	A week in November 2004
Seattle University School of Law	Adjunct Professor	January 2006
Faculty of Law, University of Pretoria	Extra-ordinary Professor Renewed for second three year term	January 2010 – 2012 January 2013 - 2015
Open University, Milton Keynes, United Kingdom	Visiting Professor of Law for five years	2010 – 2015
Open University, Milton Keynes, United Kingdom	Consultancy to prepare course material on international labour law	February 2012
School of Law University of Kwazulu-Natal	Honorary Research Fellow	August 2013 - July 2016
Pembroke College, Oxford, UK	Visiting Fellow	January - March 2014
Oxford Human Rights Hub	Visiting Fellow	January - March 2014
Human Rights for Future Generations, Oxford Martin School	Visiting Fellow	January - March 2014

7. Please furnish chronological particulars of your membership of legal organizations - past and present.

Name of organisation	Position held	Period
Chatsworth Housing Action Committee	Community Organiser	1978 – 1980
Prisoners' Education Campaign	Secretary	1978
Natal Indian Congress	Member	1979 – 1990
Support Housing Action Committee (SHAC)	Secretary	1979
Democratic Lawyers' Association (DLA)	Member	1979 – 1984
Release Mandela Committee (Durban)	Administrative Secretary	1980- 1982
Detainees' Parents Support Committee	Member	1981
Phoenix Working Committee	Community Organiser, Phoenix Units Seven and Eight	1980-1988
Reservoir Hills Ratepayers Association	Secretary	1982 – 1983
National Association of Democratic Lawyers (NADEL)	Member and executive member of the Durban Branch for a term	1984 – 1987
African National Congress	Member	1994-2000

8. Please furnish particulars of community and other organizations of which you are or have been made a member in the past ten years.

Name of organisation	Position held	Period
Durban Constitutional Law Discussion Group	Member	2006 - 2010
Academics Promoting the Pedagogy of effective Advocacy in Law (APPEAL)	Member	2008 - 2010
Clarity (a UK based NGO with members internationally committed to clear writing)	Member	2008 - 2010
Virgin Active Fitness Club	Member	More than 10 years

9. Are you now or have you ever been a member of a secret organization?

~~YES~~	NO

(Please delete which is not applicable.)

If so, please identify the organisation, position(s) held and the dates of membership

Name of organisation **Position held** **Period**

Not Applicable

10. Is there anything about the state of your health which should be disclosed to the Commission?

~~YES~~	NO

(Please delete which is not applicable)

If so, please state:

Not applicable

SECTION 2: JUDICIAL BACKGROUND

11. Please furnish particulars of your appointment.

11.1 To which Court were you appointed?

Labour Court 1 September 2000
High Court 1 July 2010

11.2 In which division were you appointed?

Labour Court (National based mainly in Durban)
KwaZulu-Natal, Pietermaritzburg and Durban

11.3 Please give the date of your appointment

above

12. If you have any publications in the field of law please list them and identify those which you regard as most significant and state shortly why you regard them as significant.

Significant

a. **"Is it safe to entrust the constitutional project entirely to adjudication?"** Rhetorical as the question may be, it is intended to provoke concern that our state sponsored dispute resolution service offers mainly litigation, an adversarial process generally yielding win-lose outcomes. Crafting an appropriate state sponsored dispute system design requires a careful balance between retaining and bolstering the norm setting characteristics of litigation on the one hand, and encouraging other appropriate dispute resolution processes to, for instance, diagnose the real causes of conflict so as to better match disputes to process and remedies. Presented to SAJHR Conference 28-29 January 2015 (unpublished as yet) this paper analyses theories about litigation starting with Lon Fuller's "proofs and reasoned arguments" model to more recent innovations such as Susan Sturm's "deliberative model of remedial decision-making", and Brian Ray's "hybrids" that oscillate between adjudication and alternate dispute resolution processes. The Constitutional Court's endorsement of "meaningful engagement" to resolve socio-economic disputes reinforces this research.

b. "Angles For Activism Against Genderised Poverty – A Paper For Discussion To Celebrate Women's Month at UKZN (2014) (an edited version published in City Press). Triggered by Nancy Fraser's publication in The Guardian, titled *'How Feminism Became Capitalism's Handmaiden - and how to reclaim it* the paper challenges the generalization that neo-capitalism has hijacked the

feminist movement. Consistent with ILO statistics the majority of low skilled employed and unemployed are women in South Africa. Contrastingly we have pockets of transformation such as the multi-racial, mainly women managed Johannesburg Stock Exchange. Constitutional Court cases such as such as *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission For Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC) which resulted in the abolition of the rule of primogeniture, and *Daniels v Campbell No* 2004 (7) BCLR 735 CC in which a common law wife in a monogamous Moslem marriage won the right to claim maintenance from the estate of her deceased husband, have the potential to transform fundamentally the lives of ordinary women. Fraser's generalisations therefore do not apply without qualification to South Africa.

c. **"Whither the Prostitution Industry" (2014) 35 ILJ 1749** updates developments since *S v Jordan & others (Sex Workers Education & Advocacy Task Force & others as Amici Curiae)* 2002 (6) SA 642 (CC)). It also illustrates the polycentric impact of the Constitutional Court's decision on principle in a criminal case. Applied to a labour case the principle sat awkwardly in the Labour Court in *'Kylie' v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 1918 (LC) overturned on appeal to the LAC in 2010 (4) SA 383 (LAC); (2010) 31 ILJ 1600 (LAC).

d. **"Victoria and Griffiths Mxenge Memorial Lecture – Public Interest Law Then and Now"** delivered at UKZN (April 2013) (edited and published on Oxford Human Rights Hub website and City Press). I encouraged students to practice public interest law.

e. **"Essential Services: Developing tools for Minimum Service Agreements"** (2012) 33 ILJ 801 is a publication of the paper I presented to the ILO on 29 November 2011 to assist business, labour and government to conclude minimum service agreements in essential services.

f. **"Courting our Constitution"** published in The Times, 6 October 2009 is a response to the question: "Are decisions of the Constitutional Court cited in foreign and international courts?"

g. Three-part series of articles on **clear writing** published in **SASLAW** Newsletter at the end of 2007, to reinforce my initiative in De Rebus to improve the quality of pleadings judges have to read.

h. Four-part series of articles on **clear writing published in De Rebus** between August 2007 and April 2008. These articles are now prescribed for the LLM students I teach at the University of Pretoria.

i. **"Domain Names"** De Rebus March 2004 p24. I anticipated what the regulations to accompany the Electronic Communications and Transactions Act 25 of 2002 might contain when they were issued, particularly from the perspective of effective dispute resolution.

j. **"Law's Republic, Democracy and the South African Constitution" SAPL - 2002, v.17(2), p.319** is a response to Frank Michelman's article "Law's Republic". Relying on the early decisions of the Constitutional Court in matters like *S v Makwanyane* 1995 6 BCLR 665 (CC) I argued that his notions about traditional republicanism and the tension between individual rights and majoritarian politics is distinguishable in South Africa where the Constitutional Assembly had explicitly bestowed the judiciary with a mandate for transformation.

k. **"The South African Essential Services Committee" Southern African Business Review Volume 5 No 1.** A discussion of the work of that committee which I chaired.

l. **PAJA v Labour Law SAPL - 2005, v. 20(2), p.413.** I argued vigorously that the Promotion of Administrative Justice Act 3 of 2000 did not apply to Labour Law. I developed this argument in a paper I presented to the Annual Labour Law Conference in 2007 titled "The Integrity of Labour Law" in which I also analysed the judgments in *Chirwa*, which, by that stage, was awaiting the judgment of the Constitutional Court.

m. **"Essential Services under the New LRA" ILJ January 2001** is a comprehensive analysis of the law and practice of labour law in essential services, and a full account of the work of the Essential Services Committee under my watch as chairperson.

n. **"Developing an 'Affirmative Action' Jurisprudence"** De Rebus December 1999. I argued that adjudicators should intervene to determine affirmative action disputes substantively.

o. **"Damages: Loss of Use of an Object"** De Rebus, July 1996. I advocated extending the *Lex Aquilia* to claims that fall between patrimonial and non-patrimonial claims.

Less significant

p. "The Constitutionalisation of Labour Law – Comparative Analysis" presented at the request of the ILO to the Judges of the Malawi Supreme Court of Appeal and the High Court in December 2005 (Conference publication).

q. "The Duty to Bargain" presented to and published by the Annual Labour Law Conference 30 June 2005.

r. "Equity and the Scope of Judicial Activism" presented to and published by the Annual Labour Law Conference 3 July 2003.

s. "Giving Meaning To Workplace Equity: The Role of the Courts" (A paper presented to Commissioners at the 7 Annual Conference of the Commission for Conciliation Mediation and Arbitration (CCMA) 15 November 2002.

t. "Bosses must learn to live with Equity Act" in the "Personal View" column of Business Report 11 August 1999.

u. "Equity law is statutory change management" Business Day 20 July 1999.

v. "Benefits of teacher redeployment" Business Day 2 July, 1999.

w. "Sexual Harassment: Little mercy will be shown to those found guilty of crossing the line" Business Day 9 June 1998.

x. "The Labour Relations Bill and appropriate dispute resolution: A drafter's perspective" 1995 18 IMSSA 2.

y. "The Constitutional Rights of Public Servants" Employment Law November 1994 Vol 11 No 2.

z. "Demotivating Demotions" Employment Law November 1993 Vol 10 No 2.

aa. "Face-Lift Promise For Public Service" Law Review Weekly Mail And Guardian December 1993.

bb. "The Public Service - The Forthcoming Distraction" IR Mirror, June 1993.

cc. "Critique of ABI v Jonker" IR Mirror, April 1993.

dd. "A Practical Approach To Conflict Management in Essential Services" Industrial and Social Relations Vol 13, Nos 1 & 2.

13. In regard to major publications indicate by whom they have been reviewed.

My contributions to accredited journals such as the Industrial Law Journal are blind peer reviewed. Marius Pieterse referred to "Law's Republic, Democracy and the South African Constitution" (2002) 17 SA Public Law 319 in "Coming to terms with judicial enforcement of socio-economic rights" 2004 SAJHR 383.

14. If any of your writings have been cited in judicial decisions please identify those decisions and indicate whether the citing was with approval.

I am not aware of any of my writings (other than judgments) being cited in judicial decisions.

15. If you have any publications outside the field of law please list them.

None

15.1 In regard to these publications please indicate by whom they have been reviewed.

Not Applicable

16. Cases

16.1 List the cases where you have written the judgment (not more than ten) which you regard as being the most significant and why.

a. **Makwickana v Ethekwini Municipality and Others** (11662/13) [2015] ZAKZDHC 7 (17 February 2015) was my first constitutional law application formally designated as such in terms of rule 16A of the Uniform Rules. It concerned the rights of street traders to s 9 (equality), s 22 (freedom of trade occupation and profession), s 25 (property) and s 34 (access to courts) of the Constitution of the Republic of South Africa, 1996. It also required a determination as to whether s 6A(1)(d) of the Businesses Act 71 of 1991 conflicts with the principles of legality and the rule of law in s 1(c) of the Constitution.

b. **Venter v Khan and Others** (14185/2011) [2014] ZAKZDHC 48 (3 November 2014) which involved interpreting a contract, exposed the unequal bargaining relationship between of the owner of a business and his senior employee.

c. **S v Mabaso** 2014 (1) SACR 299 (KZP) is a full court decision in which I as the scribe dissented. After an extensive survey of appellate decisions and comparing rape as a form of discrimination to racism I imposed a heavier sentence than the majority. I also disagreed on the procedural implementation of the minimum sentence legislation regarding notice to an accused.

d. **The Body Corporate of Dolphin Cove v Kwadukuza Municipality and Another** (8513/10) [2012] ZAKZDHC 13 (20 February 2012) introduced me to the National Environmental Management Act 107 of 1998 in order to decide whether the Municipality's construction of a promenade resulting in the encroachment on the dunes threatened the stability of Dolphin Cove. The Municipality had acted without prior authorisation from the KwaZulu-Natal Department of Agriculture, Environmental Affairs and Rural Development. I gave leave to appeal to the SCA.

e. **The National Director of Public Prosecutions v Ishwarlall Ramlutchman** Case No AR 161/14 (unreported) in which the word 'benefit' in s 18(1) of the Prevention of Organised Crime Act 121 of 1998 was interpreted to mean the profits the defendant earned from crime as distinct from the total proceeds of the contract which included the costs of construction of schools that met the requirements of the Department of Education.

f. **Growthpoint Properties Ltd v SACCAWU & others** 2011 (1) BCLR 81 (KZD) balanced the right to demonstrate with the right of occupiers of a mall to peace and quiet.

g. **Sanyathi Civil Engineering and Construction (Pty) Ltd & another v Ethekwini Municipality & others; Group Five Construction (Pty) Ltd v Ethekwini Municipality & others** 2012 (1) BCLR 45 (KZP) discussed the administrative law requirements for a valid tender for constructing a water pipeline north of Durban.

h. **Firstrand Bank v Mvelase** 2011 (1) SA 470 (KZP) dealt with the interpretation of a notice in terms of s 86 (10) of the National Credit Act

No 34 of 2005 to lawfully terminate the debt review pending before a Magistrates' Court and deciding which court has jurisdiction to hear a debt review when it resumes in terms of s 86 (11).

i. **Nulandis (Pty) Ltd v Minister of Finance and another** 2013 (5) SA 294 (KZP) discussed the reinstatement of a company on the CIPC records after it was automatically deregistered to enable a creditor to execute to recover payment.

j. **Jafta v Ezemvelo KZN Wildlife** (2008) 10 BLLR 954 (LC). I applied international law and considered foreign law to interpret the Electronic Communications Transactions Act No 25 of 2002 (ECT Act). I concluded that notwithstanding their apparent informality, SMS's and emails can result in binding contracts. It was applied in (2009) 30 ILJ 698 (CCMA) and referred to in (2010) 31 ILJ 1477 (LC). The judgment is reviewed with approval by Debbie Collier (UCT) in "Email and SMS Contacts: Lessons from the Labour Court" (2008) 16 Juta's Business Law 20 at 22; by Sylvia Papadopoulos (UP) in "Sort Message Services and E-Contracting" (an adaptation of a paper presented to the Australasian Law Teachers' Conference at the University of Western Sydney, Australia on 5-8 July 2009) Orbiter Volume 1 2010, and by Philip Stoop (Unisa) in "SMS and Email Contracts: Jafta v Ezemvelo KZN Wildlife" SA Merc LJ - 2009, v.21(1), p.110. The judgment is also referred to in the Constitutional Court Newsletter March 2009(2) and Professional Update, a monthly newsletter for KZN Attorneys from the KZN Law Society dated 10 July 2009. Also Landman, Adolph "Common law of contract adapts to the twenty first century: A note on SAMRO v Mphatsoe; Labournet Payment Solutions (Pty) Ltd v Vosloo and Jafta v Ezemvelo KZN Wildlife," the (2009) 30 ILJ 2296.

k. **Kleinhans v Parmalat** SA (Pty) Ltd (2002) 9 BLLR 879 (LC). I applied private international law to determine jurisdiction and the proper law of the contract. Eesa Allie Fredericks (Unisa) reviewed it in "The Proper Law of the International Contract of Employment" (2006) 18 SA Merc LJ 75. Mostly, she commended it. She observed that "(t)he adherence of a legal system to international labour law and human rights standards has never before been a connecting factor in South African private international law. Such an approach is commendable in view of public policy, especially in the context of labour relations where an employee is often vulnerable." She disagreed with my opinion that the *lex loci solutionis* is but one of the connecting factors, and not a decisive factor in determining the proper law of the contract.

16.2 Which of these cases have been reported?

All are reported in the law reports or on Saflii, except for e which has not yet been reported. (See list of reported judgments)

16.3 Please list cases in which you gave judgment that were unsuccessfully appealed against (not more than ten).

Labour Court	Labour Appeal Court	Supreme Court of Appeal
1. Edcon Consolidated Stores Ltd v Pillemer NO D523/04	Edcon Consolidated Stores Ltd v Pillemer NO D4/06 (2008) 29 ILJ 614 (LAC) (per Sangoni AJA, Wallis JA and Tlaletsi AJA concurring)	Edcon Consolidated Stores Ltd v P C Reddy SCA 013/2008 (Pending) 191/2008 (2009) ZASCA 135 (per Mlambo JA, Mpati P, Heher, Maya JJA and Tshiqi AJA concurring)
2. Karachi v Porter Motor Group (2000) 21 ILJ 2043 (LC)	Porter Motor Group v Karachi [2002] 4 BLLR 357 (LAC) (per Nicholson)	
3. Frank & Others v Nedcor Bank LTD (unreported)	Nedcor Bank LTD v Frank & Others [2002] 7 BLLR 600 (LAC); (2002) 23 ILJ 1243 (LAC) (per Willis JA)	
4. Feuilherade & Others v Mthimkhulu (unreported) application for rescission	Feuilherade & Others v Mthimkhulu Enforce Security Group (Pty) Ltd v Mthimkhulu (2003) 24 ILJ 362 (LAC) (per Goldstein AJA)	
5. Fidelity Cash Management Services v CCMA D1232/02	Fidelity Cash Management Services v CCMA DA10/05 LAC (per Zondo JP)	
6. Abanindranath Chandrakesh Badal v Legal Aid Board D583/05 (unreported)	Abanindranath Chandrakesh Badal v Legal Aid Board DA 5/06 (per Sangoni AJA)	
7. Coates Brothers Ltd v Shanker & Others (2003) 12 BLLR	Coates Brothers Ltd v Shanker & others (2003) 24	

1189 (LAC)	ILJ 2284 (LAC) (per Willis JA)	
8. Goodyear SA (Pty) Ltd v CCMA (unreported)	Goodyear SA (Pty) Ltd v CCMA & others [2004] 1 BLLR 7 (LAC) (per Willis JA)	
9. Venter v Avonmore Supermarket (unreported)		Avonmore Supermarket CC v Venter 2014 (5) SA 399 (SCA)

16.4 Please list cases in which you gave judgment that were successfully appealed against (not more than ten).

Labour Court	Labour Appeal Court	Supreme Court of Appeal
1. Gordon v Department of Health, KwaZulu-Natal (2004) 7 BLLR 708 (LC); (2004) 25 ILJ 1431 (LC).	Gordon v Department of Health, KwaZulu-Natal DA5/04 (unreported). Appeal dismissed for non-joinder of interested party (per Zondo JP)	Gordon v Department of Health, KwaZulu-Natal (337/2007) (2008) ZASCA (17 September 2008) 2008 (6) SA 522 (SCA) (per Mlambo JA). Appeal upheld on merits.
2. Tshishonga v Minister of Justice & Constitutional Development & Another (2007) 4 BLLR 327 (LC); [2007] (4) SA 135	Minister of Justice & Constitutional Development & Another v Tshishonga DA6/07 appeal on quantum only. Quantum reduced.	
3. Parry v Astral Operations Ltd (2005)10 BLLR 989 (LC).	Astral Operations v Parry (2008) 29 ILJ 2668 (LAC) (per Zondo JP)	
4. CEPPWAWU OBO Gumede v Republican Press (Pty) Ltd [2006] 6 BLLR 537 (LC)	Republican Press v CEPPWAWU (unreported)	Republican Press v CEPPWAWU [2007] SCA 121 (RSA) (per Nugent). Appeal upheld and remedy substituted.

5. Billiton Aluminium South Africa Limited v National Union of Metalworkers of South Africa (2001) 22 ILJ 434 (LC); [2002] 1 BLLR 38 (LC)	Billiton Aluminium South Africa Limited v National Union of Metalworkers of South Africa DA25/2001	
6. Maada v The Member of the Executive Council of the Northern Province for Finance and Expenditure and Another, (unreported)	Maada v The Member of the Executive Council of the Northern Province for Finance and Expenditure and Another, (2003) 24 ILJ 937 (LAC) (per Zondo JP)	
7. Boxer Superstores (Pty)Ltd/ Nokuthula Grace Zuma D 362/05	Boxer Superstores (Pty) Ltd v Zuma & Others (2008) 29 ILJ 2680 (LAC) DA 6/07 Appeal upheld against reinstatement order and remitted back to CCMA to determine appropriate remedy. (per Davis JA)	
8. Ethekwini Municipality/J Moodley& 103 Others; Remant Alton Land Transport (Pty) Ltd D277/07	Ethekwini Municipality/J Moodley & 103 Others; Remant Alton Land Transport (Pty) Ltd. DA 12/07. Appeal upheld. Order of LC set aside and substituted: "The application is dismissed." No order as to costs.	
Labour Court		**Constitutional Court**
9. MEC Department of Education Kwazulu-Natal v Khumalo and Another 2011 (1) BCLR 94 (LC); also reported at (D749/08) [2010] ZALC 79		Khumalo And Another v Mec For Education, Kwazulu-Natal 2014 (5) SA 579 (CC).
KZN High Court		**Supreme Court of Appeal**
10. SA Taxi Securitisation		Hlela v SA Taxi

(Pty) Ltd v Hlela (unreported)		Securitisation (Pty) Ltd (515/2013) [2014] ZASCA 112

16.4 Please list any reserved judgments still outstanding and the date(s) on which judgment was reserved.

none

16.5 What would you regard as your most significant contribution to the law and the pursuit of justice in South Africa?

A. On 19 November 2005 I received from Amnesty International SA (Durban Group) recognition as a human rights defender.

B. Since 2013 I sponsor The Yunus Ismail Mahomed Public Interest Law awards for the best article published in an accredited journal and in a newspaper or non-accredited journal. The University of KwaZulu-Natal administers the awards.

C. According to the attached list prepared with the help of the researchers in Durban High Court I have published 248 judgments in print and electronic law reports. Many of my judgments appear in more than one publication.

D. **As a judge**

a. In the Labour Court I issued more than 1000 judgments on issues such as retrenchment, closure of businesses, strikes, lockouts, discrimination, affirmative action, equality, non-appointment, HIV/AIDS testing, review of labour arbitration awards, international employment contracts, whistle-blowing, promotion of access to information and justice, electronic transaction law, constitutional law and procedural matters. (www.saflii.org)

b. More than 120 of my labour law judgments have been published or reported on in the law reports, journals and the media.

c. I estimate that appeals have been noted against 130 of my judgments. Of these, the LAC refused petitions or dismissed the appeals in about 25 matters. In about 36 matters I dismissed the applications for leave to appeal and the petitions were withdrawn or abandoned. My judgments were overturned in about 12 cases. With regard to the remaining matters, the appeals are either pending or the information is not easily accessible in the time available.

d. Acting in the High Court (crime) in November-December 2003 my judgment on the procedure to be adopted when raped children are witnesses was reported.

e. In August 2005 I acted in the High Court hearing civil cases.

f. In the High Court as a permanent judge for almost 5 years I have heard cases on road accident claims, liquidations, family law, property law, company and commercial law, administrative law, maritime law, criminal law, environmental law, contract, delict and family law.

g. About 38 of my High Court judgments are published in the law reports, journals or the media. (Included in attached list of 248).

h. I estimate that appeals have been noted against 40 of my judgments. Of these, in 25 matters the application for leave to appeal was dismissed, abandoned or settled. The outcomes in the rest are mentioned in paragraph 16.4, are outstanding or are not immediately available.

E. **As an academic**

a. I had the following engagements:

1) 5 January - March 2014: Sabbatical as Fellow at Pembroke College, Human Rights HUB and Human Rights for Future Generations, Oxford, UK. I participated in a group of doctoral and post doctoral researchers under the guidance of Professor Sandra Fredman; presented and attended many seminars, researched several topics, one of which was published in the ILJ in July 2014.

2) 17 April 2010; October 2012: Lectured LLM students at University of Pretoria.

3) May 2014. Set and graded assignments and examination for LLM students at University of Pretoria.

4) April-July 2010: Prepared course material for LLM course on International Labour Law and Multinational Enterprises in collaboration with Law Centre, Business School, Open University, United Kingdom.

5) 29 May 2010: Conducted practical legal writing course for attorneys and candidate attorneys for the Law Society, Kwa-Zulu Natal.

6) 12-13 January 2010 : American University, Washington College of Law, Washington DC hosted me as guest lecturer in a Labour Law class with Professor Susan Carle. I also participated in a panel discussion on the film "Courting Justice" with its producer Ruth Cowan.

7) 14 January 2010: The Director of International Affairs, Susan Karamanian at Washington University, Washington DC hosted me for informal exchanges on topics of mutual interest with academics.

8) 15-25 January 2010: Seattle University School of Law hosted me to present a seminar to students, be a guest lecturer in Human Rights, Labour Law and Employment Law classes, to interact informally with the University community at a reception and other social and academic engagements arranged around my visit.

9) November 2009: Prepared discrimination law course material for LLM students at University of Pretoria.

10) November 2009: Faculty of Law, University of Pretoria appointed me Extra-ordinary Professor for three years from 2010, renewed in 2012 for another term.

11) 17 October 2009: I lectured LLM students at the University of Pretoria on conflicting jurisdiction of the Labour and High Courts.

12) April –July 2009: Fellowship to Open University, Milton Keynes, United Kingdom. Based in the Law Centre of the Business School, I wrote and presented papers to the academic and broader OU community in Milton Keynes, on discrimination, social justice, dispute resolution. I drafted course material, attended discussions on preparing course material, and addressed learners at Oakgrove School and students of OU.

13) 1 May 2009: I participated in a seminar on discrimination at Oxford University Law Department for Masters' students at the invitation of Professor Sandra Fredman.

14) 13-15 May 2009: I participated in the Centre for Inequality, Human Security and Ethnicity (CRISE) Conference at Keble College, Oxford on: How can the law help reduce group based inequalities?

15) 2-4 June 2009: In Edinburgh, I visited the Scottish High Court and Sheriffs' Courts, addressed OU students, staff and Law Society officials

on legal developments and issues in South Africa; interacted with academic community at innovation exhibition by universities held in the Scottish Parliament, and met Scottish Legal Aid Board executives. In Glasgow, I met the recently established Scottish Human Rights Commission.

16) 10 June 2009: I presented a seminar to Masters' students at Exeter College, Oxford on the Impact of Constitutional Court decisions on achieving social justice for workers in the sex and security industries.

17) January 2006: I was a visiting academic at Seattle University School of Law. I presented papers to the academic staff on discrimination and to the broader community on the constitutional right to fair labour practices. I attended and participated as guest lecturer in several faculty classes on various subjects.

18) November 2004: New York Law School hosted me for a week. I presented a paper on the constitutional right to fair labour practices, attended lectures and discussions.

19) October 2004: Seattle University School of Law appointed me Adjunct Professor to lecture on International and Comparative Labour Law to students enrolled for the JD (Juris Doctoris, the American post graduate law degree).

20) 2006-2008: Annually, I lectured to Labour Law Masters students at the University of Witwatersrand on essential services.

b. I have presented the following papers at conferences or seminars:

1) Presentation to Women Parliamentarians titled "Practical Implications of the Law in the Workplace" published in the Konrad-Adenauer-Stiftung Seminar Report 19 May 1995.

2) "Labour Law under the Constitution" presented to the South African Society of Labour Lawyers (SASLAW) 26 March 2004.

3) "Promotion of Administrative Justice Act v Labour Law" a paper presented to an Administrative Law Conference convened by the University of Western Cape 20 May 2004.

4) "New Challenges for Effective Dispute Resolution and Co-operative Bargaining in Education" keynote address presented at Tenth Anniversary of the Education Labour Relations Council 13 July 2004.

5) "The Constitutionalisation of Labour Rights in South Africa" a paper presented to the South Africa Group of New York Law School on 19 November 2004 and published on NYLS's website.

6) "Constitutionalisation of Labour Law" presented to Seattle University School of Law and published on its website January 2006.

7) "*Fourie* : Race v Sexual Orientation" presented to Faculty of Seattle University School of Law January 2006.

8) "Do women lawyers think differently about legal issues?" presented at University of Kwa-Zulu Natal to law students 3 May 2006.

9) "Globalization of the Law" presented to Law Teachers' Conference Cape Town 26 July 2006.

10) "Challenges facing Women Labour practitioners" a discussion at Society of South African Labour Lawyers Women's Breakfast 8 September 2006.

11) "The Politics of Equality" presented to the Society of South African Labour Lawyers National Conference Johannesburg October 2006.

12) "The Integrity of Labour Law" presented at the Annual Labour Law Conference Johannesburg 2007.

13) "Double Vision" presented at Law Teachers' Conference, Pretoria 21 January 2008.

14) "Choosing Comparators for Discrimination Analysis" presented at International Discrimination Conference, Stellenbosch, 10 September 2008.

15) "Choosing Comparators for Discrimination Analysis" presented at Society of South African Labour Lawyers National Conference Durban October 2008.

16) "The impact of three Constitutional Court decisions on achieving social justice for workers in the sex and security industries" presented at the Annual Conference of the CCMA, KwaZulu-Natal 22 May 2009.

17) Facilitated discussion on "Courting Justice", a film on gender diversity of the South African Judiciary on 1 July 2009.

18) "Fighting Discrimination the South African Way" presented to Open University Community in Milton Keynes on 20 July 2009.

19) "Essential Services and the Public Interest" a paper presented at workshop convened by the ILO on 29 November 2011.

20) "Courting a Constitutional Right to Equality" a seminar presented to law students at Seattle University, School of Law on 20 January 2010.

21) "Angles For Activism Against Genderised Poverty – A Paper For Discussion To Celebrate Women's Month at UKZN (2014).

F. **As an attorney**

a. My human rights practice generated landmark judgments in the fields of criminal, labour and administrative law, including

1) State President and Others v Tsenoli 1986 (4) SA 1150 (A).

Significant because it was the first challenge against the validity of the emergency detention laws heard by the Appellate Division. If the regulations had been held to be invalid, it would have resulted in the release of all emergency detainees nationally.

2) Buthelezi & Others v Attorney General of Natal 1992 4 532 D.

Significant because it was the first judgment against the Attorney-General's failure to apply the *audi alteram partem* rule before issuing orders refusing bail in terms of s 30 (1) of Act 74 of 1982.

Significant also because it was the first case in which the accused applied to the High Court to subpoena former President Nelson Mandela to be brought from Robben Island to testify that even when it resolved to pursue an armed struggle, the policy of the African National Congress was always to avoid soft targets and the loss of life.

3) Ngcobo v Natal Provincial Administration (1994) 15 ILJ 806 (IC).

Significant because even though the Industrial Court held that the Public Service Labour Relations Act did not apply retrospectively, it was the first decision of the Industrial Court in terms of that Act.

4) Sibiya & Another v Administrator, Natal & Another (1991) 12 ILJ 530 (D) (Also Administrator, Natal V Sibiya 1992 4 532 AD).

Significant because it was the first Appellate Division decision on the application of the *audi alteram partem* principle to public servants prior to retrenchment.

5) Gumede and Others v Minister of Law and Order 1985 (2) SA 529.

Significant because it challenged the Minister's refusal to furnish sufficient reasons for issuing a notice in terms of s 28 (1) of Internal Security Act 74 of 1982; the right to proper reasons was subsequently confirmed by the Appellate Division in Nkondo and Others v Minister of Law And Order and Another; Gumede and Others v Minister of Law And Order And Another; Minister of Law And Order v Gumede and Others 1986 (2) SA 756 (A).

6) Ramgobin and Others (1985 (3) 587).

Significant because a full Bench appeal held that the power of the Attorney-General to issue s 30 (1) certificates in terms of the Internal Security Act 74, of 1982 arose only when a person was arrested "on a charge" of having committed a scheduled offence. Without a decision to charge, the Attorney-General's order refusing bail was irregular.

7) S v Ramgobin and Others 1985 (4) SA 130 (N).

Another bail application was pursued in a separate charge before the late Milne JP who suggested that serious consideration should be given to the repeal of s 30 (1) of the Internal Security Act 74, of 1982 which permitted the Attorney-General to prohibit the granting of bail. Remarking that the section was a "legislative curtailment of ancient and fundamental rights" he granted bail, which was unusual in a terrorism trial.

8) S v Ramgobin and Others 1986 (1) SA 68 (N).

It records the vigorous attack on the indictment for treason. It contributed to the charges being withdrawn eventually. The rulings on the joinder of accused, further particulars and admissibility of video evidence are precedents on these issues.

9) S v Ebrahim 1991 (2) SA 553 (A); Ebrahim v Minister of Law and Order 1993 (2) SA 558 T

Significant because it established that, based on the common law, the unlawful abduction of an accused did not confer jurisdiction on the Court. Special plea upheld in the criminal case. The subsequent civil case resulted in damages being awarded because, on the facts, the court found that the security police knew that the cross-border abduction was unlawful and foresaw that Ebrahim would be detained and charged.

b. During the repression of the 1980's

1) I managed a practice that served more than 250 detainees for most part of the various states of emergency.

2) With Yunus Mahomed, I met the late John Milne JP to highlight the plight of emergency detainees. Judge Milne then arranged for judges to visit detainees in prison.

3) I supported and campaigned for the release of hunger striking emergency detainees.

4) As one of the attorneys in the so called "Vula " trial I assisted in the criminal trial and was the attorney of record in the subsequent claims for damages that were instituted against the police.

5) I launched several interdicts against the so-called warlords in Kwa-Mashu and Ntuzuma and against the Kwa-Zulu Police for assault and related crimes at a time when Deputy Sheriffs refused to serve processes against the warlords in these townships.

6) I monitored funerals of activists and other political gatherings over many weekends in Kwa-Mashu and Ntuzuma in the 1980's.

7) I secured the release of six youths by driving alone to Ndwedwe police station at about 23h00 on a Friday night, in 1990, thereby preventing their further assault. (H Gumede and Others April 1990) The Minister of Police eventually paid them compensation.

8) I assisted families to trace and identify missing activists in South Africa and Swaziland.

9) I attended post mortems of murdered activists.

c. As a labour lawyer, I appeared in the following cases which are reported in the industrial law journal:

1) Paper Printing Wood & Allied Workers Union & Others v Tongaat Paper Co (Pty) Ltd (1992) 13 ILJ 393 (IC).

2) Nkomo v PICk 'N Pay Retailers (1989) 10 ILJ 937 (IC).

3) Mkhize & Others v Kingsleigh Lodge (1989) 10 ILJ 944.

4) Roshanlall & Others v Design Three & Another (1989) 10 ILJ 1162 (IC).

5) Ntuli & Others v Hazelmore Group T/A Musgrave Nursing Home (1988) 9 ILJ 709 (IC).

d. Through IMSSA, CCMA and other sources I issued more than 350 arbitration awards, mediated more than 200 disputes and facilitated more than 50 complex disputes and discussions. Thirty-two of my arbitration awards were published in labour law journals.

e. My interest in legal drafting developed through the following engagements:

1) Appointed by Minister of Labour, Tito Mboweni, to LRA Drafting Task Team, 11 August 1994 to draft new Labour Relations Act, 1995.

2) Appointment as technical expert to Technical Committee of Theme Committee 6.1 of Constitutional Assembly to assist with the drafting of clauses of the Constitution of the RSA pertaining to the Public Service Commission and the Electoral Commission (25 May 1995).

3) Assisted the Department of Public Service and Administration in drafting White Paper on Human Resource Management and Development in the Public Service (1998).

4) Drafted discussion document for legislation on tourist guiding for Department of Environmental Affairs and Tourism (1999).

5) Reappointed by Minister of Labour to drafting committee to review labour laws: February 2000.

f. I was appointed to the following positions:

1) Assessor in the Labour Appeal Court in Durban February 1992.

2) Senior Commissioner (Part-Time) in the Commission For Conciliation Mediation And Arbitration (CCMA) since June 1996.

3) Appointed by Minister of Labour to chair the Essential Services Committee 5 October 1996 to 30 July 2000.

4) Appointed as Arbitrator to panel in terms of Labour Tenants Act (April 1997).

5) Appointed to Independent Exemptions Body for National Bargaining Council of the Leather Industry of South Africa (May 1998)

6) Appointed to Independent Exemptions Body for Bargaining Council of the Liquor and Catering Industry of South Africa (August 1998)

7) Member of team who was appointed to event manage the Presidential Job Summit (1998)

8) Appointed to chair Provincial Task Team by the Education Labour Relations Council for Kwa-Zulu Natal in December 1998 and later for Eastern Cape.

9) Appointed to Public Service Coordinating Bargaining Council (October 1999).

10) Appointed as Acting Judge in the Labour Court (intermittently between 14 February to 30 August 2000).

SECTION 3: GENERAL

18. Are there any circumstances known to you which may cause you embarrassment in seeking appointment for which you have been nominated?

~~YES~~	NO

(Please delete which is not applicable)
If so, please furnish particulars

Not applicable

19. Is there any other relevant matter which you should bring to the attention of the Commission?

YES	~~NO~~

(Please delete which is not applicable)
If so, please furnish particulars

The Centre for Applied Legal Studies approached me to apply for appointment to the Constitutional Court as recently as 23 April 2015. On the same day I received confirmation of my registration as an LLD student at the University of Pretoria. If appointed to the Constitutional Court, I will defer my studies.

20. Do you hold or have you ever held any other office of profit? If your answer is yes have you divested yourself of those assets? Kindly furnish details if applicable.

Yes.
I have not divested myself of the following two close corporations:

I am the managing member of Beyond 1719 CC CK1992/028996/23. The other members are my mother and my brother. It is a vehicle to invest in property and to derive rental income for the family.

I am the sole member of YMA Investments CC CK1997/033398/23. It is a vehicle for investing in equities.

I intend to ~~retain~~ my position in both close corporations as they are merely convenient investment vehicles to own assets that I may hold in my own name.

5 **MAY 2015**

....

Signature **Date**

I am the donor and principle trustee of the Tahlia Soobrayan Trust a welfare trust for the exclusive benefit of my niece. Her mother, my sister Venitha Pillay is the other trustee.

.....
Signature

8 MAY 2015

.....
Date

Annexure A

TRANSFORMATION OF THE LEGAL PROFESSION

REPORT

ACKNOWLEDGEMENTS

The Centre for Applied Legal Studies (CALS) wishes to thank all those who have supported the work outlined in this research report. In particular, CALS would like to thank our funding partners at the Foundation for Human Rights (FHR) for their insights and financial assistance. Without the resources they have provided, research in this area would not have been possible. The idea for the project developed not least because of the consistent work that FHR has been doing on the transformation of the judiciary.

We would like to thank Tabeth Masengu of the Democratic Governance and Rights Unit at the University of Cape Town for her collegiality in sharing her work and information with us. We would also like to thank Bowman Gilfillan for hosting the meeting of the Expert Reference Group at the outset of the project.

CALS is grateful to the following individuals for their valued contribution to the work outlined here:

Kirsten Whitworth: Project Lead

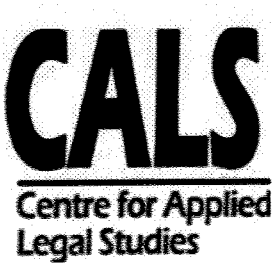
Bonita Meyersfeld: Director

Cebile Ndebele: Team Member

Jonathan Klaaren: Independent Researcher

Alice Brown: Independent Researcher

Lee-Anne Bruce: Communications



CONTENTS

A. INTRODUCTION & RESEARCH QUESTION

1. INTRODUCTION

This document is the final report on the Transformation of the Legal Profession project ("the project") conducted by the Centre for Applied Legal Studies ("CALS") in partnership with the Foundation for Human Rights from 15 February 2014 to 31 August 2014.

When initially conceptualised, the project was envisaged as being twelve months in duration. Ultimately, the project was agreed to be of six months' duration from 1 January 2014 to 1 August 2014.

The CALS team on the project consisted of Kirsten Whitworth (Project Lead); Cebile Ndebele (Team Member); Alice Brown (Researcher), Jonathan Klaaren (Researcher) and Bonita Meyersfeld (Director of CALS).

CALS is a centre of the University of the Witwatersrand, Johannesburg, and is therefore subject to the requirements of the Human Research Ethics Committee (non-medical). Any research carried out that involves human subjects must go through the ethics application process. An ethics application has been submitted to the Committee under protocol number HDS14-08-00008.

The research is not designed to be conclusive evidence regarding transformation in the legal profession. Rather, it is designed to test the accuracy of the assumptions identified. All three methodologies used yielded consistent evidence that affirms the following: that sexual harassment and the intersection between gender/race discrimination are factors that impede advancement in the legal profession.

2. RESEARCH QUESTION

The South African legal profession continues to face the challenge of meaningful transformation. The top positions in the profession, from senior partners of law firms, to senior counsel at the Bar and senior members of the judiciary, remain largely homogenous. These positions are dominated by white men, with a marked absence of diversity on the basis of race, gender and other marginalising characteristics. According to the 2013 South African Legal Fellows Network survey,[1] South Africa's major corporate law firms are still dominated by white men, especially in the upper echelons;[2] 80 per cent of the chief executives of the 12 firms canvassed in the survey were white men, as were 72 per cent of all managing partners. The picture at the CEO/managing partner level was replicated in the ownership and remuneration structures of the firms: 53 per cent of all equity partners were also white and male.

The judiciary represents similar trends, at least in respect of gender. Although the racial diversity of the Constitutional Court in the 20 years of democracy has gone from seven white judges and four black judges to the current bench, where the majority of the judges are black and two are white, the same is not true of gender. In the same period, the number of women on the Constitutional Court has remained unchanged: two in 1994 and two in 2014.

The key research question for the project participants was therefore as follows: why has there been so little

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1 2013:10 [2013] De Rebus 114.

2 On behalf of the collaborating organisations, Plus 94, a research firm, canvassed 12 out of 51 identified law firms in the country that employed 20 or more legal professionals. The 12 firms employed, in total, 1815 legal professionals. Disabled employees made up just 0.6 per cent of all legal professionals at firms participating in the survey.

change at the senior level of the legal profession, especially in respect of the intersection between race *and* gender. With a large number of black women graduating from law schools and entering the profession ,it is incongruous that the upper echelons are not more integrated.

Given the short time period, the project was not intended to conduct exhaustive research across the entire profession. Rather, the project was designed to yield preliminary findings in order to broaden the scope of the debate around transformation in the legal profession away from the judiciary, to include the profession as a whole.

3. CONTEXT

The lack of diversity in the legal profession is usually in the spotlight following the process of the appointment of senior members of the judiciary. The Judicial Services Commission ("JSC") has come under scrutiny for its appointment patterns, decision-making processes and the extent to which the constitutional imperatives of racial and gender diversity are reflected in its recommendations to the President.

On 5 June 2014, the Democratic Governance and Rights Unit ("DGRU") of the University of Cape Town convened a meeting of its *Judges Matter* project at which Tabeth Masengu delivered a presentation entitled *The Gender Transformation Aspect of Judicial Appointments*. The presentation looked at JSC interview processes, with a specific focus on the appointment of women. This is a welcome move away from the mere headcounts that are conducted in the media during JSC processes, and focuses greater attention on the process itself.

The presentation was very revealing: since June 2012, in respect of the Constitutional Court, there have been two interview processes. Nine candidates were interviewed, of whom eight were men and one was a woman. Out of these two processes, two men were appointed. At the level of the Supreme Court of Appeal, there have been three interview processes since June 2012. Fifteen candidates were interviewed. Of these candidates, there were 13 men and two women. Six men and one woman were appointed out of these processes.

At High Court level, which includes the Labour Appeal Court, Labour Courts, Electoral Courts and Land Claims Courts, the numbers are slightly more encouraging. There have been four interview processes. During these processes, 61 candidates were interviewed, of whom 32 were men and 29 were women. These processes led to the appointment of 17 men and 14 women judges.

Constitutional Court	Supreme Court of Appeal	High Courts (including Labour Appeal Court, Labour, Electoral and Land Claims Court)
2 interview processes	3 interview processes	4 interview processes
9 candidates interviewed: 8 men 1 woman	15 candidates interviewed: 13 men 2 women	61 candidates interviewed: 32 men 29 women
2 men appointed	6 men and 1 woman appointed	17 men and 14 women appointed

Figure 1: T Masengu *The Gender Transformation Aspect of Judicial Appointments*

As at October 2013, there were 77 women judges out of a total of 239 in South Africa. The JSC processes have

resulted in the two women Constitutional Court judges on a bench of 11, and two women Supreme Court of Appeal judges on a bench of 26. While the numbers cited may seem encouraging in respect of the High Courts, gender transformation is simply not taking place higher up in the judiciary.

The transformation – or lack thereof – of the judiciary is not a new debate. Every few years it captures the attention of the profession, the media and South Africans concerned with transformation. At the commencement of the project, South Africa found itself once again in the throes of such discussions.

Today the debate revolves around the question of whether one should appoint judges on the basis of talent or diversity.[3] By broadening the frame of reference to the profession as a whole, the project challenges this binary: talent and diversity are not alternatives. Diversity is not inconsistent with talent and ability. To say otherwise suggests that black women, for example, are less capable than white men and are appointed for their diverse characteristics rather than their legal capability. The project seeks to invert that assumption.

The project also seeks to understand the specific emphasis on race and not gender, where racial transformation has advanced, albeit slowly, and gender transformation has had a much slower growth pattern.

The language used to describe the racial groups in this research emanates from the standard language used in the national discourse around transformation. These categories are not a reflection of how people may self-identify, nor do we endorse the categorisation as appropriate. It is a function of capturing external perceptions that may impede advancement in the legal profession.

4. Our Assumptions

4.1. Meaning of Transformation

As with any research, the project began with a number of assumptions. The project adopted an understanding of transformation as an open, bias-free and non-hierarchical profession which sees the removal of prejudices so that talent can flourish, unhindered by the assumptions that are often linked to the characteristics of race, sex, gender and sexual orientation, among others.

Transformation is not a case of facilitating the appointment of less qualified black lawyers to senior positions; rather, is it about the removal of barriers that impede talented lawyers from opportunities to develop and gain skills, experience and knowledge within the legal profession because they are black, women, lesbian, living with a disability or disease or, in some way, non-compliant with the dominant homogenous culture.

This requires us to ask deeply uncomfortable questions, not only about the lack of transformation at the end point of the profession, namely the judiciary, but also and perhaps even primarily about the entire lifespan of a legal career, from graduation to attaining some of the most senior positions in the profession. This focus on the entirety of the legal profession and on the career paths through the legal profession is a distinctive perspective of this project.

4.2. Exclusion Throughout the Lifespan of the Legal Career

Predominant among our assumptions is that it is simply too late to question the paucity of suitable talented

[3] Susannah Cowen *Judicial Selection in South Africa* (DGRU, 2010); M Olivier 'A perspective on gender transformation of the South African judiciary' (2013) *South African Law Journal* 448.

female/black candidates when it comes to the judicial appointment process. This is the highest stage of a legal career and an exclusive focus on this stage ignores the lifespan of a legal professional, beginning with entry into the profession. Based on the definition of transformation above, the project is founded on the assumption that there are still many barriers of difference that impede the career trajectory of, predominantly, black women in the profession. The project's first assumption, therefore, is that there are a series of points of exclusion along the spectrum of the legal career of black women.

The project posits that regardless of the type of legal career that an individual chooses to follow, talented female/black lawyers face barriers to achieving senior positions. Our profession operates according to assumptions – often invisible but very real assumptions – about race, gender and similarly exclusionary characteristics. Black and female lawyers are not appointed (or are not available for appointment) to senior positions in law because of barriers, behaviour and unwritten rules of the profession that impede talent and promote stereotypes throughout the lifespan of the legal career. Indeed, part of the value of this project lies in surfacing and outlining the barriers, behaviour and unwritten rules of the profession.

5. PRELIMINARY FINDINGS

Black women face an array of barriers throughout their legal careers. These barriers differ during the course of the profession. The patterns are depicted below and include:

1. A shortage of jobs and few connections to established members of the profession: because the profession remains largely male and white, it is unlikely that black women will have longstanding connections with people in the profession. Connections remain an important part of entering the profession – not necessarily because of nepotism but rather to learn the standard modes of behaviour and how best to conduct oneself within a very particular law culture;

2. Offers from the corporate sector which cannot be matched by the legal profession: many outstanding young lawyers move to the corporate sector;

3. Cultural alienation: black and/or female lawyers face invisible rules determined by social interaction outside of work. Informal engagement around weekends and sport create alienating cultural practices;

4. Bias based on historic roles of black women: many black female lawyers noted that they are associated with their white colleagues' domestic workers, albeit subliminally;

5. Racism: there are lawyers who continue to refer to black women as window dressing, a direct form of racism which speaks to the person's race / gender rather than their capability;

6. Sexual harassment: women are exposed to a spectrum of alienation based on references to their physicality, from inappropriate and lewd comments, to violence and rape;

7. Briefing patterns: both at the Bar and at firms, briefing patterns tend to prefer a small selection of black women and a larger selection of white men. This is due to a reluctance to brief outside one's race and/or sex and also due to client demands (although the inverse is also true in that clients may demand diversity in their legal representation);

8. Behaviour based on gendered roles: women are still asked to pour the tea in meetings, even if there are other junior men, reinforcing the domestic assumptions regarding women's roles;

9. Lack of childcare facilities: work/family dynamics and social imperatives continue to preference female childcare over male childcare. This is exacerbated by the insistence by senior female members of the Bar that childcare was not – and is not – necessary; and

10. The trailblazer phenomenon: exceptional women who have reached the senior levels of the profession have set a standard of excellence required for black women to succeed that does not apply to white men.

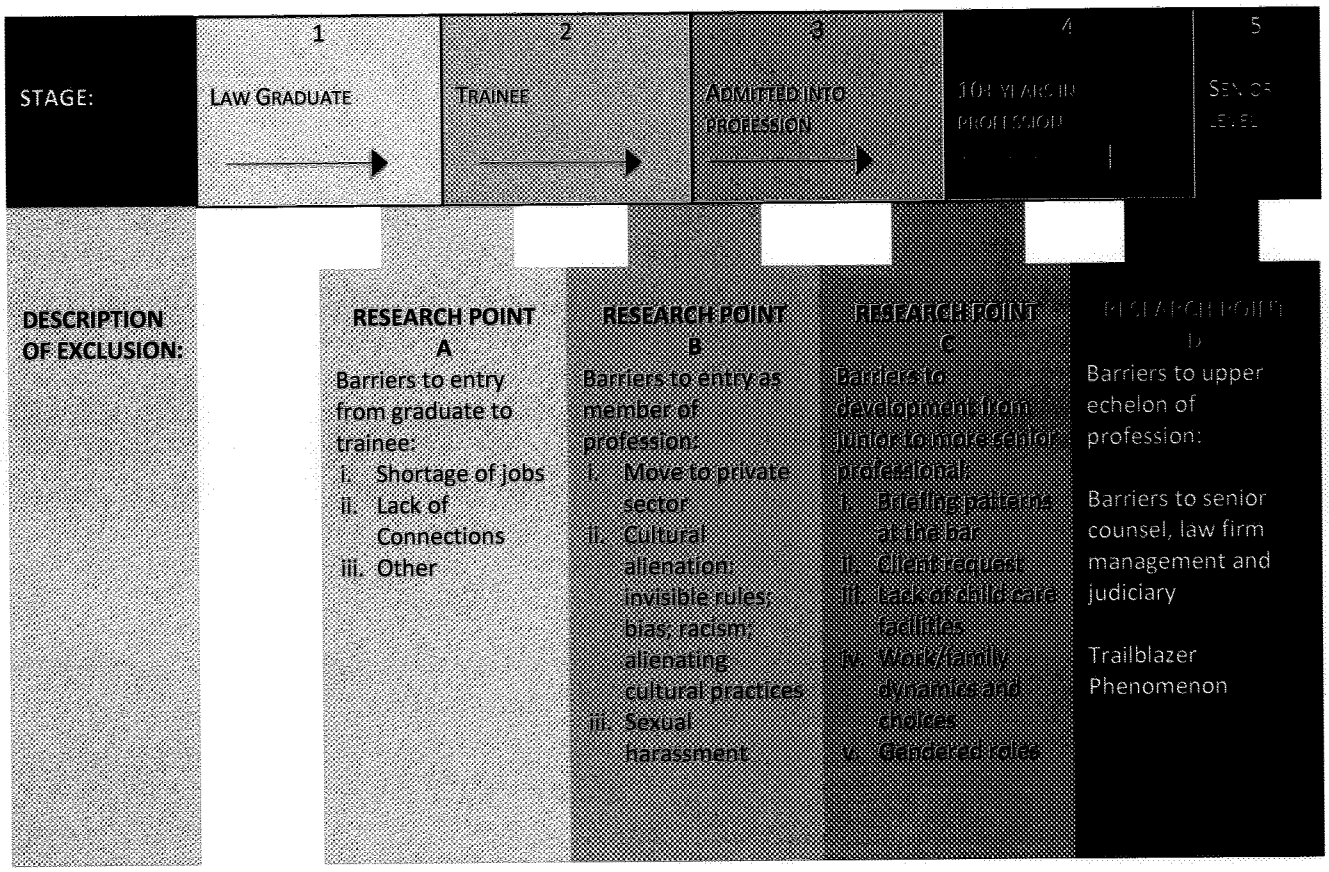
6. OUTPUT ONE: LITERATURE REVIEW

The project was embedded in and has advanced existing research on the transformation of the judiciary. The majority of research in this area has focused on the racial and gendered make-up of the judiciary and not on the legal profession as a whole. Within the profession, there has been some attention to the attorneys and advocates, but otherwise there is very little extant relevant research. One recent exception noted in the literature review is an earlier inquiry into this area of research, focusing on the management of 50 top law firms in Johannesburg. The research notes the dominance of white men in senior positions of such firms.

In preparation for the Expert Reference Group meeting, Researchers Jonathan Klaaren and Alice Brown prepared a preliminary literature review, which was circulated to the attendees in advance of the meeting and formed the basis for part of the discussion. The literature review was subsequently updated and a copy of the final literature review is attached to this document as "A".

On the basis of this literature review, four phases for a standard legal professional career in South Africa were identified. Phase One covers the period of time as a law student (from first registration in the LLB to LLB graduate). Phase Two covers the period of time of vocational training (e.g. service as an articled clerk or pupillage, prior to admission as an attorney or an advocate with Bar Council). Phase Three covers the period of time from admission (as an attorney or with a Bar Council) to five years of experience. Phase Four then covers the period from five years' professional experience to senior status in the profession, e.g. a legal professional with at least ten years' of experience.

The assumptions and preliminary findings are depicted diagrammatically as follows:



7. OUTPUT TWO: EXPERT REFERENCE GROUP MEETING

To test our initial assumptions, on 28 March 2014, we hosted an Expert Reference Group meeting at the offices of Bowman Gilfillan in Sandton, Johannesburg. The aim of the meeting was to gather experts on transformation, representatives from the legal profession, including advocates, attorneys, academics, members of civil society, and government representatives, in order to present to the group the aims and proposed methodologies of the project; to test the assumptions underlying the project; and to canvass the opinions of the experts whose own experiences and work are relevant to the research.

The meeting was very well attended by a broad spectrum of professionals. The debate was lively and fed significantly into the project's design. The Expert Reference Group helped us better to understand and address the lack of transformation in the legal profession and points of exclusion. Attendees included a judge of the High Court; the Deputy Minister of Justice; academics; senior law firm partners; junior lawyers; junior members of the Bar; representatives of the National Association of Democratic Lawyers (NADEL) and former lawyers no longer in practice. The meeting comprised twelve black women, five white women, four black men and five white men.

At the meeting, Bonita Meyersfeld presented the aims of the project, and outlined the proposed methodologies to be used. Jonathan Klaaren and Alice Brown discussed the preliminary literature review and made four key points:

1. The legal profession must be viewed holistically in order to understand the lack of transformation.

2. The research posits four phases to the 'standard' legal career, while understanding that this is, in itself, a potentially overbroad categorisation. These phases are (i) law graduates entering the profession, (ii) the professional training phase, (iii) junior professional (the first five years or so) and (iv) senior professional. (See section 6 above)

3. To identify points of exclusion from law, we must track the progression or lack of progression along the lifespan of a legal career of black women.

4. The project is applied research, rather than purely academic or theoretical research.

Bonita Meyersfeld then opened the meeting for discussion. Although various avenues of further research were suggested, the attendees were unanimous in their support for and welcoming of the research question and proposed methodology (which is described in section B below).

The following questions were raised in the Expert Reference Group meeting:

1. What is the underlying purpose of the research? Are we seeking to achieve an understanding of transformation for the sake of a diverse judiciary (as required by the Constitution) or are we seeking to achieve a more diverse profession as a whole, for the sake of an equal and open legal profession?

2. Is the project aimed, ultimately, at transforming the judiciary through transforming the legal profession, or does it intend to look at the profession more broadly, and to consider positions such as magistrates, prosecutors, and others positions within the profession?

3. Should the project take into account the alternative judiciary, i.e. mediators and arbitrators?

4. Is the project clear on the meaning of the concepts 'diversity' and 'transformation'? Is the project looking only at race and gender as indicators of transformation, or taking into account an individual's values and constitutional development?

5. Who is the intended audience of the project?

6. Who are the 'members of the profession' for the purposes of engagement?

7. Will the research compare different law schools and where their graduates end up, and the experiences of those graduates within the profession?

8. Will the research use statistics or pure narrative from interviews? Are there sufficient statistics available to inform the breadth of the proposed research?

9. If statistics are used, will the research focus only on quantitative rather than qualitative research?

10. Will structured discussion groups only look within the profession, or will there be structured discussion groups that canvass the views of those outside the profession, i.e. those who use the services provided by the profession?

11. Will the research engage in comparative studies, both in respect of other jurisdictions and in respect of other professions?

12. What type of 'points of exclusion' will the research consider? Will it go beyond race and gender and interrogate differentials such as economic status, whether a job applicant has a driver's licence and the geographical background of an individual?

13. Is it possible to transform the legal profession without looking at broader societal issues?

14. What is so special about lawyers? What is unique to the legal profession that requires transformation as opposed to broader societal transformation, particularly given that there are structural impediments in every profession?

15. Is it possible, or appropriate, to build a business case for why transformation is important, given that it will be difficult to convince some people to care about transformation as a social justice imperative?

The meeting was a resounding success for the research questions and assumptions posed. It brought together a diverse group of experts and practitioners, including senior members of the profession. The positive responses to the invitation meant that the venue had to be changed to accommodate the overwhelming numbers. This in itself is a finding: the issue of transformation of the legal profession is taken very seriously at all levels, from the practitioner, to the judiciary, to government. This high level of questioning and critical engagement with the project assisted the Researchers in testing their initial assumptions and formulating the next steps of the project with greater clarity and insight into the realities of the profession. Above all, it confirmed the imperative for change.

The Expert Reference Group meeting had the following impact on the progression of the project:

1. The research question was further developed to include recommendations regarding the purpose and relevance of the research question;

2. The importance of economic status became a key component of the research;

3. The breadth of the legal profession was widened, in order to canvass those beyond the practising attorneys' and advocates' profession in respect of interventions and solutions; and

4. The participants at the meeting confirmed the assumptions and proposed methodology.

8. Outputs Three and Four: Interim and Final Reports

The third output was an interim report, which was submitted to the Foundation for Human Rights on 30 June 2014. The interim report formed the basis of the presentations of the research for the Public Interest Law Gathering, described in greater detail in section 10.5 below.

This report is the fourth and final output of the project.

B. FIELD RESEARCH STRUCTURE AND METHODOLOGY

9. RESEARCH METHODOLOGY

9.1. FIELD RESEARCH: OVERVIEW OF PROCESS

9.1.1. Objectives

The objective of the field research was to engage directly with members of the profession, at various stages of their career, to (i) identify some of the impediments to advancement in the profession (invisible barriers or points of exclusion) and (ii) to identify potential interventions that could mitigate these specific barriers. The research looked at the experiences of legal academics, practising attorneys and advocates, and attorneys and advocates who have left private practice, all of whom are at various points along their respective careers. The research was conducted in Gauteng. While it would have been particularly interesting to have spoken to established judges, this fell beyond the ambit of the research, given that the research specifically examines the barriers throughout the lifespan of a legal career that ultimately result in a smaller pool of eligible candidates for appointment to the judiciary.

9.1.2. Format

The field research comprised: (i) semi-structured individual interviews; (ii) semi-structured discussion groups under the mantle 'Breakfast for Change'; and (iii) electronic surveys.

9.1.3. Preparation

In preparation for the Breakfasts for Change, the project team (i) identified the organisations that would offer members of their group, firm or company as participants in the project; (ii) scheduled the meetings for such engagement; and (iii) prepared background research and certain questions for each discussion (after each Breakfast for Change, the questions became richer and more comprehensive, based on the data captured in preceding meetings). The Breakfasts for Change were led by the Project Lead and the Director.

In preparation for the semi-structured individual interviews, the project team (i) identified the organisations that would support the study and encourage members of their group, firm or company to participate in the one-on-one individual interviews; (ii) scheduled the meetings for such engagement; and (iii) prepared the questions for discussion. The individual interviews were led by the Researchers.

In preparation for the electronic survey, the project team, led by the Researchers, (i) prepared an electronic survey to yield answers to the research questions and (ii) identified the organisations to be approached to agree to the distribution and facilitation of the electronic survey. In some instances, this aspect of the project required an engagement with an entity's human resource management and its IT staff, both presenting complex and difficult areas of navigation. A sample of one of the surveys is attached to this report as "B".

9.2. FIELD RESEARCH METHOD 1: STRUCTURED DISCUSSION GROUPS – BREAKFASTS FOR CHANGE

The project envisaged a series of structured discussion groups, with representation based on stage of career, race, gender, and age. There would also be a series of randomly constructed structured discussion groups (i.e. where participants are selected using a randomised selection without any of the defining characteristics above) in order to challenge the groups identified in the preceding categories, and which were intended to yield

information to facilitate the understanding of the disaggregated structured discussion groups.

The structured discussion groups were designed to capture small-group input by members of the legal profession who share similar characteristics. With one exception (where senior and junior members of the profession attended the Breakfast), the group context of the Breakfast for Change discussions was designed to encourage the sharing of anecdotes and experiences by similarly placed individuals in a space where they would feel safe doing so. The Breakfasts were discussion-based, and varied according to the nature of each group. The Breakfasts tended to open with fairly generic questions, and were then guided by the information provided by the participants. It was in the interests of the research to encourage discussion, rather than to pressurise the participants with a flurry of questions. However, it was also often necessary to drill down into statements made by participants by asking further specific questions in relation to statements made. By their nature, these questions could not be prepared in advance. One of the objectives of the Breakfasts was the pursuit of interventions and solutions. After discussing issues relating to transformation, participants were asked to propose solutions to address issues raised in the discussion.

A sample invitation letter to a Breakfast for Change, a participant information form, and a consent form are attached to this report as "C", "D" and "E" respectively.

9.3. Field Research Method 2: Semi-Structured Individual Interviews

The selection criteria were the same as the structured discussion groups described above, i.e. gender, race, stage and age. Each participant was asked the same basic standardised questions, which were developed as part of the project.

Identified organisations were asked to inform members of their respective group, firm or company of the study and the possibility of volunteering to participate in the semi-structured individual interviews. The aim was to include 15 to 20 participants in this aspect of the study with the understanding that all information and data collected during this process would be anonymous and confidential, identities would be withheld and demographic information would be used for statistical and research purposes only. Each interview took between 60 to 75 minutes on average and, in the end, 15 legal practitioners agreed to participate.

The individualised approach allowed the Researchers to garner information that may not have been forthcoming in the group context that characterised the Breakfast for Change discussions. The semi-structured nature of the interviews provided a degree of flexibility to cover those issues not covered by pre-prepared interview questions. It also allowed for further and deeper probing of specific responses and comments in order to address issues that emerged during the interviews. In particular, the interviewing of individuals was designed to understand if there are universal or standard barriers for specific members (black women, for example) of the profession at specific stages of the legal profession.

9.4. Field Research Method 3: Electronic Surveys

Electronic survey questionnaires were used to increase the range, outreach and impact of the research. This also assisted with the correlation and comparison of the project findings with the findings of other existing research (including the 2013 Johannesburg Bar Council research on junior advocates at the Johannesburg Bar, currently under embargo by the Johannesburg Bar Council). Electronic surveys allowed us to correlate and compare the findings of the other two methodologies. This bolsters the finding that sexual harassment and the intersection between race and gender discrimination are common impediments to advancement in the legal

profession, described in section 11.1 below.

As a technique, electronic surveying yields quantitative data, which was seminal to augmenting the information emanating from direct engagement with people in the profession. Respondents were given the option of answering questions using a range of responses such as "never", "very rarely", "occasionally", "often", "continuously" or "not sure".

10. Implementation of the Research Methodology

We outline below our approaches to the described research methodologies, some of the challenges faced, and some of the additional activities undertaken in the project.

10.1. Breakfasts for Change

The structured discussion groups were held as breakfasts for various reasons. First, a breakfast creates a slightly more informal atmosphere, and encourages conversation. Additionally, it avoids disruption to an individual's or entity's operations by ensuring minimal interruption to the work day. We realised that we would be more likely to secure participation by scheduling structured discussion group meetings at the beginning of the business day than if we were to ask participants to interrupt their days to attend meetings. This is especially important in the legal profession where one charges per hour.

Originally, the project was envisaged as being twelve months in duration. As the timeframes narrowed, we were placed under certain pressures to schedule the Breakfasts for Change within a shorter period of time than originally anticipated.

The structured discussion groups were arranged thematically, and ranged in attendance from three to ten participants:

- The first Breakfast for Change was held for admitted attorneys who had chosen to leave private practice. All of the participants were female. It was hosted by CALS at Wits University. There were three participants.

- The second Breakfast for Change was held with members of the Johannesburg Bar. All of the participants self-identified as 'black, 'Indian' or 'coloured'. It was hosted by the Victoria Mxenge Group, and attended by advocates from a variety of groups. There were five participants.

- The third Breakfast for Change was held at a large Johannesburg attorneys' firm. The participants were broadly representative in terms of age, stage of career, race and gender. There were ten participants.

- The fourth Breakfast for Change was held for candidate attorneys who are members of the South African chapter of a global network of public interest lawyers. All of the participants were black. It was hosted by CALS at Wits University. There were three participants.

- The fifth Breakfast for Change was held for legal academics. The participants were broadly representative in terms of age, stage of career, race and gender. It was hosted by CALS at Wits University. There were five participants.

A further Breakfast for Change was to be hosted at a medium-sized Johannesburg attorneys' firm but this could

not be arranged during the currency of the project. The medium-sized law firm was, however, represented at the Expert Reference Group meeting at the beginning of the project.

10.2. INDIVIDUAL INTERVIEWS

The Researchers undertook 15 one-on-one interviews with individuals across the spectrum of the legal profession. Participants included attorneys and advocates in the private sector and civil society at varying stages of their careers. Participants were also disaggregated by race and gender:

- 1 African woman: candidate attorney
- 1 African woman: attorney, admitted approximately 3 years
- 1 African woman: attorney, admitted approximately 8 years
- 1 African woman: attorney, admitted approximately 10 years
- 1 African woman: attorney, admitted approximately 5 years
- 1 African woman: attorney, admitted approximately 7 years
- 1 African woman: advocate, admitted approximately 9 years
- 1 Indian woman: attorney, admitted approximately 8 years
- 1 Indian woman: attorney, admitted approximately 25 years
- 1 Indian woman: advocate, admitted approximately 11 years
- 1 African man: attorney, admitted approximately 16 years
- 2 African men: attorneys, admitted approximately 10 years
- 1 African man: attorney, admitted approximately 10 years
- 1 white woman: advocate, admitted approximately 13 years
- 1 white man: attorney, admitted approximately 10 years

There were few representatives from the group of 'coloured' people. Across the project there were only two coloured members of the profession with whom we engaged.

10.3. ELECTRONIC SURVEYS

The electronic surveys consisted of six separate surveys, which were distributed to various organisations, including:

- A civil society organisation with offices in multiple cities;

- A network of attorneys involved in corporate and commercial law practices;
- The South African chapter of a global network of public interest lawyers;
- The Johannesburg and Cape Town offices of a large attorneys' firm;
- A medium-sized Johannesburg attorneys' firm; and
- A Johannesburg-based civil society organisation.[4]

All institutions are based in part or entirely in Johannesburg. The data was collected between 27 May 2014 and 16 July 2014 and the surveys were distributed within the email networks of the above organisations.

The intention in putting together this set of surveys was to achieve a somewhat representative sample of the Johannesburg legal services market. Although it would be difficult to draw the line between the two precisely, the sample includes significant responses from lawyers working in both public and private spheres. One caveat, however, is that the sample clearly does deviate from the Johannesburg legal services market in its exclusion of the large number of solo practitioners and small firms of, for instance, one or two professionals. Of the 10 959 law firms in South Africa as of 2014, 62% are solo practitioners and 35% have between two and nine attorneys. Only 30 firms have more than 50 attorneys.[5]

A total of 95 respondents responded to these surveys. Only 73 surveys were completed in full and the remaining respondents did not respond to all items. Of the 95 respondents, 65 identified themselves by race and gender. After analysis for race and gender, on the variables of interest (as further described below), we were left with a sample size of 62. Quite organically, black female professionals became the largest group of participants. This is inversely proportionate to the number of practicing black female attorneys in South Africa (black female attorneys constitute 13% of practising attorneys in South Africa).[6] The final sample consisted of:

- 26 black females
- 8 black males
- 19 white females
- 9 white males

The entire cohort of white males came from the large commercial firm but otherwise the race/gender cohorts were spread across the component surveys. Black females thus constituted 41.9% of the sample, while black males were 12.9%; white females were 30.6%, and white males were 14.5%. For purposes of this survey, 'black' was taken to mean a combined category of persons identifying as either African, Indian, or coloured.

We can compare this with the current demographic composition of the legal profession in order to get a sense

[4] A test run of the electronic survey was conducted on a voluntary and confidential basis within CALS.

[5] B Whittle, The attorneys' profession in numbers *De Rebus* September 2014. http://www.myvirtualpaper.com/doc/derebus/de_rebus_digital_september_2014/2014082002/ (last visited Aug 26, 2014).

[6] Ibid.

of the representativeness of the sample. In the legal profession, it is white males who make up 40% of the whole. White females make up 24% of the profession – thus are slightly overrepresented in the sample here. Black males are 23% of the profession and therefore are slightly underrepresented in the sample at only 13%. Finally, the extent of overrepresentation of black females is shown by their share of the national profession – 13% -- being just one third of the percentage in the research sample.

A further aspect of the representativeness of the sample concerns diversity within the senior and management ranks of the organisations for which the respondents work. As a whole, the respondents mostly worked in organisations where 60% to 80% of the partners or principals were male.[7] On the racial side, the picture was slightly different and a bit more evenly spread within our sample:

- 14.6% reported working with no white principals or partners;
- 14.6% reported working with 20% white partners/principals;
- 6.2% reported working with 40% senior white colleagues;
- 22.9% reported working with 60% white management;
- 35.4% reported working with 80% white partners/principals;
- 6.2% reported working with all white partners/principals.

Again, we can compare this with the current demographic composition of the legal profession in order to get a sense of the representativeness of the sample. In the 2013 research cited in section 2 above, 80% of the chief executives were white as well as 72% of the managing partners. 53% of all equity partners were white and male.

The survey questions themselves were modelled on a recent survey done by the Law Society of Australia. The topics covered in the survey include work satisfaction, availability of career development and progression opportunities, workplace tolerance of flexible working arrangements, the level of discrimination and harassment at work, and drivers of retention and attrition. At least as an initial matter, sample size was not large enough to facilitate analysis of the availability of career development and progression opportunities and the drivers of retention and attrition. Nonetheless, we were able to conduct a preliminary analysis of work satisfaction, workplace toleration of flexible working arrangements, and the level of discrimination and harassment at work.

10.4. CHALLENGES

There were several challenges in setting up and conducting the field research.

The first was the risk of non-response. Members of the legal profession literally earn their fees through time and the request for members of the profession to engage with the project, in any form, was a cost not only to their productivity but also possibly to their ultimate income for the month in question. Notwithstanding this challenge, the project was met with a high number of participants who committed their time to the research. This experience reinforced the finding of the initial Expert Reference Group meeting, namely, that members of

[7] The responses regarding the composition of partners/principals were all male (2%), 80% male (29.7%), 60% male (46.8%), 40% male (2%), 20% male (8.5%), and all female (10.6%).

the legal profession take the issue of transformation very seriously.

Ten organisations were identified and invited to participate in the electronic survey and to nominate individuals or to call for volunteers for individual interviews. Some of those organisations were also invited to participate in the Breakfasts for Change. One month after the letters of invitation had been sent, only two organisations had confirmed their participation. Two months later, seven organisations had either not acknowledged the invitation, or had undertaken to consider the invitation but had not responded to it.

It became necessary for members of the project team to leverage professional relationships with members of various organisations in order to explain the project and confirm the organisations' participation. In our interactions with members of these organisations, it was clear that the project was extremely welcome and seen as very valuable. Yet, despite this interest, it remained difficult to schedule sessions within the available time of the project.

The second challenge related to the need to obtain an appropriate balance between the various parts of the profession, including attorneys, advocates, the academy and people who no longer are in practice. This diversity was achieved to some extent but, as with all research, a wider group of participating entities over a longer period of time would have enriched the research findings.

The third challenge was to ensure representation across the profession, based on gender, race, age, stage of career, and sector of the profession. This challenge proved to be surmountable with a wide diversity represented in the field research.

10.5. PROJECT ADVOCACY

In addition to the research component of the project, various members of the team engaged in project advocacy at various points during the project.

Project Lead, Kirsten Whitworth, attended the *Judges Matter* meeting in Cape Town on 5 June 2014. The meeting was organised by the University of Cape Town's DGRU, in order to discuss the Judicial Services Commission and the appointment of women judges. On 9 June 2014, Ms Whitworth also attended a meeting facilitated by Sonke Gender Justice to discuss women judges, and the interaction between gender and race.

Researcher Alice Brown attended the ENSAfrica *Contemporary Conversations: Interactive Dialogue between In-house Counsel and Outside Counsel* on 5 June 2014. Of particular interest for the purposes of our project was the panel on 'Diversity in the Law, Why It's Top of Mind for General Counsels'. The General Counsel of Coca-Cola Bottling Investments Group and the Legal Director - Africa of Cummins, Inc. were the guest speakers and in their presentations, both emphasised their respective companies' commitment to diversity and transformation, identifying ways in which they monitor and assess compliance on the part of the law firms they hire.

Both Kirsten Whitworth and Alice Brown presented on the project at the Public Interest Law Gathering (PILG), held at the University of the Witwatersrand, Johannesburg, on 24 and 25 July 2014, as part of a panel on 'Transformation and Diversity in the South African Judiciary and Legal Profession'. The panel also included Tabeth Masengu (Research Officer at the DGRU), Alison Tilley (Head of Advocacy and Special Projects at the Open Democracy Advice Centre) and Sammie Moshenberg (former Director of the Washington DC Operations for the National Council of Jewish Women, where she led BenchMark: NCJW's Judicial Nominations Campaign which she helped develop in 2001 as a way to educate and engage NCJW's members and their communities on

the importance of the federal judiciary and filling judicial vacancies with a diverse group of individuals with a proven record of fidelity to core constitutional values). Jonathan Klaaren chaired the session.

C. FINDINGS AND RECOMMENDATIONS

11. PROJECT FINDINGS

As mentioned in section 7 above, the project is applied research, rather than purely academic or theoretical research. The research is not designed to yield conclusive evidence regarding transformation in the legal profession. Rather, it is designed to test the accuracy of the assumptions identified in section 4 above. It is also important to bear in mind that the project is not held up as scientific research, nor was it designed as such. It engaged in qualitative research, by investigating the lived realities of those with experience in the legal profession. All three methodologies yielded consistent evidence that affirms the following: that sexual 'othering' – the process of prejudging a person on the basis of stereotypes relating to their race, gender and class, and the intersection between gender and race discrimination are factors that impede advancement in the legal profession.

11.1. THE INTERSECTION OF RACE AND GENDER DISCRIMINATION

i. Description of the Finding

On the whole the participants noted that the experience of discrimination based on race is different from that based on gender. Where one is part of the racial and gender minority, a most particular type of discrimination is experienced, which is not addressed by the transformation project. The data indicates that while black women experience the same types of gender discrimination as their white female colleagues, they also experienced a *different and additional* form of discrimination by virtue of their race. Similarly, the experience of racial discrimination is similar to that experienced by their black male colleagues but there too, there is a *different and additional* form of discrimination based on their gender.

ii. The Research Leading to the Finding

Gender tends to be seen as less important in the process of transformation than race. In the context of the intersecting points of discrimination (namely race and gender) there appears to be a deepening divide. When we speak of groups who are disadvantaged or poorly represented in the legal profession, we speak of blacks, women and black women. It is important to acknowledge each of these groupings and to recognise that the intersectionality of being both black and female cannot be ignored. The prejudice against a person based on both gender and race, was not addressed by the project of racial transformation. Black women can face discrimination and prejudice both because of their race and their gender. As a participant noted, it seems that while white women suffer from sexual harassment throughout their careers, black women suffer from both sexual harassment and gender discrimination. As a result of this intersection of discrimination, there are fewer successful black women than white women, and this appears most manifestly on the Bench. A participant noted that it is particularly distressing that the Constitutional Court, which is the guardian of our Constitution, does not appear to be transformed for black women, and that this does not bode well for black women.

The Bar participants expressed very particular concerns. Certain participants at the Bar observed that the experience of being at the Bar is significantly different for black and women advocates because they feel like a

cultural minority. People talk in a particular way and socialise in a particular way, and work flows as a result of socialising.

Due to racism, prejudice and pre-conceived notions of ability, or inability, many black legal practitioners believe that they have to "work twice as hard" to disprove these negative assumptions but, even in doing so, they only get "half as far" as their white counter parts, again, due to racism, prejudice and pre-conceived notions of their capabilities.

Participants at the Bar remarked about the difficulties of being self-employed. This is reportedly exacerbated for black counsel: a participant noted that she has financial responsibilities that other people do not, including, for example, having to buy her parents a house before she was able to buy one for herself, which meant she had to work much harder and for far longer in order to reach the same position as her white colleagues.

The participants from the Bar noted that the Johannesburg Bar Council has not adopted either a maternity leave or a sexual harassment policy, but has recommended instead that such policies be adopted by individual groups. They noted with concern that this lack of leadership from the Bar Council is indicative of the established hierarchy of the Bar, and the cemented traditions where women's views and positions are not taken as seriously as those of men. They noted that because the Bar relies so heavily on tradition, it is very difficult to change things from the way that they have always been done.

The attorney's profession was similarly problematic. One participant was the only black female employee when serving her articles. She worked with a number of white men. She described an incident where her employer shouted at her in the corridor, in front of her colleagues, yelling "I will not have incompetent women in my firm".

Participants made nuanced references to respect. A number of female participants observed that they feel that although they are taken seriously within the workplace, they are not taken as seriously as their male colleagues. One participant remarked that she had felt that she was taken seriously throughout her upbringing, until she began working in a law firm. She noted that this is endemic to the legal profession, and not specific to any one firm.

For example, senior members of the profession will assume that, as the only woman in the room, the female staff member will make the coffee. The same participant noted that ninety per cent of the time, she is the only woman in the room. Her supervising partner ensures that either he or the most junior person in the room makes coffee. However, other partners tend automatically to assume that, as the only female present, she will make the coffee.

Several black women spoke of difficulties that they had in teams supervised by white women. One person gave an example of working in a team that was entirely comprised of women and where, initially, she thought that there would be support and solidarity. Instead, she was confronted with instances of what she perceived as racial prejudice and discrimination. There must be "an honest discussion around gender discrimination and the different impacts on black women and white women".

The sentiments above were largely confirmed in the results of the electronic surveys. One part of the survey focused on aspects of discrimination, bullying/intimidation and sexual harassment. It posed the question to respondents "To what extent have you personally experienced any of the following in your current workplace?" and then queried several different aspects of discrimination, bullying/intimidation and sexual harassment.

Respondents were given the option of answering "never", "very rarely", "occasionally", "often", "continuously" or "not sure".

The most prevalent of these issues were bullying/intimidation and discrimination based on gender, age, and ethnicity. For the subset of black females in the sample, the level of bullying/intimidation experienced and reported (7.6%) was consistent with the sample as a whole. With respect to white women, the reported level of bullying/intimidation was 15.8%, about twice the rate in the sample as a whole and twice the rate reported by the black females in the study.

11.2. GENDER DISCRIMINATION AND REPRODUCTIVE RIGHTS

Gender discrimination on the whole seems to be accepted in the legal profession, particularly when it comes to pregnancy. One participant spoke of the tension between her desire to try to become a director/partner in her firm and her desire to start a family. She does not know if these two goals are compatible. Another participant described one incident where a woman had disclosed her pregnancy to an employer and had been asked what she was "going to do about it." The strong implication was that she needed to terminate her pregnancy, or lose her job. According to the electronic survey, no respondents had requested unpaid maternity/paternity leave but this may be because none of the respondents had been pregnant.

11.3. LATENT DISCRIMINATION AND 'OTHERNESS'

"I didn't realise how hard it is to be coloured until I came to [firm]"

i. Description of the Finding

As participants discussed their experiences, the 'invisible barriers' and alienating behaviour became part of the definition of transformation. It was observed that those who are different have the following choices (i) seek to accommodate the prejudice in adjusting their behaviour and not being offended; (ii) seek to assimilate into the dominant culture through language, behaviour and other social conduct; or (iii) challenge the institutional culture that perpetuates privileged white culture, with possible consequences of alienation and ultimately leaving the profession.

ii. The Research Leading to the Finding

Prejudice and exclusion may not always be deliberate or conscious. Male and female junior associates in law firms noted vastly different experiences, as did white and black attorneys. Some participants observed that, within the law firm context, seniors tend to be dismissive of juniors as a whole but still treat white males better than their black / female colleagues. A theme that came out quite strongly was that some participants who are different from the hegemonic norm are penalised for their difference, and that they should not have to pay a "tax" for being different. Instances of preferring white junior counsel over black junior counsel continue to occur. Both clients and the senior counsel will more readily listen to the white junior than to a black female junior.

There was also recognition that prejudices are often unconscious or unintentional. Some female participants noted that prejudice is not always apparently negative, for example, male senior partners may be 'protective' of their female juniors, treating them more like a daughter than a professional colleague. This facially neutral practice becomes negative, however, by undermining the female junior and categorising her as a child in a

parent-child relationship. This practice, and its unintended paternalistic side-effect, was acknowledged by male participants.

An example of othering or sub-conscious prejudice was raised by a participant from the Bar, who noted that, social conversations are often about cricket or rugby, historically white sports in South Africa. Confirming this position, a member of the attorney's profession noted that the only unifying sporting discussion is the English Premier League or European Football League. Importantly, this was also an example of how women may be excluded irrespective of the race of their male colleagues. Some efforts at cultural exchanges are made but may backfire, for example, a white senior male lawyer asked a black senior male lawyer, in a discussion about cricket, how BafanaBafana was doing, thereby offering a well-intended but ultimately belittling overture of inclusion. The participant noted that black members of the Bar feel that they must take an interest in historically white sports in order to participate in social conversations. Yet, the same courtesy tends not to be extended to them by their white counterparts.

Some participants from the Bar observed that a good relationship with an attorney, which is encouraged by social interaction, leads to more work. But, there are limited opportunities to socialise across race, which restricts briefing patterns and some participants noted that attorneys tend to brief counsel that look like they do.

Lawyers who socialise together tend to give each other work. The example that has been repeated on a number of occasions, by advocates, attorneys, and corporate lawyers, is the expectation that one cannot succeed if one does not go skiing with the right people.

One member of the Bar voiced an objection to the fact that advocates get work by playing golf, but admitted that it is preferable to learn how to play golf than to rebel against the system.

If lawyers have spent the day together on a Sunday it is more likely that there will be a more compatible working relationship during the week. This acts as an organic and unintended but very real barrier to development for people who are not part of the homogenous seniority.

For example, one participant reported about the longstanding arrangement by an all-white and all-male group to watch a rugby match. Black associates were invited only an hour before the match. The event had apparently been arranged as an informal social outing by a group of employees who tended to socialise with each other. The last minute invitation from obviously white colleagues to obviously black colleagues only served to reinforce the alienation based on race.

A black female candidate attorney reported being told that she would "never be like" her white male counterpart and while he is taken to meetings, she is sent to make deliveries and photocopies. She observed that her colleague attended the same school as their supervisor, and believes that there was a pre-existing relationship between them, which influences their interaction within the professional sphere.

Perhaps most poignantly, a participant observed that as a black lawyer, it is difficult to abandon ingrained prejudices, even against oneself. The participant noted that this leads to hesitation before speaking in consultations and with colleagues, because there is a need to be particularly comfortable saying something, due to a lack of confidence and trust in one's own abilities. The participant emphasised that this is not just about language: every time she is in a room with white people, she is hesitant to talk in case she embarrasses herself.

11.4. SEXUAL HARASSMENT

i. Description of the Finding

As participants related their experiences, it became apparent that sexual harassment is a problem across the profession with insufficient structures in place to address it; insufficient understanding of the range of behaviours that constitute sexual harassment; and a lack of understanding of the manner in which it impedes advancement.

ii. The Research Leading to the Finding

Some participants related that there is a range of behaviour that constitutes sexual harassment experienced in the professional environment (in varying degrees of intensity). However, senior management at law firms and some members of the Bar Council either do not seem to understand the complexity of sexual harassment, or deny its existence. In the opinion of one participant, sexual harassment is a problem at the Bar but the Bar Council has no formal position on the matter. Although there are few formal complaints, there are several stories of sexual harassment. This status quo is entrenched by the concern at junior levels that being too vocal in raising concerns around sexual harassment, will "rock the boat" and the individual will be seen as a troublemaker. The lack of understanding, coupled with a fear of being perceived to be disruptive (referred to as a "career limiting move"), creates a de facto system in which there *is* sexual harassment but not consequences for such violations. Because there is little, if any, relief for victims and survivors of sexual harassment, the imperative of silence remains. Quite simply, complaining about sexual harassment has the result of impeding the flow of work to the complainant.

The established hierarchy of the Bar obfuscates the identification of acts that constitute sexual harassment. Participants from the Bar observed that the generally accepted rule of practice at the Bar is that juniors do "whatever is required" of them by their seniors. This can – and does – extend to sexual harassment. Some are of the view that it is understood to be a career-limiting move not to acquiesce to a senior's demands. One participant reported incidents where a senior had asked a junior to accompany him to Cape Town on a business trip, even though she was not on brief, and had no role to play in the matter. The innuendo was that the request was made for non-professional reasons. The same participants noted, however, that at the Bar, reputation is everything, and women fight a constant battle between having to manage their reputations while managing sexual harassment, and perceptions of their colleagues.

Another participant noted "sexual harassment is a big issue at the Bar. It is not spoken about but it needs to be exposed. If you could get women to tell their stories at the Bar, you would be shocked".

11.5. COLOURED PEOPLE FEEL PARTICULARLY EXCLUDED AND ISOLATED

Many participants noted that the transformation debate is often seen in binary form, as white versus black. As a result, coloured members of the legal profession tend to fall outwith any one particular group. One participant remarked that it was only when she started working at a law firm that she realised how it felt to be a "coloured woman". Another participant observed that she would not be invited to social events by black colleagues, because she was not seen as black, nor did she fit in with white colleagues' social groupings. The result is that one is excluded both for the purposes of social networks, and also, for the purposes of having a network of similarly placed individuals with whom one can commiserate in the Gauteng area.

Therefore, in terms of social groups, a particularly isolated category of persons is 'coloured' women at the Bar. One participant noted that it is much harder to be of "mixed race" because she does not belong to any group, and therefore has no comfort zone or protective category. The absence of a network of coloured women (as opposed to networks of black men and black women) highlighted this to her.

11.6. THE IMPORTANCE OF NETWORKS

i. Description of the Finding

Participants noted that the so-called old boys' network is well documented and understood: groups of similarly placed people support, interact and protect each other. The support that individuals gain from networks provides significant advantages in career progression. Many participants noted that white male lawyers look after the interests of other white male lawyers, often subconsciously.

Increasingly, black 'boys' clubs' are also emerging. The result is that black and white female lawyers fall through the cracks without the right connections, either through gender, family, schooling, or conforming to an appropriate dress, behaviour or accent.

ii. The Research Leading to the Finding

Some participants spoke of the very specific culture of the Bar, noting that people talk and socialise in a particular and different way. Because work follows as a result of socialising, it is important to be attuned to that way of socialising. Those who are already familiar with this are at an advantage, and they tend to be white and male. Success is therefore easier for those who fit that culture.

Many participants noted that the 'boys' club' may not be the exclusive domain of white lawyers. There are black boys' clubs and, to a lesser extent, Indian boys' clubs. There are, however, no equivalent 'women's clubs'. Some female attorneys noted that they worked in all female teams, but on the whole, there are no organic groupings of women, with a dearth of encouragement from women for each other.

The absence of a women's network arises in part because of discrimination by women (particularly senior women) against other women. Some participants noted that this may be because of the need for women to act like men and to relinquish their gendered identity in order to fit into the hegemonic norm.

The participants from the Bar acknowledged that theirs is a particularly tough environment. It is a fight to enter this domain; it is a fight to remain in this domain; and it is a significant fight to succeed in this domain. Some participants noted that entering the Bar and succeeding as an advocate can be difficult for anyone because of the series of challenges that coming to the Bar poses. For example, the financial strain of pupillage followed by the 97-day invoicing period places a burden on all members of the Bar. It is difficult to come to the Bar in general but it is particularly acute for anyone who is not part of the overwhelmingly white and male domain. White men do not face the same difficulties precisely because the position of a minority is one hurdle they do not have to clear. One participant remarked that this problem is exacerbated by the tendency that the legal community has "to intermarry", thus perpetuating the cycle of socialising within particular circles, and making it difficult for outsiders to gain access.

One participant noted that there are two manifestations of exclusion in respect of career progression, both formal and informal. There are formal programmes such as performance monitoring, but informally, people are

able to rise to the top based on their informal relations. This participant noted that the only time that he is able to have ordinary conversations with colleagues, regardless of race or seniority, is when they play soccer.

11.7. FRONTING / WINDOW DRESSING

i. Description of the Finding

A number of black participants spoke of being used in expedient and opportunistic ways by their firms: they described being invited to participate in meetings in which their respective firm was soliciting or "pitching" work from potential clients.

ii. The Research Leading to the Finding

Participants spoke of being actively recruited to participate in these sessions. Then, the next time they would hear about that client and work would be weeks or months later, in the corridors, so to speak. They would learn that the firm had been retained and was engaged in the work but that they, the black attorney used to attract the client, would not have been included in the work. It becomes clear why a black, capable attorney would want to leave the profession for such a reason.

One participant told us of an incident in which she was included in the pitch to solicit work from a particular client. Her name and photograph were included in the team profile presented to that prospective source of business. Months later, and inadvertently, she learned that the firm had indeed been hired by the client but that she had not been included in the team and work that the firm had received. Another participant spoke of the "dishonesty" of "using black identities" to solicit business from government entities such as Eskom but then not being included in the work once the firm was appointed.

11.8. SCEPTICISM ABOUT BLACK AND FEMALE PROFESSIONALS' ABILITY (OR: A MISTAKE BY A BLACK LAWYER IS WORSE THAN THE SAME MISTAKE MADE BY A WHITE LAWYER)

i. Description of the Finding

Many of the participants believe that those in senior positions (be it within law firms, at the Bar or in the judiciary) doubt and question the intelligence, talent or prior experience of black and female practitioners. In their opinions, black professionals are generally viewed as less than equal or worthy until they prove themselves differently. In contrast, they felt that their white colleagues were always presumed to be competent and capable until or unless they prove otherwise. Black and female and, in particular, black female professionals, need to overcome preconceived ideas and assumptions related to their race, gender, language and accent.

ii. The Research Leading to the Finding

Participants almost always agreed that the legal profession is far from transformed. They noted that it is largely white and male physically, and that this is reflected in the profession's ideology and prejudices. Many participants spoke about facing preconceived notions and attitudes that assumed blacks were incompetent, lazy or token appointees without substantive knowledge and skills. On more than one occasion and in more than one setting, the research team heard some participants talk about the requirement for them, as black professionals and/or as women, to "prove themselves" or to "show that [they] could do the work" or to "have

to work harder and longer" than their white male counterparts to be recognised and respected by their supervisors. In other words, the presumption of intelligence was against them. One participant reported that a senior white male lamented that there were "no competent blacks". Another participant noted that, in many instances, clients "do not trust" black attorneys or women attorneys.

One mid-level professional stated that black candidates attorneys need to "work extra hard" and understand that the playing field is not level. These young professionals should not be "naïve" about the reality of who stays and who departs at the end of the articles period. According to this source, as a general rule, the majority of white candidate attorneys obtain offers and stay while the majority of black candidate attorneys depart because they are not invited to continue with the large firms once they have completed their articles. This, in the opinion of this participant, is the reality that black entrants into the profession must face.

A participant reported an incident where a black female lawyer had sent an email containing spelling errors to a client. The client replied to the entire team, complaining that *this was why he opposed working with black women* and insisting that she be removed from the matter. The firm took her off the matter. After this incident, the attorney in question left the firm. The critique of the firm's response was not because spelling is not an important component of professional lawyering; rather, the response linked the error to the race and gender of the attorney – and all like her. The participant noted that it is highly unlikely both that the client would have requested the removal of the attorney, and that the firm would have agreed to his removal, had he been a white man.

Just as women may discriminate against other women, the same was true in respect of race. It was noted that there are black professionals who are affected by this. Some of the participants noted that it can be difficult for people to go against what they have been trained to think for years, such as perceptions that blacks are intellectually inferior. There are, for example, deep-seated prejudices about which type of matters black counsel are, or are not, capable of handling.

A black senior counsel noted that, when briefed on a construction matter, he will automatically think "Black counsel do not understand construction law, so I had better find a white junior", despite the fact that there are black junior counsel who are indeed experienced in construction law. He feels that he has been conditioned to underestimate black juniors because his white counterparts underestimate black juniors, and because he, himself, was underestimated as a junior. He noted that, even though he himself is black and aware of the imperatives of transformation, these assumptions are very difficult to unlearn and will take time.

Some participants from the Bar noted that there are black attorneys who feel that they cannot brief black advocates. They fear that if such black counsel fails to perform to a certain standard, this will serve as confirmation that *all* black professionals cannot succeed. They noted that some black attorneys would rather brief white counsel than risk confirming their white colleagues' prejudices about black professionals.

One participant observed that, as a black lawyer, his seniors assume that he cannot do the work that he is given, or that he will find it more difficult to take instructions than his white colleagues. He also noted that he and his black colleagues seem to be criticised in a different way to white colleagues when making mistakes: a mistake made by black colleagues seems to be of far greater significance and to have greater consequences. Similar mistakes made by a white colleague are shrugged off as an innocent mistake. The position suggests that when a white professional makes a mistake, it is because there was an error in judgment. When a black professional makes a mistake, it confirms that black colleagues are, on the whole, unable to do the work.

11.9. LANGUAGE, ACCENT AND CLASS

i. Description of the Finding

Some participants noted concerns about prejudices in the workplace against those who are black and "have an accent", because of the assumption that they belong to a lower socio-economic category of non-professionals.

ii. The Research Leading to the Finding

A participant noted that in a consultation, clients associate certain accents with assumptions about an individual's ability. That person is at a disadvantage before they have even begun the consultation. As a result, people are pigeonholed at the time of greeting clients, and before there has been any engagement with the substance of a matter. This can have a silencing effect, resulting in a junior sitting quietly in a consultation, allowing others to speak. This perpetuates the problem, allowing white colleagues of the same status to establish seniority because they feel able to speak more freely.

A participant noted that how English is spoken matters, and that this is true of academia, law firms and the Bar. People, who speak English better than others, automatically benefit from the perception created that they are better at their job. This erodes the confidence of those who are not as proficient in English, creating the impression that black juniors are not 'hungry' for the work.

Another participant noted that language is a particular barrier for Afrikaans-speakers, and that many Afrikaans students do not apply to the perceived top law firms because they feel that being Afrikaans speakers is viewed negatively, and that they will not be able to succeed. This adds an additional barrier for Afrikaans-speaking coloured individuals, who have both racial and language barriers to clear.

11.10. THE ONE 'GOOD BLACK FEMALE' LAWYER

iii. Description of the Finding

Participants from the Bar observed that once a black junior has proved him- or herself, s/he is inundated with work because s/he immediately becomes known as "the one black person who can do it".

iv. The Research Leading to the Finding

Participants noted the risk of being pigeonholed: once a junior does well in a particular field, it is difficult to get work in another field, and thus to grow a diverse practice. The inundation of work also presents the potential negative consequence of making mistakes because of an unmanageable workload, thereby reinforcing prejudices against the capability of black professionals, both male and female.

Participants from the Bar raised concerns that some clients will not trust black attorneys with matters because "they'll mess it up." If the firm insists on a black attorney to manage the matter, the client will then insist on hiring white counsel, because "the buck stops" with white counsel. The implication is that at least the person who has control over the end product will be able to fix the deficiencies of the black attorney (representing discrimination based not only on race but also on a longstanding distinction between the Bar and the side-Bar).

In a perverse way, the perception that there are only a few good black legal practitioners can be advantageous, at least initially, for some juniors. Capable black juniors will have flourishing practices but this quickly becomes

an unmanageable burden because they are the black counsel everyone will use. The burden for the "good black junior" who receives a great deal of attention and work, soon amounts to *too much* work, the sheer volume of which undermines their ability to perform optimally. Inevitably there will be a moment of under-performance, which will expunge his or her reputation as the "good" black. Similar weak moments for white juniors are not so absolute in their consequences and are not interpreted as evidence of a lack of capability amongst *all* white female juniors. Moreover, this perception of there being only a few good blacks also impacts adversely on the work and attention that other black professionals receive. So, some black juniors are over-worked and over-used while others are under-developed and ignored. The support for the 'good black' lawyer is therefore an exception, rather than the rule.

11.11. BRIEFING PATTERNS AND WORK ALLOCATION

i. Description of the Finding

Various participants noted that work allocation is based on either informal relations or racial and gender prejudices. In order for this to occur, it was observed, senior professionals must change their patterns of briefing (which some are already doing). Change therefore must come "from the top". Directors of law firms and senior counsel need to be deliberate in their briefing patterns and allocation of work to address the issues of transformation.

The briefing patterns have an economic impact too. In respect of attorneys, the more lucrative commercial fields are skewed towards white attorneys and black attorneys tend to be found in the less lucrative fields such as criminal and labour law.

ii. The Research Leading to the Finding

Participants from the Bar observed in order to get effective training, one needs exposure to a mix of small manageable cases in which an advocate can grow one's confidence and larger matters in which one can get exposure. Participants noted that white juniors are given small matters in which they can succeed and are able to shine; black female juniors, however, are usually brought into larger matters only. Moreover, because of the perceived 'lack of good black female' advocates, junior black advocates are brought into matters, which are far beyond their experience, setting up them to fail. As a result, they are seen as incapable of delivering quality work, which has an impact on obtaining future work. Where the junior advocate, notwithstanding her lack of experience, succeeds and bucks the stereotypes, she is then inundated with high level work, subsequently missing out on a steady progression of training that her male colleagues ordinarily receive. A participant noted that after herself ten years at the Bar she has never managed small, relatively simple matters because of the lack of training in those areas.

Some participants also noted that some parastatals insist on black juniors for all of their work. Because people tend to work with the same people repeatedly, a clique develops. Some participants observed that there are some black female juniors who are preferred over others, and as a result are briefed in too many matters. Some cannot maintain the workflow and lose credibility. A participant observed that this could be alleviated by widening the pool of black women briefed; there are many capable black women who do not yet have access to this work, despite clients and attorneys lamenting the lack of black female counsel, which is simply untrue.

Another participant observed that, at times, even when black juniors are brought into large matters, clients rely exclusively on the white senior counsel. The participant reported being excluded from consultations and not

being informed about developments in the matter. While formally on brief, the participant described that she was not involved at all in the matter. When the client asked for an invoice, the participant refused to provide one. She explained that she had been excluded from the work in the matter, making her position one of 'window dressing'. Because she could not do any work she refused to bill the client.

Some participants felt that the role of senior advocates is critical, but that it is difficult to get buy-in from them for a number of reasons, including that mentoring takes a great deal of time and effort. They noted, however, that this is only part of the problem, because there is a balance to be struck between being a junior on matters on the one hand and developing a practice through individual briefs on the other. The risk of not developing properly is that after ten years at the Bar, one should have certain skills, but juniors who have spent ten years battling to keep their heads above water in very large matters with poor mentoring or supervision may not have those skills. Some participants noted that leaving private practice for the corporate world then becomes an attractive option.

A number of female participants spoke of problematic work assignment patterns in firms. In a mixed group of male and female junior attorneys, the women talked about how they were assigned administrative or company secretary type assignments while their male counterparts would be included in meeting with clients and given "real" legal work such as transactional work. One participant reported that during her period of articles, women were assigned more administrative work; substantive work was the preserve of white males.

In a particular team, white candidate attorneys and juniors reportedly received the "crème de la crème" of the work; of the two black women on the team, one was allocated some, but insufficient, work and another received no assignments at all.

One participant spoke of the presumption that blacks and women can only do certain kinds of work, which others considered to be 'soft" law. She noted that some think that blacks and women "can't do numbers".

At the Bar, advocates shared the observation that family law and trusts and estates are seen as "women's work". They found that gaining exposure to and experience in commercial and corporate work can be difficult for female (and black) advocates.

The nuanced nature of 'othering' i.e. making someone feel inferior or insecure because of their differences from the hegemonic norm, and discrimination is evident in the various narratives accompanying the workloading of black women. These narratives include (i) black women are imposed on clients; (ii) black women lack experience and therefore seniors do not give them work; and (iii) the smallest error will be interpreted as evidence of the ineptitude associated with race and gender.

11.12. SCEPTICISM ABOUT TRANSFORMATION

i. Description of the Finding

Many of the participants expressed doubt or pessimism about the possibilities or probabilities of meaningful transformation in the near term. They spoke about the slow pace of transformation, the lack of will to effect meaningful transformation, and the ways in which the legal profession is conservative and traditional. All of this leads them to doubt that matters will change for the better any time in the near future. Many participants acknowledged that the profession needs to be transformed, and noted that buy-in from senior levels of the profession is critical in order for transformation to be successful.

ii. The Research Leading to the Finding

Participants acknowledged that transformation is not a simple or rapid process, with one participant commenting on the audacity of a senior director of a prominent law firm who had recently announced that, within his law firm, all gender issues would be resolved within the next five years. The same firm gave their female attorneys sewing kits to mark International Women's Day, thereby reinforcing the stereotype of women's domesticity. "The real barrier to change: deep seated patriarchy and racism," the participant stated, "cannot be wished away."

One participant observed that she did not believe that she will see "real" transformation in her lifetime. In her opinion, "not enough is being done," there has not been adequate skills-transfer and training has been insufficient. "Transformation is very far off." Some participants observed that as long as the upper echelons of the profession remain occupied by white men who do not recognise the problem, it will be very difficult for transformation to be taken seriously and to advance.

Comments made included: "We still have a long way to go"; "We need to move away from lip service transformation." My firm is "great at giving audience" to transformation issues and discussions "but it does not always get it right." Echoing the sentiments of others, a participant noted that at the junior level within the profession, diversity can be seen but at the higher ranks, it drops off.

Institutions may spend a great deal of money on surveys and assessments but some participants question the willingness of these entities to take matters beyond the information-gathering stage. Money spent on these types of effort "does not translate into practice. This is the problem."

It was also noted that interventions in support of transformation "will not come from the law firms". There is "no commitment", there are "no penalties", "no negative press", and "no accountability".

One participant noted that, although some black advocates (for example) want to see change, they want just enough change so that they can obtain what white men have, but not so much that the status and power that they seek is perceived to be somehow diluted or diminished by transformation.

A participant noted that "there has been transformation at the Bar over the last [ten or so] years. There are more women and blacks at the Bar. The work distribution is better but it is still inequitable. White men are more likely to be successful at the Bar. [People of colour] fall through the cracks. [We must recognise that] the Bar is intrinsically conservative and traditional. Bar leaders find change threatening, even some of the blacks [in leadership positions]." Another participant noted the "dramatic changes in the last 13 years [at the Bar]. We must recognise this," however, this participant went on to note that "progress has not been that good. The numbers speak for themselves."

Many participants spoke of the inevitability of transformation, not because the current leadership is willing to do the right thing, but rather due to the changing demographics and increased opportunities of previously disadvantaged population groups. One participant noted that "eventually, the Bar will be transformed. But it may not reach those who are already at the Bar. The evolution of the profession is inevitable."

11.13. HIERARCHICAL STRUCTURES OF THE LEGAL PROFESSION

i. Description of the Finding

Some participants spoke of the role of profit and rainmakers in the context of legal practice. They noted that law firms and groups of advocates exist to make money, not to ensure positive and integrated workplaces or social policies. As a result, problematic, discriminatory, racist and/or sexist behaviours or actions of rainmakers and lucrative clients are often ignored. The corollary is that being seen at work is a component of getting work and being perceived as a good lawyer. This creates impediments for those who would prefer to work outside of the established working routines.

ii. The Research Leading to the Finding

A number of participants spoke of the difficulties faced by those under-represented in private sector firms (that is, black men, black women and white women) in gaining access to lucrative clients and how this limits their ability to become authentic members of the top echelons of the large South African firms. Rainmaking is difficult, especially without support from seniors.

Rainmakers can also be laws unto themselves. Because they bring large profits to the firm, they are often not held accountable with regard to their prejudices and biases.

Indeed, when one participant was asked why he had left a major firm, his response was that he had two choices: one, as a black man he could stay at the firm and make partner with no clients or two, he could leave the firm for the corporate sector and try to establish a name for himself with clients in that setting. He chose the latter.

Many participants also spoke about how members of firms can be very territorial when it comes to clients.

Some participants spoke about the difficulty of breaking out of the status of a junior, even as they advance in their careers. Another participant also spoke of the difficulty faced by black attorneys (juniors and directors) to get work clients and progress in one's career. Obtaining work is challenging for all lawyers but there are black directors who are still treated as though they are at the senior associate level, impeding their ability to grow a client base.

In order to rise within the profession's hierarchy, lawyers must be *seen* at work. This creates problems for those who want to work flexible hours. Because childcare remains the perceived primary responsibility of women and not men, this 'face time' creates problems mostly for women. In the electronic survey, flexible working arrangements were requested by just over 10% of the sample. These included flexible hours (start and finish times); remote working (working from home); and part time work or a compressed workweek.

The surveys also surfaced information about why a respondent did not request access to flexible working arrangements despite finding such flexibility necessary. Of these persons not requesting access to flexible working arrangements, the largest group - 42.8% of the sample – did so because the arrangements were "not feasible due to the requirements and expectations of my role". The next most prevalent reasons were "concern that making the request would negatively impact my status/reputation" and "concern that if approved, the arrangement would impact negatively on my status and career opportunities", both expressed by 30.3% of the sample.

For the subset of black female respondents in the sample, the picture is largely similar to the overall sample. The highest number of requests was for remote working (34%) and flexible hours (30.4%). As in the sample overall, black women interested in, but who did not request, flexible working arrangements, noted that the primary reasons was that it was "not feasible due to the requirements and expectations of my role".

11.14. THE IMPORTANCE OF TRAINING, MONITORING AND ACCOUNTABILITY

i. Description of the Finding

A number of participants in the study spoke of the importance of receiving (i) proper, appropriate and timely legal training and (ii) exposure to both substantive areas of law and to clients during the early stages of one's legal career. Those fortunate enough to receive this type of training and exposure spoke highly and enthusiastically of these experiences. Those who did not benefit from these types of interventions recognised the adverse impact that this absence had on their professional development and expressed disappointment, if not anger, about the lack thereof. Often, participants (in both the individual and group interviews) stated that white male juniors were more likely to garner these types of experiences than black females, black males and white women.

ii. The Research Leading to the Finding

Many participants referred to law firms' laudable value statements and policies in support of transformation, diversity and equal opportunity. They say that the words are there, the policies are in place, but these statements do not translate into practices and actions in the work environment. Against this background, a number of participants talked about the need for legal workplaces to be monitored and assessed in the context of their transformation policies and held accountable when they fail to meet or uphold these assertions and policies. An important observation was that unless clients demand transformation or the failure to effect transformation negatively impacts profit, there is little, if any, incentive to implement the change articulated in the firm's vision statements. Black female respondents to the electronic survey disproportionately expressed scepticism about the leadership's commitment to actualising transformation. One of the key areas of dissatisfaction cited in the electronic survey was individuals' concern with the leadership and direction of the organisation. 38.4% of black female respondents were either "very dissatisfied" or "dissatisfied" with the leadership and direction of their organisation.

11.15. THE IMPORTANCE OF MENTORING, SPONSORSHIP AND CHAMPIONS

i. Description of the Finding

Most of the participants stressed the crucial role of mentorship and sponsorship in the context of legal practice (as an attorney and as an advocate). Juniors and mid-level professionals do best when they have the guidance and assistance of legal practitioners who are senior to them. Beyond training (which is also critical), these types of relationships help newcomers to the profession develop their professional reputations and build confidence, networks and client-bases. Those participants who have or had mentors and sponsors noted the positive effect of these relationships on their careers. And again, both those who benefited and those who did not benefit from these types of professional relationships spoke of the tendency for mentorships and sponsorships to be disbursed, so to speak, along racial lines.

ii. The Research Leading to the Finding

Participants were of the view that those in senior positions set the tone regarding diversity and transformation. One participant noted that "in a large firm, you need a mentor or sponsor. You can't become partner on your own".

One participant noted that if a trailblazer is female, this can have a significant, and negative, impact on a junior's professional development. This is because there is constant comparison to the achievements of the trailblazer. A particularly high standard is set by the trailblazer – higher than the standard required for the majority of lawyers advancing in the profession. The result is that female juniors are expected to have the same characteristics as that trailblazer; their white male counterparts are not required to meet such demanding standards.

A number of participants also noted the importance of seniors being public about their faith in their black junior colleagues. One participant noted that importance of the senior lawyer sponsoring juniors positively in front of the clients by saying asking the junior "bring the client up to date about this matter," instead of dismissing them in front of clients as mere juniors.

One participant reported a consultation with the Human Resources Department where she was told "we don't move problems", in response to her request to move to another team. She did eventually move to another team, and was told by her new supervisor that, over time she would "become numb". This contributed to the participant's leaving private practice, which could have been avoided had she had appropriate mentoring.

A number of participants observed that if a senior leader (be it a director, a managing partner or a senior counsel) seriously and vigorously takes up the mantle of promoting transformation, there is a trickle-down effect and circumstances within the work place or professional environment improve noticeably.

Participants from the Bar were asked why some people get support and others do not. One response was that "some juniors don't feel comfortable seeking support. Some groups don't have seniors who do this. Some groups don't have enough seniors. Then, the snowballing effect kicks in. Some juniors take on too much and then can't apply themselves to the tasks at hand. Reputation is everything. Relationships with attorneys: they function on reputation and word of mouth".

A number of participants expressed concern at the absence of black female role models in the top echelons of law firms. One black female participant observed that the absence of women in senior positions, on whom she can model her career, means that she does not feel that the senior position is an option for her. As a result, she frequently finds herself questioning her choice of career. Female participants within a law firm noted that they feel that they are expected to lose their femininity and individuality, and channel their energies into being trailblazers who demonstrate none of the characteristics of the stereotypes associated with women.

11.16. THE IMPORTANCE OF A CLEAR UNDERSTANDING OF TRANSFORMATION

i. Description of the Finding

A number of participants expressed concern at the use of the word "transformation" without a clear understanding of its meaning.

ii. The Research Leading to the Finding

One participant told us she is frequently told that, should she go to the Bar, she will have no problems getting briefs because she is a black woman. She expressed discomfort at being guaranteed briefs by virtue of her race and gender, and wants her success to be based on her merit. This leads her to question what transformation is, and what drives debates on transformation.

The same participant told us that she is concerned when questions of transformation look only at race and gender, and suggested that the debate should also take economic circumstances into account. She provided the example of a white female colleague with whom she served her articles. Her colleague started her articles and had a number of loans which she had had to take out in order to pay for her studies, whereas she, as a middle class black female, had had her studies paid for by her parents.

11.17. IMPACT OF ECONOMIC DISADVANTAGE

i. Description of the Finding

Participants recognise the growing black middle class that is entering into the legal profession. However, issues of economic status and class continue to impede development and growth in the profession.

ii. The Research Leading to the Finding

Although, since 1994, there are many more black law students, many of them come from poor or modest economic backgrounds. And, even with the possibility of entering into well-paying employment in the private sector and government, many come to these positions with limited financial resources, debt and sizable family obligations and responsibilities. What does this mean in the context of transformation and diversity in the legal profession? This reality plays out in a variety of ways. For example, several participants spoke of issues involving candidate attorneys and young black professionals who did not have driver's licenses or did not have cars and how this adversely affected these attorneys during their article periods.

A participant told of a black female candidate attorney in a large firm who did not have a car and therefore used public transport to travel to work. This hindered her ability to work late, although she did the best she could under the circumstances. Yet, white seniors who supervised this young attorney saw her inability to work late into the night on a regular basis as laziness and lack of dedication. In the end, this candidate attorney left the firm.

This issue of access to driver's licenses and cars, and the impact of the lack of these on young attorneys from disadvantaged economic backgrounds, was introduced in a number of settings over the course of this study. One participant observed that just as South African society does not always reflect the values of the Constitution, the legal profession does not reflect the values of the Constitution, and the people who work within the profession are not as progressive as the Constitution. He provided an example of eviction law, where the rules are designed to protect the poor, but where there is largely a resistance from the profession to assist the poor, in the face of the imperatives of profit-making. He observed that this is indicative of the way South African society views the poor and vulnerable.

12. RECOMMENDATIONS

The project mapped four stages of the legal profession and in respect of each stage there are clear recommendations to be made.

12.1. TO THOSE WORKING ON TRANSFORMATION OF THE JUDICIARY

12.1.1. Identify the Link between Transformation of the Judiciary and Transformation of the Profession as a Whole

The first recommendation is to acknowledge and identify that the lack of transformation in the judiciary is linked to a lack of transformation in the legal profession. Addressing the representation of the judiciary demands an analysis of the lifespan of the entire legal profession to determine why black women in particular are exiting the profession, resulting in a smaller pool of black female candidates for the judiciary than their white male colleagues.

12.2. TO LAW FIRMS AND MEMBERS OF THE BAR

12.2.1. Take it from the Top

Transformation requires a champion. The champion must be someone with power in the organisation and who is both respected and a high fee earner. Change occurs if behaviour by those with power is adjusted. Somebody in a position of power in a firm needs to take on the role of championing transformation and addressing the impediments identified within that firm. This should not be left to human resources.

12.2.2. Address the Pattern of Exclusion of Black Women

The second recommendation is to acknowledge and respond to the patterns of discrimination that cause black women to leave the profession. The points of exit within the legal profession are in fact patterns of exclusion that mitigate the retention of black women in the profession. This pattern is something that is going to require correction and to be addressed so that there is a greater pool of black women in stage three of the legal profession to fortify and fuel the judicial selection process.

12.2.3. Ensure Accountability

For those firms and counsel groups who speak about transformation, there has to be fair and representative mechanisms that hold perpetrators to account and protect victims of discrimination and harassment. The Law Society and the Bar Councils at a minimum should have policies around harassment and sexual discrimination for the parts of the profession they represent. This does not preclude individual group policies.

12.2.4. Manage Assumptions about 'All' Black Women

Senior lawyers should be very clear about their own responses to black and white juniors. They should always draw a distinction between criticism of an individual's work and criticism of an individual and the group to which they belong. The former is acceptable and promoted excellence. The latter is a form of racial and gender discrimination, both of which are prohibited and which impede transformation of the profession as a whole.

12.3. TO GOVERNMENT

12.3.1. Map the Progression of Black Women in the Profession

For those firms and counsel groups who speak about transformation, there has to be fair and representative mechanisms that hold perpetrators to account and protect victims of discrimination and harassment. The Law Society and the Bar Councils at a minimum should have policies around harassment and sexual discrimination

The Department of Justice and Constitutional Development should undertake a research project to monitor the career paths of black female law graduates and determine how and if they progress in the legal profession over a ten year period.

Encourage the JSC to take responsibility for the patterns of discrimination that may or may not be emerging in the profession and, as a result, in their decision-making.

13. CONCLUSION

The research relies on an assumption that transformation of the legal profession is an important objective. Apart from the constitutional imperative that the judiciary be representative of the country, why would transformation matter? The research undertaken in the production of the report indicates that across the profession in Gauteng, lawyers are experiencing a range of hostility and exclusionary conduct based particularly on the intersection of race and gender. This hostility is deeply inconsistent with the notions of dignity and ubuntu, which underlie our constitutional democracy. It is also causing the stultification of excellence and the effective repression of talent in the profession. In the same way as centuries of gender- and race-based discrimination has led to the loss of scientists, mathematicians and artists because the identity and race of a person mattered more than their skill, so too we risk the loss of excellence in the legal profession today.

The research aims to reveal the invisible nature of barriers that continue to impede the progression of black women in the legal profession. If we are at all serious about the commitment to reverse this pattern, these findings need to be explored further and addressed. Failure to do so will result in the debate about transformation of the judiciary being a constant and unchanging phenomenon well into South Africa's future.

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TRANSFORMATION OF THE LEGAL PROFESSION

FINAL LITERATURE REVIEW

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1. Introduction

This document presents some preliminary discussion concerning transformation dynamics drawing on the relatively thin literature on the South African legal profession. Following on from the concept note that explains the Transformation of the Legal Profession Research Project, this introductory section posits and outlines four phases to the lifespan of a legal professional career in South Africa. The next section covers the existing literature, with specific attention both to the posited four phases to the lifespan of a legal professional career in South Africa and to potential presence and operation of reasons for exclusion and inclusion.

At least as a starting hypothesis and as a guide to this research, we posit four phases for a standard legal professional career in South Africa. Phase One covers the period of time as a law student (from first registration in the LLB to LLB graduate). Phase Two covers the period of time of vocational training (e.g. service as an articled clerk or pupillage, prior to admission as an attorney or an advocate with Bar Council). Note that there is some evidence to the effect that three years rather than five years is an important threshold (Godfrey 2009: 111). The next two phases are somewhat more arbitrary. Phase Three covers the period of time from admission (as an attorney or with a Bar Council) to five years of experience. Phase Four then covers the period from five years' professional experience to senior status in the profession, e.g. a legal professional with at least ten years' of experience.

2. The Existing Literature

South Africa has been missing from the existing academic historical comparative work on the legal profession. The extensive work of Richard Abel is a clear case in point here. Despite Abel's careful and formative attention to South Africa and its legal politics in his monograph *Politics by Other Means* (1995), the country is missing from his historical and comparative work on the legal profession (Abel 1988a, 1988b) that includes nearly every other country with a developed legal profession. There is certainly nothing on South Africa to compare with Abel's full-scale work on the English legal profession (Abel 2003), which tells the story of English lawyers in the 1990s.

Why is there this lack of research into the legal profession in South Africa? There appear to be two primary reasons. First, the existing knowledge base about the legal profession in South Africa has been in a sense over contextualised, indeed skewed, by the struggle against apartheid. On the question of the role of law in respect of apartheid, lawyers have certainly come in for some critical examination (White 1988) as well as celebration (Broun 1999), but the bulk of scholarship on lawyers under apartheid has been of a jurisprudential nature (Budlender 1988, Dyzenhaus 1998), even where such analyses have explicitly valued everyday lawyering as well as impact cases (Budlender 1988). Likewise, Meierhenrich's account of anti-apartheid lawyering attends particularly to the effects of such lawyering on the legitimacy of the legal system (Meierhenrich 2008: 208-217). Combining these two concerns, Albie Sachs presented a short pen portrait of 'Brown and Black Lawyers in Action', including accounts of the Treason and Rivonia Trials (Sachs 1973: 205-229). This gap in terms of knowledge of the profession as a whole has been perpetuated, in a certain sense, by the attention given to issues of public interest law as opposed to access to justice in the transitional and post-apartheid contexts (Budlender 1988, Marcus and Budlender 2008).

Second, there has been little to no state support for research into the transformation of the legal profession – a feature that appears as true after apartheid's demise as during its reign. It is notable that little or none of the funding provided by the Attorneys Fidelity Fund has supported research. Instead, it is used for teaching law students, particularly in the university law clinics (which have an access to justice mission as well as legal education). Likewise, the percentage spend by the Law Society of South Africa on research is dwarfed by its spending on continuing education and vocational education. Research spending by the attorneys' profession has been perhaps one or two surveys, which were themselves seen as excessively expensive. The Bar appears to have a similar attitude, having recently funded two or three studies, but not having as yet demonstrated a sustained interest. Finally, the state appears not to be funding research in any comprehensive manner. The funding for legal research coordinated through the South African Law Reform Commission has largely gone to doctrinal and comparative research supporting legislative drafting efforts. Apart from a few ad-hoc projects – notably the scarce skills research funding underlying the work of Shane Godfrey provided by the Department of Labour and the assessment currently being undertaken by the HSRC and the University of Fort Hare with extensive funding from the Department of Justice and Constitutional Development – there appears to be little coordinated or sustained research into the contemporary dynamics and future trends and prospects of the legal profession.

So what research does exist? Perhaps the two best and most focused accounts of the legal profession in South Africa are Lisa Pruitt's early and careful study, No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession (2002) and Godfrey's work on the legal profession (2009a, 2009b). While Pruitt uses the perspective of the US market for legal services and its accompanying analytical literature, Godfrey begins by examining the legal services market based on a concern regarding scarce skills in the South African labour market. The work by Martin Chanock on the development of the profession in the first few decades of the 1900s bears mention as well.

Lisa Pruitt's work provides a comprehensive contemporary investigation into the question of black representation particularly in the commercial law segment of the attorneys' profession. Her research

and arguments took into account three studies of the legal profession done in the first ten years post-apartheid (Pruitt 2002: 550 n7). Pruitt drew on earlier theoretical work of Wilkins and Gulati and came to a fairly pessimistic conclusion regarding the then-current place of black commercial lawyers as well as the potential for improvement. In her view, "[w]hile black law graduates are moving into [elite commercial law] firms at an unprecedented pace, however, few are remaining with the firms for more than a couple of years, often no longer than is required for them to become admitted attorneys. Early in their legal careers, even in comparison to their white counterparts, these black attorneys take full advantage of their mobility in the current labour market to pursue alternate career opportunities in both the public and private sectors". (Pruitt 2002: 671)

Based on her findings, Pruitt put forward that the reasons for exclusion seen by blacks included very low law firm salaries, lack of opportunities within the corporate firms, better paying professional opportunities in non-law firms, cultural alienation, and professional isolation. Whites identified intellectual inferiority, deficits of human capital, interest, loyalty, and perseverance as explanations for exclusion. Ultimately, Pruitt located the relative underpresentation of blacks in elite commercial law firms in the interplay of institutional and individual racism, a racism that Pruitt found was shielded from the market and its potential corrective force by a lack of transparency.

Put into the above posited four-phase and points of exclusion structure, Pruitt found that law firms were not discriminating at the end of Phase Two (e.g. in the hiring decisions) but were discriminating in their implementation of practices of training and mentoring operative and determinative in Phase Three (Pruitt 2002: 673). Indeed, for Pruitt the real question as to why the firms are not doing more to identify and counter these practices is, in part, because there is no clear 'integration leader' in the top five law firms.

The interviews Pruitt conducted as well as her secondary research into questions of remuneration, firm structure, and candidate attorney training could well be profitably updated from her research period of 1999-2000. One set of non-exclusive reasons used in a survey in another Commonwealth jurisdiction regarding retention included: Better salary/remuneration, Lack of promotional opportunities, More scope for flexible working arrangements, Better work-life balance, More flexibility to balance my work and personal responsibilities, Unhappy with the workplace culture, Unhappy with the leadership and direction of the organisation, Unhappy with the relationship I had with the person to whom I reported, Experienced bias or discrimination, Experienced harassment or bullying, More independence/ control in work, Better quality of work, More interesting or varied work, Wanted to work in a different sector, Looking for a change/ something new, Better position/ significant job opportunity, Better job security/ reliability of work and/or income, Better mentorship, Better learning and development opportunities, Better location, Wanted to start a new business/ work for myself, Too much pressure on billable hours, Too much pressure on bringing in clients/ new business, Reduced stress and pressure, Mental or physical health reasons, Wanted to work in a business/company, Wanted to work in a team-based working environment, Wanted to give back to the community, It's part of my career plan, Didn't want to work as a lawyer anymore, Taking time out from the profession (career break), Taking time out from the profession (parental leave), Relocation with my partner/family, Redundancy/ termination of employment, and Retirement (Law Council of Australia, 2014).

With funding and support from the Department of Labour, Shane Godfrey conducted a thorough investigation of the legal profession. Sourced largely from Legal Education and Development (LEAD) section of the Law Society of South Africa (LSSA) and from the General Council of the Bar of South Africa (GCB), Godfrey's data extended through 2006 and his work was published in 2009. Reflecting at least the data he was working with (if not also the dominant concern of the profession regarding the profession at the time), Godfrey's findings are particularly valuable and focused with respect to the first two phases of a standard legal career. Godfrey's data do not permit him to make analyses regarding the further two phases in a standard legal career – the first five years after admission and then the period from that level of experience to senior status either as an attorney or as an advocate.

Godfrey's findings with respect to Phases One and Two pertain both to overall dynamics and to dynamics with respect to racial and gender representivity. In Phase One, his data show a drop-out rate of 51% overall for law students between their first year of LLB registration and LLB graduation (Godfrey 2009: 113 (Figure 5.1)). For Phase One, the African attrition rate was 17 percentage points higher than the overall rate, 68% versus 51%.

For Phase Two (which is of course a shorter period), the drop-out rate is much lower than it is for Phase One, 18% of those completing an LLB degree attrite and do not gain admission as an attorney (Godfrey 2009: 113). Godfrey was unable to calculate a specific attrition rate for Africans in Phase Two because of the unavailability of data from the KZN provincial law society.

With respect to representation in the profession, the attention has been largely to issues of transformation understood in terms of race (Pruitt 2002, Godfrey 2009) with some but lesser attention being paid to gender. Godfrey unfortunately relegates the analysis of the gender dimension to a single footnote, 2009: 119, n39.

Martin Chanock's work employs a different research method to the interviews of Pruitt and the statistical analysis of Godfrey. Using a historical approach, Chanock argues that the South African legal profession had to struggle at least up until 1936 to establish itself in a power social and economic position. In this period, lawyers varied considerably in social status and education. In addition, they worked in a field where contestation with non-lawyers for legitimate work status was constant. Chanock links the formalist voice of the legal profession with its desire to establish dominance over the magistracy (which was both judicial and administrative) in the lower courts (Chanock 2001: 229). Chanock identified earlier on a central South African paradox: "We can see something of a conundrum in relation to the 'prestige' of law in South African society. Lawyers were not popular, yet 'law' came to be a central and eventually revered part of the composition of whiteness". (Chanock 2001: 231) While there was the occasional voice of conscience – what we would term today as public interest law – for the most part the profession depicted by Chanock is one that is formalist in a sense worse than its British model, distasteful of women and non-whites, of ambiguous status, deeply implicated in the concentration of rural land ownership and in the growth of the mining industry, and ignorant of the legal needs of the most disadvantaged (Chanock 2001: 239).

3. Research on the attorneys' sub-sector of the legal profession

Beyond Pruitt and the studies she draws on, at least two other studies have added significantly to our understanding of the dynamics within the attorneys' profession.

In 2007/2008, the Mandela Institute of the Wits Law School collaborated with the Black Lawyers Association and other groups to commission a study on black commercial lawyers, with the research carried out by the Community Agency for Social Enquiry (CASE 2008). Drawing on a more limited number of interviews than Pruitt, the CASE study identified a prevailing perception among black commercial law professionals that could only be considered a slight improvement on Pruitt's pessimistic view and forecast: "Black commercial attorneys currently perceive improved ease of access to commercial law firms as a result of transformation legislation such as BEE and Affirmative Action. The perception is, however, that larger, established firms only recruit candidate attorneys to improve their procurement profile and often neglect to transfer skills, an important defining characteristic of an empowered individual. This sentiment is shared by black firms partnering with larger firms". (CASE 2008: 22)

In 2008, the LSSA commissioned a National Survey of the Attorneys Profession that found that the total number of professionals employed in attorneys' practices was 20 743 (36.7% of total employment). More than half (54.1%) of the professionals were equity partners and the majority of professionals (72.7%) were White. At the most senior levels – namely equity partners, salaried partners, senior associates and consultants – more than 75% of the attorneys were White. Women constituted 40.4% of the attorneys in private practice.

In 2013, a collaboration between the Wits Law School, the Vance Center of the New York City Bar, and the South African Legal Fellows Network (SALFN) together with other partners surveyed demographics within the commercial law firm sector (Klaaren 2014). According to the survey of large corporate law firms, "senior positions seem to be dominated by white males". 80% of the chief executives of the 12 firms canvassed in the survey were white men as were 68% of all managing partners. Further, the picture at the CEO/managing partner level was replicated in the ownership and remuneration structures of the firms: 53% of all equity partners were also white and male. In a number of firms, equity partners continue to play a significant strategic management role. Correspondingly, the survey found that there "are far fewer black males employed in senior positions compared with white males" and that the total number of black male lawyers made up less than half of the total white male count: 9.7% compared with 29.1%.

With the addition of white women to the SALFN analysis, the dominance by white persons becomes more pronounced. There were more white lawyers in senior positions than any other race group: 79% of managing partners and 80% of the chief executives. This was carried through at the level of equity partners, where 79% were white women or men. The survey found that though 53.4% of employees at firms are female, the number of white women is more than double that of black African women: 28.1% versus 11.9% of the total.

The survey may also be viewed from the perspective of African women. As one looks higher and higher up the corporate ladder within these large law firms, there is an overall decline in the percentage of African women. Indeed, the decline could well be termed precipitous with respect to

the drop off between the representation of African women at the candidate attorney stage and at the subsequent career stage of employment as an admitted attorney. First-year and second-year articled clerks account for 23.6% and 24.5% of the total of black African women, respectively, in the survey. If replicated across the non-participating firms in the corporate legal sector, this means that over half of the African women professionally employed in large corporate law firms are candidate attorneys.

The relatively junior profile of the African women employed is further replicated within the structure of the admitted attorneys in the firms surveyed. In the 12 participating law firms, the percentage of African female legal professionals employed at the first and second years of associate level is 20.8%. 17.1% of employees are black female associates with three or more years' experience. 10.6% of the African women are employed at equity partner or director level, with no black female lawyers at managing partner or chief executive level.

As of 2014, 64% of practising attorneys are white and and 63% male. The picture is significantly different – indeed effectively reversed -- for candidate attorneys where 41% are white and 44% male (Whittle 2014b).

4. Research on other sub-sectors of the legal profession

There is some but not much literature examining the transformation dynamics of the advocates at the Bar, here understood as the dominant Society of Advocates' structures. A particular and particularly appropriate focus in the Bar's self-examination of its transformation challenges has been directed towards briefing patterns. For instance, the characterisation of such patterns as the major transformational challenge facing the Bar was an outcome of the Bar's March 2007 Transformation Symposium (Bham 2007).

The High Court judiciary has been the topic of numerous investigations into diversity arguments (see e.g. Olivier 2013; Hoexter & Olivier 2014). Nonetheless, there does not appear to be as yet a study taking a career or labour market perspective on the High Court judiciary.

Compared to the literature on the attorneys, the Bar, and the High Court judiciary, there is not much on other significant sub-sectors of the profession: the magistracy, prosecutors, other state lawyers, legal academics, and paralegals. Research in other jurisdictions (such as Israel) where courts have had some significant impact on governance has increasingly focused on government lawyers (e.g. Dotan 2013).

There is a particular paucity of work on the magistrates, with the shining exception of Olivier 2014. Olivier offers an overview of the position of magistrates within the South African judicial regime. He notes that at the district level, the percentage of magistrates being women has improved from 24% in 2000 to 40.6% in 2013 (Olivier 2014: 330).

There is some self-avowedly preliminary and incomplete literature on community based paralegals and community advice offices (Dugard and Drage 2013).

The popular and professional literature has also been concerned with issues of transformation in the profession. Here, there are two significant threads of discussion. First, there has been an explosion

of popular interest in the demographic profile of the judiciary that has paralleled the increasing political salience of this issue and its increased attention by legal academics. Second, there is a long tradition of discussion within the professional literature both reporting on and advocating for (and defending against) calls for transformation. An example reporting on and advocating transformation within the advocates' sub-sector is Bham 2007. Within the attorneys' sub-sector an example is Whittle 2014a.

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Jonathan Klaaren & Alice Brown
August 2014

Survey Information & Consent

There are significant gaps in diversity in more senior roles in the legal profession. The representation of both blacks and women in sectors of the profession and in the judiciary has come under intense scrutiny.

This Centre for Applied Legal Studies (CALS) study, funded by the Foundation for Human Rights, aims to improve understanding about the experiences and motivations of legal professionals from all demographic groups as they move through their careers. This includes improving understanding of the reasons why lawyers choose to leave the legal profession or choose a different career path.

The survey itself should take between 10 and 15 minutes to complete and will collect information relating to your current employment, career moves and progression since admission, and future career aspirations.

This survey is being administered and managed by the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, Johannesburg. All information is confidential and specific information provided about individuals will not be identified or provided to any other party. All results will be de-identified and aggregated for analysis and reporting. Nothing you say will be attributed to yourself or your organisation.

Funding for this research is facilitated by the Foundation for Human Rights which is funded by the Department of Justice and Constitutional Development and the European Union under the Sector Budget Support Programme – Access to Justice and the Promotion of Constitutional Rights.

1. Based on the information above, do you consent to participate in this survey?

◯ Yes

◯ No

Screening Questions

2. Do you have a legal qualification to be a lawyer?

- ◯ Yes
- ◯ No

Screening Questions

3. Are you currently working in paid employment?

- ◯ Yes
- ◯ No

Screening Questions

This question asks about "working as a lawyer". We understand this to include working as a lawyer (e.g. primarily giving legal advice and doing legal work) for a corporation, parastatal or NGO, even without being admitted to practise, as well as working as a legal academic or legal researcher. We also understand "working as a lawyer" to include work as a candidate attorney or as a pupil.

4. Are you currently working as a lawyer?

- ◯ Yes
- ◯ No

Screening Questions

5. Have you ever worked as a lawyer?

- ◯ Yes
- ◯ No

Primary demographics: Lawyering

6. Are you ...

- ◯ Male
- ◯ Female

7. How old are you?

- ◯ Less than 25 years of age
- ◯ 25-29 years
- ◯ 30-34 years
- ◯ 35-39 years
- ◯ 40-44 years
- ◯ 45-49 years
- ◯ 50-54 years
- ◯ 55-59 years
- ◯ 60-64 years
- ◯ 65 years or older

8. How many years is it since you were first admitted to practise in South Africa? (please round to the nearest number of full years)

years

9. How many years practising experience do you have post admission (excluding any time taken as breaks from the profession)?

years

Studying law

10. What were the main reasons for your decision to study law? (please select all that apply)

- [ ] I had an interest in the law
- [ ] I had an interest in social justice
- [ ] I had an interest in government and/or politics
- [ ] I had an interest in international relations
- [ ] I thought a law degree would provide good job opportunities
- [ ] I thought a law degree would ensure job security
- [ ] I thought a law degree would give me a broad skill base for employment in different fields
- [ ] I wanted intellectual stimulation
- [ ] I got the marks/grades to study law
- [ ] I wanted a good income
- [ ] I wanted prestige/status
- [ ] I wanted a career change
- [ ] I had the right aptitude for a law degree
- [ ] I wasn't good at maths or science
- [ ] I wasn't sure what else to do
- [ ] My parents/family wanted me to study law
- [ ] Other (please specify)

11. When you started your law degree, did you plan to practise law after graduating?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

12. When you finished your law degree, did you plan to practise law?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

13. To what extent did your law degree meet the expectations you had when starting it?

- ◯ Major extent
- ◯ Moderate extent
- ◯ Minor extent
- ◯ Not at all
- ◯ Not sure/can't say

Professional Legal Training

14. What kind of professional legal training did you do prior to admission?

- ◯ Candidate attorney in a private law firm
- ◯ Candidate attorney and a six months LEAD course
- ◯ Pupillage
- ◯ Other (please specify)

15. How long (excluding breaks) were you engage in professional legal training prior to admission?

- ◯ Six months or less
- ◯ More than six months and less than or equal to one year
- ◯ More than one year and less than or equal to one year and six months
- ◯ More than one year and six months and less than or equal to two years
- ◯ More than two years and less than or equal to three years
- ◯ More than three years

Other (please specify)

16. When you started your professional legal training, were you planning to practise as a lawyer?

- ◯ Yes
- ◯ No

17. When you finished your professional legal training, did you plan to practise as a lawyer?

- ◯ Yes
- ◯ No

18. How would you describe your time of professional legal training?

Current legal employment characteristics

19. Which ONE category best describes your main work (the role that you spend most time on each week)?

- ◯ Courts and Tribunals: Judge or Magistrate
- ◯ Courts and Tribunals: Judge's Clerk
- ◯ Courts and Tribunals: Registrar
- ◯ Courts and Tribunals: Other court personnel
- ◯ Courts and Tribunals: Tribunal Member
- ◯ Courts and Tribunals: Other (please specify)
- ◯ Advocate: Senior Counsel
- ◯ Advocate: Junior Counsel
- ◯ State Prosecutor: Senior Counsel
- ◯ State Prosecutor: Junior Counsel
- ◯ Legal Aid South Africa: Attorney
- ◯ Private law firm: Equity partner
- ◯ Private law firm: Salaried partner
- ◯ Private law firm: Sole practitioner
- ◯ Private law firm: Special Counsel
- ◯ Private law firm: Consultant
- ◯ Private law firm: Senior Associate
- ◯ Private law firm: Associate
- ◯ Private law firm: Attorney
- ◯ Private law firm: Candidate Attorney
- ◯ Private law firm: Locum
- ◯ Private law firm: Paralegal
- ◯ Private law firm: Other role (please specify)
- ◯ Corporate legal (in-house): General Counsel/Head Legal Counsel
- ◯ Corporate legal (in-house): Senior Legal Counsel/Senior Lawyer
- ◯ Corporate legal (in-house): Legal Counsel/Lawyer
- ◯ Corporate legal (in-house): Non-legal role (e.g. company director, management)
- ◯ Corporate legal (in-house): Other (Please specify)
- ◯ Government legal: Management
- ◯ Government legal: Policy
- ◯ Government legal: State Attorney
- ◯ Government legal: Legal
- ◯ Government legal: Other (please specify)

- ◯
- ◯ Non-governmental organisation/not-for-profit: Legal
- ◯ Non-governmental organisation/not-for-profit: Non-legal
- ◯ Legal Academia
- ◯ Other Academia
- ◯ Not currently working (e.g. on leave, studying, unemployed)
- ◯ Retired (retaining admission to practice)
- ◯ Other (please specify)

Other (please specify)

20. For how many years have you been employed at your current workplace?

- ◯ Under 1 year
- ◯ 1 year - < 2 years
- ◯ 2 years - < 3 years
- ◯ 3 years - < 4 years
- ◯ 4 years - < 5 years
- ◯ 5 years - < 7 years
- ◯ 7 years - < 10 years
- ◯ 10 years - < 15 years
- ◯ 15 years or more

21. Do you currently work full time or part time in your current main role?

- ◯ Full time
- ◯ Part time

Current legal employment characteristics (cont.)

22. Please specify the fractional Full Time Equivalency (FTE) of your role. The purpose of this question is to ask about the extent of part-time work, e.g. 10% of a full-time post, 60% of a full-time post, etc.

- ◯ 0.1 (0.5 day / week)
- ◯ 0.2 (1.0 day/ week)
- ◯ 0.3 (1.5 days / week)
- ◯ 0.4 (2.0 days / week)
- ◯ 0.5 (2.5 days / week)
- ◯ 0.6 (3.0 days / week)
- ◯ 0.7 (3.5 days / week)
- ◯ 0.8 (4.0 days / week)
- ◯ 0.9 (4.5 days / week)
- ◯ Other (please specify)

_____

Current legal employment characteristics (cont. cont.)

23. How many hours a week do you usually work (excluding breaks)?

hours

24. How many partners/principals are there in your firm?

- ◯ 1-4 partners/principals
- ◯ 5-10 partners/principals
- ◯ 11-20 partners/principals
- ◯ 21-39 partners/principals
- ◯ 40+ partners/principals

Other (please specify)

25. Approximately what proportion of the partners/principals are female?

- ◯ None
- ◯ 20%
- ◯ 40%
- ◯ 60%
- ◯ 80%
- ◯ 100%
- ◯ Not sure

26. Approximately what proportion of the partners/principals are white?

- ◯ None
- ◯ 20%
- ◯ 40%
- ◯ 60%
- ◯ 80%
- ◯ 100%
- ◯ Not sure

27. To your knowledge, do any of the partners/principals at your firm work part time (i.e. less than 5 days a week)?

- ◯ Yes
- ◯ No
- ◯ Not sure

28. Approximately how many people are employed as lawyers (excluding volunteers but including candidate attorneys) in your organisation or business?

- ◯ 1 lawyer
- ◯ 2-10 lawyers
- ◯ 11-29 lawyers
- ◯ 30-59 lawyers
- ◯ 60+ lawyers
- ◯ Not sure

Other (please specify)

29. What are the areas of law that you mainly practise? (please select all that apply)

- [ ] Administrative Law
- [ ] Advocacy
- [ ] Banking/Finance
- [ ] Civil Litigation
- [ ] Commercial Law
- [ ] Conveyancing/Real Property
- [ ] Corporate Law
- [ ] Criminal Law
- [ ] Debts/Insolvency
- [ ] Employment/Industrial Law
- [ ] Environmental Law
- [ ] Family Law
- [ ] Human Rights/Public Interest/Social Justice
- [ ] Immigration Law
- [ ] Information technology/Telecommunications
- [ ] Intellectual Property
- [ ] Litigation - general
- [ ] Personal Injury
- [ ] Planning/Local Government
- [ ] Small Business
- [ ] Taxation
- [ ] Trade Practices Law
- [ ] Wills and Estates
- [ ] Not applicable to my situation
- [ ] Other (please specify)

30. In which province is your main workplace located?

- ◯ Limpopo
- ◯ Mpumalanga
- ◯ KwaZulu-Natal
- ◯ Eastern Cape
- ◯ Western Cape
- ◯ Northern Cape
- ◯ North-West
- ◯ Gauteng
- ◯ Free State
- ◯ Outside South Africa

31. And is your main workplace located in:

- ◯ The central business district of a large metropolitan (including Sandton)
- ◯ A suburban area of a large metropolitan
- ◯ A town or small city
- ◯ A rural or remote location

Legal career satisfaction

In answering the following questions, please note the following:
For the purposes of this study, discrimination is defined as any distinction, exclusion or preference made on the basis of race, colour, sex, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation (International Labour Organisation Agreement No. 111, 1958). This may include opportunities related to the type of work allocated, benefits provided, or access to promotion or career progression.

32. To what extent are you satisfied with the following aspects of your current main employment position?

	Very satisfied	Satisfied	Neutral	Dissatisfied	Very dissatisfied	Not relevant	Not sure
The level of salary/remuneration	○	○	○	○	○	○	○
The stability and reliability of my income	○	○	○	○	○	○	○
Opportunities for promotion and advancement	○	○	○	○	○	○	○
Access to flexible working arrangements	○	○	○	○	○	○	○
The hours I am required to work	○	○	○	○	○	○	○
The requirements for billable hours	○	○	○	○	○	○	○
The requirement for non-chargeable commitments	○	○	○	○	○	○	○
The level of work-life balance that I have	○	○	○	○	○	○	○
The level of support in my organisation for work-life balance	○	○	○	○	○	○	○
The culture of my workplace	○	○	○	○	○	○	○
The leadership and direction of my organisation	○	○	○	○	○	○	○
The relationships I have with my colleagues	○	○	○	○	○	○	○
The relationship I have with the person to whom I report	○	○	○	○	○	○	○
The level of independence and control I have over my work	○	○	○	○	○	○	○
The quality/profile of work I am given the opportunity to do	○	○	○	○	○	○	○
Exposure to a variety of interesting work	○	○	○	○	○	○	○
Opportunities to practise in the areas of law in which I am interested	○	○	○	○	○	○	○
Opportunities to make full use of my skills and abilities	○	○	○	○	○	○	○
The level of personal satisfaction in the work that I do	○	○	○	○	○	○	○

The level of job security	○	○	○	○	○	○	○
Accessibility of mentors to support my career development	○	○	○	○	○	○	○
Support provided to access contacts and networks	○	○	○	○	○	○	○
Accessibility of learning and development opportunities	○	○	○	○	○	○	○
The extent to which I am respected by my clients	○	○	○	○	○	○	○

33. To what extent have you personally experienced any of the following in your current workplace?

	Never	Very rarely	Occasionally	Often	Continuously	Not sure
Bullying or intimidation	○	○	○	○	○	○
Sexual harassment	○	○	○	○	○	○
Discrimination due to my gender	○	○	○	○	○	○
Discrimination due to my age	○	○	○	○	○	○
Discrimination due to my ethnicity	○	○	○	○	○	○
Discrimination due to my sexual preference	○	○	○	○	○	○
Discrimination due to disability/health issue	○	○	○	○	○	○
Discrimination due to my family or career responsibilities	○	○	○	○	○	○
Discrimination due to pregnancy	○	○	○	○	○	○

34. Have you requested access to any of the following flexible working arrangements in your current employment position (select all that apply)?

	Not requested	My request was approved	My request was partially approved	My request was denied
Part time work	○	○	○	○
Remote working (e.g. working from home)	○	○	○	○
Flexi-time/time off in lieu	○	○	○	○
Compressed work week	○	○	○	○
Flexible hours (start and finish times)	○	○	○	○
Job sharing	○	○	○	○
Paid maternity/paternity leave	○	○	○	○
Unpaid maternity/paternity leave	○	○	○	○
None of the above	○	○	○	○

35. If you have not requested access, why have you not requested access to any flexible working arrangements? (select all that apply)

- [ ] I have requested access to flexible working arrangements
- [ ] Not relevant for me/not interested
- [ ] Not feasible due to impact on household income
- [ ] Not feasible due to the requirements and expectations of my role
- [ ] Unlikely that my request would be approved
- [ ] Concern that making the request would negatively impact my status/reputation
- [ ] Concern that if approved, the arrangement would impact negatively on my status and career opportunities
- [ ] Other (please specify)

36. To what extent do you agree or disagree with the following statements about how the arrangements that were approved have worked in practice:

	Agree strongly	Agree	Disagree	Disagree strongly	Not relevant	Not sure
Overall, the arrangements have worked as intended	○	○	○	○	○	○
Initially, the arrangements worked well but they were not sustainable for me	○	○	○	○	○	○
Management was/is supportive of these arrangements	○	○	○	○	○	○
My colleagues were/are supportive of these arrangements	○	○	○	○	○	○
The arrangements have negatively impacted my career path and opportunities for promotion	○	○	○	○	○	○
The arrangements have negatively impacted the profile and type of work I am given	○	○	○	○	○	○

37. Now thinking about your career as a whole, to what extent are you satisfied with each of the following:

	Very satisfied	Satisfied	Neutral	Dissatisfied	Very dissatisfied	Not sure	Not sureDissatisfied
The opportunities you have had for professional development and promotion	○	○	○	○	○	○	○
The rate at which your career has progressed	○	○	○	○	○	○	○
Your career trajectory (compared to your expectations)	○	○	○	○	○	○	○

Legal career moves

38. How many times have you left a job (e.g. changed employer, taken a career break, started your own business) in the last 5 years (since May 2009)?

times

39. How many times have you left a job (e.g. changed employer, taken a career break, started your own business) since admission?

times

40. Did you continue to work as a lawyer in the same workplace as you worked as a candidate attorney or pupil?

- ◯ Yes
- ◯ No

Other (please specify)

41. For your most recent move, please specify the year you moved

Year

42. For your most recent move, please specify the type of employment you moved from.

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm -- sole practitioner
- ◯ Private law firm -- law firm with 2-4 partners/principals
- ◯ Private law firm -- law firm with 6-10 partners/principals
- ◯ Private law firm -- law firm with 11-20 partners/principals
- ◯ Private law firm -- law firm with 21-39 partners/principals
- ◯ Private law firm -- law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Non-legal role (please specify)
- ◯ An extended break from paid employment
- ◯ Other (please specify)

Other (please specify)

43. For your most recent move, please specify the type of employment you moved to.

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm – sole practitioner
- ◯ Private law firm – law firm with 2-4 partners/principals
- ◯ Private law firm – law firm with 6-10 partners/principals
- ◯ Private law firm – law firm with 11-20 partners/principals
- ◯ Private law firm – law firm with 21-39 partners/principals
- ◯ Private law firm – law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Non-legal role (please specify)
- ◯ An extended break from paid employment
- ◯ Retirement
- ◯ Other (please specify)

Other (please specify)

Legal career moves (continued)

44. For your move from [Q42] to [Q43], please specify which of the following factors played a role in your decision to move (select all that apply):

	Major extent	Moderate extent	Minor extent	Not sure	No role
Better salary/remuneration	○	○	○	○	○
Lack of promotional opportunities	○	○	○	○	○
More scope for flexible working arrangements	○	○	○	○	○
Better work-life balance	○	○	○	○	○
More flexibility to balance my work and personal responsibilities	○	○	○	○	○
Unhappy with the workplace culture	○	○	○	○	○
Unhappy with the leadership and direction of the organisation	○	○	○	○	○
Unhappy with the relationship I had with the person to whom I reported	○	○	○	○	○
Experienced bias or discrimination	○	○	○	○	○
Experienced harassment or bullying	○	○	○	○	○
More independence/control in work	○	○	○	○	○
Better quality of work	○	○	○	○	○
More interesting or varied work	○	○	○	○	○
Change in practice area/different type of work	○	○	○	○	○
Looking for a change/something new	○	○	○	○	○
Better position/significant job opportunity	○	○	○	○	○
Better job security/reliability of work and/or income	○	○	○	○	○
Better mentorship	○	○	○	○	○
Better learning and development opportunities	○	○	○	○	○
Better location	○	○	○	○	○
Wanted to start a new firm/sole practice/work for myself	○	○	○	○	○
Too much pressure on billable hours	○	○	○	○	○
Too much pressure on	○	○	○	○	○

bringing in clients/new business					
Reduced stress and pressure	○	○	○	○	○
Mental or physical health reasons	○	○	○	○	○
Wanted to work in a business/company	○	○	○	○	○
Wanted to work in a team-based working environment	○	○	○	○	○
Wanted to give back to the community	○	○	○	○	○
It's part of my career plan	○	○	○	○	○
Didn't want to work as a lawyer anymore	○	○	○	○	○
Taking time out from the profession (career break)	○	○	○	○	○
Taking time out from the profession (parental leave)	○	○	○	○	○
Relocation with my partner/family	○	○	○	○	○
Redundancy/termination of employment	○	○	○	○	○
Retirement	○	○	○	○	○

Other (please specify)

Legal career intentions

45. Are you considering moving to a new job/new employment circumstances (e.g. changing employer, taking a career break, starting your own business) in the next 5 years?

- ◯ No
- ◯ Yes
- ◯ Maybe

46. In approximately what time are you considering moving to a new job/new employment circumstances?

- ◯ Next 12 months
- ◯ 1 - 2 years
- ◯ 3 - 5 years
- ◯ Not sure

47. What new job/employment are you considering moving to? (please select the workplace that you would be most likely to consider moving to)

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm – sole practitioner
- ◯ Private law firm – law firm with 2-4 partners/principals
- ◯ Private law firm – law firm with 6-10 partners/principals
- ◯ Private law firm – law firm with 11-20 partners/principals
- ◯ Private law firm – law firm with 21-39 partners/principals
- ◯ Private law firm – law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Non-legal role (please specify)
- ◯ An extended break from paid employment
- ◯ Retirement
- ◯ Other (please specify)
- ◯ Not sure

Other (please specify)

48. Please specify which of the following factors may play a role in your decision to move (select all that apply) and the extent to which the factor may play a role (select one extent)

	Major extent	Moderate extent	Minor extent	No role	Not sure
Better salary/remuneration	○	○	○	○	○
Lack of promotional opportunities	○	○	○	○	○
More scope for flexible working arrangements	○	○	○	○	○
Better work-life balance	○	○	○	○	○
More flexibility to balance my work and personal responsibilities	○	○	○	○	○
Unhappy with the workplace culture	○	○	○	○	○
Unhappy with the leadership and direction of the organisation	○	○	○	○	○
Unhappy with the relationship I had with the person to whom I reported	○	○	○	○	○
Experienced bias or discrimination	○	○	○	○	○
Experienced harassment or bullying	○	○	○	○	○
More independence/control in work	○	○	○	○	○
Better quality of work	○	○	○	○	○
More interesting or varied work	○	○	○	○	○
Change in practice area/different type of work	○	○	○	○	○
Looking for a change/something new	○	○	○	○	○
Better position/significant job opportunity	○	○	○	○	○
Better job security/reliability of work and/or income	○	○	○	○	○
Better mentorship	○	○	○	○	○
Better learning and development opportunities	○	○	○	○	○
Better location	○	○	○	○	○
Wanted to start a new firm/sole practice/work for myself	○	○	○	○	○
Too much pressure on billable hours	○	○	○	○	○
Too much pressure on bringing in clients/new business	○	○	○	○	○

Reduced stress and pressure	○	○	○	○	○
Mental or physical health reasons	○	○	○	○	○
Wanted to work in a business/company	○	○	○	○	○
Wanted to work in a team-based working environment	○	○	○	○	○
Wanted to give back to the community	○	○	○	○	○
It's part of my career plan	○	○	○	○	○
Didn't want to work as a lawyer anymore	○	○	○	○	○
Taking time out from the profession (career break)	○	○	○	○	○
Taking time out from the profession (parental leave)	○	○	○	○	○
Relocation with my partner/family	○	○	○	○	○
Redundancy/termination of employment	○	○	○	○	○
Retirement	○	○	○	○	○

Other (please specify)

49. What, if anything, would change your decision to move job/employment circumstances? (i.e. encourage you to stay in your current job)

50. Would you consider working in a private law firm in the future?

- ○ Yes
- ○ No
- ○ Maybe

51. Please indicate briefly why you would or would not be interested in working in a private law firm in the future.

52. Please indicate what (if anything) would influence your decision.

53. Would you consider working as an advocate in the future?

- ○ Yes
- ○ No
- ○ Maybe

54. Please indicate briefly why you would or would not be interested in working as an advocate in the future.

55. Please indicate briefly what (if anything) would influence your decision.

Primary demographics: Never lawyered

56. Are you ...

- ◯ Male
- ◯ Female

57. How old are you?

- ◯ Less than 25 years of age
- ◯ 25-29 years
- ◯ 30-34 years
- ◯ 35-39 years
- ◯ 40-44 years
- ◯ 45-49 years
- ◯ 50-54 years
- ◯ 55-59 years
- ◯ 60-64 years
- ◯ 65 years or older

58. How many years is it since you finished your first legal qualification? (please round to the nearest number of full years)

years

59. Are you admitted as a legal practitioner in South Africa?

- ◯ Yes
- ◯ No

60. In which province is your main workplace located?

- ◯ Limpopo
- ◯ Mpumalanga
- ◯ KwaZulu-Natal
- ◯ Eastern Cape
- ◯ Western Cape
- ◯ Northern Cape
- ◯ North-West
- ◯ Gauteng
- ◯ Free State
- ◯ Outside South Africa

61. And is your main workplace located in:

- ◯ The central business district of a large metropolitan (including Sandton)
- ◯ A suburban area of a large metropolitan
- ◯ A town or small city
- ◯ A rural or remote location

Studying law

62. What were the main reasons for your decision to study law? (please select all that apply)

- [ ] I had an interest in the law
- [ ] I had an interest in social justice
- [ ] I had an interest in government and/or politics
- [ ] I had an interest in international relations
- [ ] I thought a law degree would provide good job opportunities
- [ ] I thought a law degree would ensure job security
- [ ] I thought a law degree would give me a broad skill base for employment in different fields
- [ ] I wanted intellectual stimulation
- [ ] I got the marks/grades to study law
- [ ] I wanted a good income
- [ ] I wanted prestige/status
- [ ] I wanted a career change
- [ ] I had the right aptitude for a law degree
- [ ] I wasn't good at maths or science
- [ ] I wasn't sure what else to do
- [ ] My parents/family wanted me to study law
- [ ] Other (please specify)

63. When you started your law degree, did you plan to practise law after graduating?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

64. When you finished your law degree, did you plan to practise law?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

65. To what extent did your law degree meet the expectations you had when starting it?

- ◯ Major extent
- ◯ Moderate extent
- ◯ Minor extent
- ◯ Not at all
- ◯ Not sure/can't say

Decision not to work as a lawyer

66. To what extent did the following impact on your decision not to practise law?

	Major extent	Moderate extent	Minor extent	Not at all	Not relevant
Didn't like studying law	○	○	○	○	○
Studied a double degree and wanted to pursue a career related to my other degree	○	○	○	○	○
Couldn't find a job practising law	○	○	○	○	○
Couldn't find a job practising in the area of law I was interested in	○	○	○	○	○
I was offered another job opportunity	○	○	○	○	○
I never intended to practise as a lawyer	○	○	○	○	○
More interesting or varied work elsewhere	○	○	○	○	○
Better salary/remuneration elsewhere	○	○	○	○	○
More scope for flexible working arrangements elsewhere	○	○	○	○	○
Shorter working hours elsewhere	○	○	○	○	○
Greater support for work-life balance (personal life) elsewhere	○	○	○	○	○
Greater support for work-life balance (family commitments) elsewhere	○	○	○	○	○
Better job security elsewhere	○	○	○	○	○
Better mentorship elsewhere	○	○	○	○	○
Better learning and development opportunities elsewhere	○	○	○	○	○
Reduced stress elsewhere	○	○	○	○	○

67. Since finishing your law degree, which of the following sectors have you mainly worked in?

- [ ] Advertising/media/arts and entertainment
- [ ] Agriculture, forestry and fishing
- [ ] Banking and financial services
- [ ] Construction
- [ ] Consulting
- [ ] Education and training
- [ ] Government and defence
- [ ] Health and community services
- [ ] Hospitality, tourism and recreation
- [ ] IT and telecommunications
- [ ] Manufacturing
- [ ] Mining, resources and energy
- [ ] Not for profit
- [ ] PR, communications and marketing
- [ ] Property and business services
- [ ] Science and technology
- [ ] Transport and storage
- [ ] Whole and retail trade
- [ ] Other (please specify)

68. How satisfied are you with your decision not to practise law?

- ◯ Very satisfied
- ◯ Satisfied
- ◯ Neither satisfied nor dissatisfied
- ◯ Dissatisfied
- ◯ Very dissatisfied
- ◯ Not sure/can't say

69. How satisfied are you with your current career path?

- ◯ Very satisfied
- ◯ Satisfied
- ◯ Neither satisfied nor dissatisfied
- ◯ Dissatisfied
- ◯ Very dissatisfied
- ◯ Not sure/can't say

70. Would you be interested in practising law in the future?

- ◯ Yes
- ◯ No
- ◯ Maybe

71. If you did choose to eventually practise, in what capacity would you be interested in doing this?

- ◯ Advocate
- ◯ Private law firm
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not for profit
- ◯ Other (please specify)

72. Please indicate briefly why you might be interested in practising law in the future?

73. Please indicate briefly what (if anything) would influence your decision?

Primary demographics: No longer lawyering

74. Are you ...

- ◯ Male
- ◯ Female

75. How old are you?

- ◯ Less than 25 years of age
- ◯ 25-29 years
- ◯ 30-34 years
- ◯ 35-39 years
- ◯ 40-44 years
- ◯ 45-49 years
- ◯ 50-54 years
- ◯ 55-59 years
- ◯ 60-64 years
- ◯ 65 years or older

76. How many years is it since you were first admitted as a legal practitioner in South Africa? (please round to the nearest number of full years)

years

77. Prior to leaving the legal profession, how many years practising experience did you have post admission (excluding any time taken as breaks from the profession)?

years

Studying law

78. What were the main reasons for your decision to study law? (please select all that apply)

- [ ] I had an interest in the law
- [ ] I had an interest in social justice
- [ ] I had an interest in government and/or politics
- [ ] I had an interest in international relations
- [ ] I thought a law degree would provide good job opportunities
- [ ] I thought a law degree would ensure job security
- [ ] I thought a law degree would give me a broad skill base for employment in different fields
- [ ] I wanted intellectual stimulation
- [ ] I got the marks/grades to study law
- [ ] I wanted a good income
- [ ] I wanted prestige/status
- [ ] I wanted a career change
- [ ] I had the right aptitude for a law degree
- [ ] I wasn't good at maths or science
- [ ] I wasn't sure what else to do
- [ ] My parents/family wanted me to study law
- [ ] Other (please specify)

79. When you started your law degree, did you plan to practise law after graduating?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

80. When you finished your law degree, did you plan to practise law?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

81. To what extent did your law degree meet the expectations you had when starting it?

- ◯ Major extent
- ◯ Moderate extent
- ◯ Minor extent
- ◯ Not at all
- ◯ Not sure/can't say

Professional Legal Training

82. What kind of professional legal training did you do prior to admission?

- ◯ Candidate attorney in a private law firm
- ◯ Candidate attorney and a six months LEAD course
- ◯ Pupillage
- ◯ Other (please specify)

83. How long (excluding breaks) were you engage in professional legal training prior to admission?

- ◯ Six months or less
- ◯ More than six months and less than or equal to one year
- ◯ More than one year and less than or equal to one year and six months
- ◯ More than one year and six months and less than or equal to two years
- ◯ More than two years and less than or equal to three years
- ◯ More than three years

Other (please specify)

84. When you started your professional legal training, were you planning to practise as a lawyer?

- ◯ Yes
- ◯ No

85. When you finished your professional legal training, did you plan to practise as a lawyer?

- ◯ Yes
- ◯ No

86. How would you describe your time of professional legal training? Please answer in one sentence or one paragraph.

Current employment characteristics

87. Which ONE category best describes the sector in which you currently work?

- ◯ Advertising/media/arts and entertainment
- ◯ Agriculture, forestry and fishing
- ◯ Banking and financial services
- ◯ Construction
- ◯ Consulting
- ◯ Education and training
- ◯ Government and defence
- ◯ Health and community services
- ◯ Hospitality, tourism and recreation
- ◯ IT and telecommunications
- ◯ Manufacturing
- ◯ Mining, resources and energy
- ◯ Not for profit
- ◯ PR, communications and marketing
- ◯ Property and business services
- ◯ Science and technology
- ◯ Transport and storage
- ◯ Whole and retail trade
- ◯ Other (please specify)

88. For how many years have you been employed at your current workplace?

- ◯ Under 1 year
- ◯ 1 year - < 2 years
- ◯ 2 years - < 3 years
- ◯ 3 years - < 4 years
- ◯ 4 years - < 5 years
- ◯ 5 years - < 7 years
- ◯ 7 years - < 10 years
- ◯ 10 years - < 15 years
- ◯ 15 years or more

89. Do you currently work full time or part time in your current main role?

- ◯ Full time
- ◯ Part time

Current Employment Characteristics (continued)

90. Please specify the fractional Full Time Equivalency (FTE) of your role.

- ◯ 0.1 (0.5 day / week)
- ◯ 0.2 (1.0 day/ week)
- ◯ 0.3 (1.5 days / week)
- ◯ 0.4 (2.0 days / week)
- ◯ 0.5 (2.5 days / week)
- ◯ 0.6 (3.0 days / week)
- ◯ 0.7 (3.5 days / week)
- ◯ 0.8 (4.0 days / week)
- ◯ 0.9 (4.5 days / week)
- ◯ Other (please specify)

_____

Current Employment Characteristics (continued continued)

91. How many hours a week do you usually work (excluding breaks)?

hours

92. In which province is your main workplace located?

- ◯ Limpopo
- ◯ Mpumalanga
- ◯ KwaZulu-Natal
- ◯ Eastern Cape
- ◯ Western Cape
- ◯ Northern Cape
- ◯ North-West
- ◯ Gauteng
- ◯ Free State
- ◯ Outside South Africa

93. And is your main workplace located in:

- ◯ The central business district of a large metropolitan (including Sandton)
- ◯ A suburban area of a large metropolitan
- ◯ A town or small city
- ◯ A rural or remote location

Career moves

94. In what year did you last practise as a lawyer?

Year

95. Which one category best describes the last role in which you practised as a lawyer?

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm -- sole practitioner
- ◯ Private law firm -- law firm with 2-4 partners/principals
- ◯ Private law firm -- law firm with 6-10 partners/principals
- ◯ Private law firm -- law firm with 11-20 partners/principals
- ◯ Private law firm -- law firm with 21-39 partners/principals
- ◯ Private law firm -- law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Other (please specify)
- ◯ Other (please specify)

96. When you left your role as a practising lawyer, please specify which of the following factors played a role in your decision (select all that apply).

	Major extent	Moderate extent	Minor extent	Not sure	No role
Better salary/remuneration	○	○	○	○	○
Lack of promotional opportunities	○	○	○	○	○
More scope for flexible working arrangements	○	○	○	○	○
Better work-life balance	○	○	○	○	○
More flexibility to balance my work and personal responsibilities	○	○	○	○	○
Unhappy with the workplace culture	○	○	○	○	○
Unhappy with the leadership and direction of the organisation	○	○	○	○	○
Unhappy with the relationship I had with the person to whom I reported	○	○	○	○	○
Experienced bias or discrimination	○	○	○	○	○
Experienced harassment or bullying	○	○	○	○	○
More independence/control in work	○	○	○	○	○
Better quality of work	○	○	○	○	○
More interesting or varied work	○	○	○	○	○
Change in practice area/different type of work	○	○	○	○	○
Looking for a change/something new	○	○	○	○	○
Better position/significant job opportunity	○	○	○	○	○
Better job security/reliability of work and/or income	○	○	○	○	○
Better mentorship	○	○	○	○	○
Better learning and development opportunities	○	○	○	○	○
Better location	○	○	○	○	○
Wanted to start a new firm/sole practice/work for myself	○	○	○	○	○
Too much pressure on billable hours	○	○	○	○	○
Too much pressure on bringing in clients/new business	○	○	○	○	○
Reduced stress and	○	○	○	○	○

pressure					
Mental or physical health reasons	○	○	○	○	○
Wanted to work in a business/company	○	○	○	○	○
Wanted to work in a team-based working environment	○	○	○	○	○
Wanted to give back to the community	○	○	○	○	○
It's part of my career plan	○	○	○	○	○
Didn't want to work as a lawyer anymore	○	○	○	○	○
Taking time out from the profession (career break)	○	○	○	○	○
Taking time out from the profession (parental leave)	○	○	○	○	○
Relocation with my partner/family	○	○	○	○	○
Redundancy/termination of employment	○	○	○	○	○
Retirement	○	○	○	○	○

Other (please specify)

97. What, if anything, would have changed your decision to leave the legal profession?

98. What, if anything, do you miss about working in the legal profession?

Career intentions

99. Would you consider working as a lawyer again in the future?

- ◯ Yes
- ◯ No
- ◯ Maybe

Career intentions

100. In approximately what time frame would you consider returning to the legal profession?

- ◯ Within the next 12 months
- ◯ 1-2 years
- ◯ 3-5 years
- ◯ 6-10 years
- ◯ More than 10 years
- ◯ Not sure

101. What type of workplace would you consider working in as a lawyer? (please select the workplace that you would be most likely to consider working in)

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm -- sole practitioner
- ◯ Private law firm -- law firm with 2-4 partners/principals
- ◯ Private law firm -- law firm with 6-10 partners/principals
- ◯ Private law firm -- law firm with 11-20 partners/principals
- ◯ Private law firm -- law firm with 21-39 partners/principals
- ◯ Private law firm -- law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Other (please specify)

102. Please indicate briefly why you would or would not be interested in working as a lawyer in the future.

103. Please indicate what (if anything) would influence your decision.

Demographics

104. What is the highest level of legal qualification you have completed?

- ◯ Doctor of Laws / PhD in Law
- ◯ Masters of Laws
- ◯ Juris Doctor / Postgraduate qualification for admission to practice
- ◯ Bachelor of Laws (LLB) or equivalent
- ◯ Combined Bachelor of Laws (LLB) and another degree (e.g. BA/LLB or BCom/LLB or BSc/LLB)
- ◯ Other (please specify)

105. What educational institution conferred on you your South African LLB or BJuris?

- ◯ Transkei
- ◯ Zululand
- ◯ University of Johannesburg
- ◯ UNISA
- ◯ Limpopo
- ◯ Venda
- ◯ Free State
- ◯ Ft. Hare
- ◯ Potchestroom University
- ◯ Pietermaritzburg
- ◯ Univ of KwaZulu-Natal
- ◯ UCT
- ◯ Rhodes
- ◯ Port Elizabeth
- ◯ Western Cape
- ◯ Wits University
- ◯ University of Pretoria
- ◯ Stellenbosch University
- ◯ I do not have a South African LLB or BJuris
- ◯ Other (please specify)

106. Which of these categories best describes your personal gross income (pre-tax, excluding superannuation) in the financial year ending 28 February 2014?

- ◯ Less than R250,000
- ◯ R250,000 - R500,000
- ◯ R500,000 - R750,000
- ◯ R750,000 - R1,000,000
- ◯ R1,000,000 - R1,500,000
- ◯ R1,500,000 - R2,000,000
- ◯ R2,000,000 - R2,500,000
- ◯ R2,500,000 - R3,000,000
- ◯ More than R3,000,000

107. Approximately what percentage of your total household income comes from your salary?

- ◯ 100%
- ◯ 80-99%
- ◯ 60-79%
- ◯ 40-59%
- ◯ 20-39%
- ◯ 0-19%
- ◯ Not sure/rather not say

108. Were you born in South Africa?

- ◯ Yes
- ◯ No

109. Are you a South African citizen or a permanent resident of South Africa?

- ◯ Yes
- ◯ No

110. Do you regularly speak a language other than English at home?

- ◯ Yes
- ◯ No, English only

111. Do you identify as being White, Indian, Coloured, or African?

- ◯ White
- ◯ Indian
- ◯ Coloured
- ◯ African
- ◯ Other (please specify)

112. Which best describes your marital status?

- ◯ Single
- ◯ Married or de facto
- ◯ Divorced, separated, widowed

113. How many dependent children do you have (including step-children)?

- ◯ 0
- ◯ 1
- ◯ 2
- ◯ 3
- ◯ 4
- ◯ 5 or more

114. Are any of these children ... (select all that apply)

- ◯ Aged under 6 and living with you all / some of the time
- ◯ Aged 6 - 12 and living with you all / some of the time
- ◯ Aged 12 - 17 and living with you all / some of the time
- ◯ Aged 18 or older and living with you all / some of the time
- ◯ None of the above

115. Are you the primary carer in your family?

- ◯ Yes
- ◯ No
- ◯ There is no primary carer – the role is shared

116. Who is the primary carer?

- ◯ My partner
- ◯ My ex-partner
- ◯ My or my partner's parents
- ◯ Other (please specify)

117. Do you have any other family or carer responsibilities?

- ◯ Yes
- ◯ No

118. Please indicate for whom you have carer responsibilities

- ◯ Grandparent/s (mine or my partner's)
- ◯ Parent/s (mine or my partner's)
- ◯ Sibling/s (mine or my partner's)
- ◯ Other (please specify)

Follow up interviews and Thanks

Thank you for your participation in our survey!

CALS may be undertaking follow up one-on-one interviews or telephone interviews with a number of lawyers to discuss their career progression, rationale for career moves and future intentions in more detail. The interviews will take about an hour for the one-on-one interviews and between 30 and 45 minutes for the telephone interviews. Please note that this will be a confidential process: responses will not be attributed to individuals or their employer in our reporting or in our discussions. If you choose to provide your contact details, you may be contacted for purposes of this research only and your contact details will not be provided to any other party than the CALS team conducting this research.

119. Would you be interested in participating in a one-on-one or telephone interview? If so, please provide your appropriate contact details below: name, email address, telephone.

- ◯ No thanks
- ◯ Yes -- one-on-one interview
- ◯ Yes -- telephone interview
- ◯ Yes -- either type of interview

Other (please specify)

ANNEXURE C

CALS

Centre for Applied Legal Studies

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Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

Tel: 011 717 8609 (direct)
Ref: Whitworth/TLP

To: [Name]
Email: [address]

Date

Dear Name

Transformation of the Legal Profession: Invitation to a breakfast meeting

We would like to invite you to a breakfast meeting at The Wits Club at West Campus, Wits University, Braamfontein from **08:00 to 09:30** on **Thursday 26 June 2014**.

The Centre for Applied Legal Studies, together with the Foundation for Human Rights, is conducting a research project into the transformation of the legal profession. This breakfast is one of a series of Breakfasts for Change, which comprises the focus group component of the research. The focus group will be led by Professor Bonita Meyersfeld, with one of our researchers, Ms Alice Brown. Further information on the research is included in the appendix.

Please confirm your attendance by contacting Ms Cebile Ndebele on 011 717 8648 or Cebile.Ndebele@wits.ac.za.

Please do not hesitate to contact me if you have any questions in connection with this project.

Kind Regards

KWhitworth

Kirsten Whitworth
Attorney: Centre for Applied Legal Studies
Tel: 011 717 8609
Email: Kirsten.Whitworth@wits.ac.za

Appendix

The South African legal profession continues to face the challenge of meaningful transformation. While junior stages of the legal profession see a diverse representation of professionals, the top positions in the profession, from senior partners of law firms, to senior counsel at the bar and senior members of the judiciary, are less diverse. Senior positions do not reflect the diversity of the country, and are dominated by men, with a marked absence of diversity on the basis of race, gender and other marginalising characteristics such as sexual orientation, disability and religion.

The lack of diversity in the legal profession has gained widespread media attention with respect to the appointment of senior members of the judiciary. The Judicial Services Commission has come under scrutiny for its appointment patterns, decision-making processes and the extent to which the constitutional imperatives of racial and gender diversity are reflected in its recommendations to the President.

There have been successes of course. The racial diversity of the Constitutional Court in the 20 years of democracy has gone from seven white justices and four black judges to the current bench of two white judges and the majority being black judges. In the same period, however, the number of women on the Constitutional Court has remained the same: two in 1994 and two today, betraying a lack of meaningful transformation in respect of gender.

Against this background, the project aims to broaden the frame of reference of the debate to the profession as a whole to challenge the binary distinction between talent and diversity; understand the specific emphasis on race and not gender, where racial transformation has advanced, albeit slowly, and gender transformation has had a much slower growth pattern; and uncover other less visible barriers to transformation.

ANNEXURE D

FOUNDATION FOR HUMAN RIGHTS

CALS
Centre for Applied Legal Studies

TRANSFORMATION OF THE LEGAL PROFESSION

Participant Information Sheet

Dear Potential Participant

Greetings! Thank you for considering participating in our research.

The Centre for Applied Legal Studies (CALS), together with the Foundation for Human Rights, would like to invite you to participate in a research project examining transformation within the legal profession ("the project").

The South African legal profession continues to face the challenge of meaningful transformation. While junior stages of the legal profession see a diverse representation of professionals, the top positions in the profession, from senior partners of law firms, to senior counsel at the bar and senior members of the judiciary, are less diverse. Senior positions do not reflect the diversity of the country, and are dominated by men, with a marked absence of diversity on the basis of race, gender and other marginalising characteristics such as sexual orientation, disability and religion.

The lack of diversity in the legal profession has gained widespread media attention with respect to the appointment of senior members of the judiciary. Indeed, the Judicial Services Commission has come under scrutiny for its appointment patterns, decision-making processes and the extent to which the constitutional imperatives of racial and gender diversity are reflected in its recommendations to the President.

Yet, there have been successes of course. The racial diversity of the Constitutional Court in the 20 years of democracy has gone from seven white justices and four black judges to the current bench in which the majority of the judges are black and two are white. In the same period, however, the number of women on the Constitutional Court has remained the same: two in 1994 and two today, betraying a lack of meaningful transformation in respect of gender.

Against this background, the project aims to broaden the frame of reference of the debate to the profession as a whole to: challenge the binary distinction between talent and diversity; understand the specific emphasis on race and not gender, where racial transformation has advanced, albeit slowly, and gender transformation has had a much slower growth pattern; and uncover other less visible barriers to transformation.

In the current phase of research under the banner of "Breakfasts for Change," the research team will conduct approximately six structured discussion group meetings with 25 to 40 legal practitioners in

total. Ideally, the interviewees will be broadly representative in terms of age, race, gender and stage of career. Each meeting should thus have no more than six to eight participants.

Information and data collected during these meetings will be kept anonymous in the research. The researchers will take detailed notes during the interview. The researchers will keep personal information gained confidential. Although identities will be withheld, demographic information will be used for statistical and research purposes.

We invite you to participate in this study – which will take the form described above and last sixty to ninety minutes. We hope that participants will be forthright, candid and comfortable with the mission and purpose of this study and the fact that their contributions will be anonymous.

If you agree to participate, you may choose not to answer particular questions, and, should you initially consent to participate, you may withdraw your consent at any time. We must emphasise that participation in this research is entirely voluntary, and that you will not be paid for participation.

The study will be reported to the Foundation for Human Rights and made accessible through academic publication. A summary of the research will be available to each participant who requests it.

Please contact us with any questions at Jonathan Klaaren (jonathan.klaaren@wits.ac.za) and at Alice Brown (brown.alice99@gmail.com).

Regards

Jonathan Klaaren
Alice L. Brown

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ANNEXURE E

TRANSFORMATION OF THE LEGAL PROFESSION

Participant Consent Form

I have read and understood the Participant Information Sheet regarding the Transformation of the Legal Profession and/or I have discussed the research project with the CALS researchers.

I understand that reporting from the study will be anonymous, that I may withdraw if I wish, and that the information will be kept confidential.

I give consent to participate in semi-structured interviews in this research project of the Centre for Applied Legal Studies.

Name: _____

Signature: _____

Date: _____

Annexure B

JUDGE DHAYA PILLAY

Selected Judgments

JAFTA V EZEMVELO KZN WILDLIFE (2009) 30 ILJ 131 (LC)

This case raised questions of whether an offer of employment sent by e-mail or SMS could result in a valid contract. Applicant had been offered a position by Respondent, and had wanted to accept the offer but with a different start date. Just before the deadline for his acceptance, Applicant e-mailed acceptance of the offer to a representative of the Respondent (a Ms Phakathi), but Respondent denied having received the e-mail. Applicant then received an SMS from Phakathi, indicating that if Applicant did not confirm his acceptance, another candidate would be appointed. Applicant responded by SMS that he had "responded to the affirmative" via e-mail. Receipt of the SMS was admitted, but there was dispute as to the use of the word "affirmative".

"Wildlife does not dispute that e-mailing an acceptance of its offer was an acceptable form of concluding the contract. It denies, however, that it received Jafta's e-mail. Even if it had received Jafta's e-mail, it contends that his response was not a clear and unequivocal acceptance that corresponded with its offer. It denied that the SMS was an unequivocal acceptance of the offer, that Phakathi was authorized to conclude a contract via SMS and that an SMS was an appropriate mode of communicating acceptance of an offer. Wildlife acknowledged that if the court finds that the parties had concluded a contract, Wildlife repudiated the contract." (page 138)

Pillay J then analysed the evidence and found that Applicant's SMS amounted to an unequivocal acceptance of the offer, and that both his e-mail and SMS corresponded with the offer. Pillay J then turned to deal with two remaining issues: whether Respondent had received the e-mailed acceptance, and whether acceptance by SMS was an appropriate mode of concluding a contract. In doing so, Pillay J embarked on a detailed comparative law analysis, which was explained as follows:

"Neither party referred the court to international or foreign law during their final submissions. Being ubiquitous, electronic communication renders electronic commerce and transactions borderless. As a technical matter devoid of ethical, political, social or other value-laden considerations, electronic communication calls out to be regulated by universal principles. ...

Internationalization of electronic communications law means that it has to apply harmoniously and uniformly to alternatives to paper-free communication systems. Harmonization is the process through which states modify domestic laws to enhance predictability in cross-border commercial transactions. Unification occurs when states adopt common legal standards...

Even though this case was not transnational ... the court was concerned nevertheless that if it ignored international and foreign law, it might take a parochial approach to solve a local dispute thereby losing sight of the broader objectives of the ECT Act. Justice O'Regan warned against parochialism in *NK v Minister of Safety & Security*... and urged practitioners to seek guidance, positive or negative, from other legal systems struggling with similar issues." (page 142)

"Usually, comparing foreign laws is risky. ... These risks are minimized somewhat in the information age when the law regulating electronic communication is itself freely available electronically and ubiquitously. Furthermore, many of the impediments to unification such as geographical, cultural, religious, economic, social and political differences are non-existent in e-commerce law." (page 143)

Pillay J then analysed the United Nations Commission on International Trade Law's Model Law and Electronic Commerce (UNICITRAL), and compared it to South Africa's Electronic communications and Transactions Act (ECT), as well as to the legislation of other implementing states. Pillay J further discussed case law and legislation from several countries, including Singapore, the United States, Canada, England and India, noting that "[t]he test for receipt of data messages in South Africa is ... higher than the international standard." (page 150).

Applying the provisions of the ECT in light of this analysis:

"[T]he court finds that as between Jafta, the originator, and Wildlife, the addressee of the SMS, Jafta's SMS was an electronic communication. As such Jafta's acceptance by SMS was not without legal force and effect merely on the grounds that it was in the form of an SMS.

[T]he court finds therefore that Jafta did not communicate his e-mail accepting the offer to Wildlife [having found that the e-mail had not been received by the respondent] . He did communicate his acceptance via SMS. An SMS is as effective a mode of communication as an e-mail or a written document. In view of these findings, the court concludes that a contract of employment came into existence." (page 154)

STANDARD BANK OF SA V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION & OTHERS (2008) 29 ILJ 1239 (LC)

Third Respondent (Ferreira) had suffered injuries in a motor accident in a motor accident, leaving her with severe back pain. After working in various alternative positions after the accident, the bank dismissed Ferreira for incapacity resulting in high absenteeism and low productivity. The case concerned what steps the bank was expect to take in order to reasonably accommodate Ferreira, and in what circumstances the dismissal of such an employee would be fair.

"The origin of the test for fairness of the dismissal of an employee with disabilities is the Constitution. Various foreign and international human rights and labour instruments seek to re-enforce the protection of people with disabilities and prevent discrimination against them. The overarching policy underpinning the protection of disabled people is to give effect to human rights. In a claim based on an incapacity dismissal, the intersecting constitutional rights are rights to equality, human dignity, the right to choose a trade, occupation or profession freely and to fair labour practices."

"The Constitution, several statutes including the EEA and the LRA and codes of practice protect employees with disabilities as a vulnerable group because they are a minority with attributes different from mainstream society." (page 1253) Pillay J then analysed Canadian law on the protection of disabled people in terms of equality provisions.

"Dignity, for employees with disabilities, is about being independent socially, and most of all, economically, about managing their normal day-to-day activities..." (page 1255)
"The first question to ask in an incapacity investigation is: Is the employee a person with disabilities in that she has a long-term recurring physical or mental impairment which substantially limits her

prospects of entry into or advancement in employment? ... This enquiry is usually factual but can become legal if interpretation disputes arise. To cast the interpretive net widely, Australia and Canada define 'disability' to include respectively 'imputed' and 'perceived' impairment." (page 1256).

Pillay J then set out the requirements for an incapacity dismissal, and noted that:
" Many jurisdictions require employers to use reasonable accommodation to achieve substantive equality and prevent discrimination against people with disabilities", and after analysing the Employment Equity Act and code, concluded that "[c]onsequently, if an employer fails reasonably to accommodate an employee with disabilities, the dismissal of that employee is not merely unfair, but automatically unfair." (page 1259).

Pillay J then analysed discrimination cases involving disability in the United Kingdom and Germany, before continuing:
"Because it protects against automatically unfair dismissal, reasonable accommodation is more onerous than a general obligation to implement affirmative action. Although reasonable accommodation is sometimes used synonymously with affirmation action, in relation to accommodating people with disabilities to avoid dismissal it is a term of art with most jurisdictions defining it similarly. Reasonable accommodation of people with disabilities is also more onerous than accommodating religious and cultural beliefs. ... Hence the jurisprudence on reasonable accommodation for religious and cultural beliefs and possibly other vulnerable groups may not apply to disability." (page 1260)

"What the modification or adjustment should be calls for a pragmatic commonsense approach to explore, perhaps even experiment, to establish what will work best in the particular circumstance of the employee, the nature of her post and the configuration of the workplace." (pages 1260-1261)
Following an analysis of Canadian and English cases, Pillay J noted that:

" Unjustifiable hardship is the threshold at which employers are relieved of their obligation to accommodate disabled employees. ... Unjustifiable hardship means '[m]ore than mere negligible effort'. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. ... No hard and fast rule can be set as to what constitutes undue hardship. Each case has to be determined on its own facts." (page 1264)

Pillay J then analysed the banks refusal to accommodate Ferreira in light of United States and Canadian case law, cautioning that "one should take care to observe this distinction between pre- and post-ADA [Americans with Disabilities Act] cases and between the different historical developments between South African disability discrimination law and the law of other jurisdictions."(page 1265)

" Quite simply, the bank had a legal obligation G to accommodate Ferreira to ensure that she could continue to work. It also bore a reverse onus of ensuring that it did not compel Ferreira or encourage her to terminate her employment. ... [I]t emerges that the bank did encourage her to leave." (pages 1267-1268)

"Having regard to Ferreira's disability, the bank could not rationally or fairly measure her performance on the same standard as other employees. That is precisely what the bank did." (page 1269)

"In the circumstances the bank failed reasonably to accommodate Ferreira, thereby making it difficult for her to continue to work. Instead, it compelled and encouraged her to terminate her employment by seeking early retirement. When this failed, it dismissed her." (page 1272)

After noting that the bank had not raised a defence of undue hardship in accommodating Ferreira, Pillay J decided on the issue of discrimination:

"All five jurisdictions discussed in this judgment have adopted in varying ways the push-pull dynamic of the right of an employee to reasonable accommodation and the protection of an employer against unjustified hardship. This model is the principal means of not only balancing the economic rights of the parties but also of avoiding discrimination.

Having failed to accommodate Ferreira and discharge the onus of proving ... unjustified hardship, the court finds that the bank discriminated against Ferreira. ... The bank also dismissed Ferreira in bad faith." (page 1273)

PFG BUILDING GLASS)PTY) LTD V CEPPAWU & OTHERS [2003] 5 BLLR 475 (LC)

This case dealt with the making of orders under section 7(2) of the Employment Equity Act, which prohibits the testing of an employee to determine their HIV status, unless the testing as determined to be justifiable by the Labour Court.

Pillay J began by identifying the approach to interpretation of constitutional rights and limitations as "a "two-stage" approach which requires, on the one hand, that a broad rather than a narrow interpretation be given to the fundamental rights and, on the other hand, that limitations be justified." (pages 474-475)

Pillay J then held that "[c]ompliance with the Constitution when interpreting section 7(2) of the EEA begins by identifying the fundamental rights that may be affected", and found that the core rights affected were the rights to physical and bodily integrity, which included the right to security and control over a person's own body, and the right not to be subjected to medical or scientific experiments without informed consent. Pillay J found that:

"the exercise of the right to security in and control over one's body is also an exercise of one's inherent right to dignity. Human dignity, it has been held, informs constitutional adjudication and interpretation at a range of levels. It is a "foundational value" that informs the interpretation of possibly all other rights."

"The right to privacy deserves more than superficial treatment in the context of HIV testing. There is a plethora of publications and reports about the prejudice endured by those living with HIV/AIDS." (pages 474-475)

"No right is absolute. As mentioned above, rights may be limited not only by a law of general application, but also by other competing fundamental rights ... Unlike socio-economic rights, the nature of the rights in section 12(2)(b) and (c) are so personal and subjective that a person is less likely to encroach on the rights of others by exercising them." (page 481)

"It emerges that the primary purpose of prohibiting HIV testing, unless authorised by the Labour Court, is to prevent unfair discrimination. ... The purpose of section 7(2)of the EEA is entirely in sync with the constitutional right to equality. It contextualises that right insofar as it relates to HIV testing in employment."

"However, the section simultaneously imposes a limitation on the rights under section 12(2)(b) and (c) of the Constitution by permitting testing that is regarded as justifiable by the Labour Court. ... Because the purpose of the EEA is to achieve equity in the workplace, the testing may not in any way be discriminatory. However, the justifiability of testing for HIV is not limited to determining whether it is equitable or not. Nor is section 7(1)(b) of the EEA the springboard for determining justifiability for such tests. To the extent that my learned brothers Landman J and Rogers AJ have relied on it as such, I respectfully disagree."

"In my respectful opinion, the starting point for determining justifiability in terms of section 7(2) of the EEA is the same as for the limitation of any fundamental right; that is, it must be constitutional. ... Simultaneously, the constitutionality of the testing must be assessed in terms of the specific criteria identified in section 7(1)(b) for medical testing generally." (page 483)

"The importance of the purpose of the limitation of the section 12 rights depends on the reason for the testing. Whatever the reason for the testing may be, its purpose or effect cannot be unfairly discriminatory."

Pillay J discussed the Constitutional Court judgment in *Hoffman* and continued:

"Usually the purpose of testing is to obtain data to enable, eg the employer to better manage the workforce needs of the enterprise, or for stakeholders ... to better manage the provision of employee benefits." (page 484)

"To determine the nature and extent of the limitation, the court must enquire into the entire process of testing ... Viewed objectively, there is a direct, rational connection between HIV testing and the purpose thereof ... However, if the purpose of the testing is to establish whether a particular employee is HIV positive, the Labour Court will have to be more circumspect as the potential for unfair discrimination, invasion of privacy, unfair labour practices and infringements of fundamental rights increase." (page 485)

Pillay J noted that no evidence had been put forward concerning less restrictive means of testing, and emphasised the importance of the relevance of the data sought and the confidentiality and anonymity of the testing, before analysing the code of Good Practice on Key aspects of HIV/AIDS and Employment.

"[C]lause 7.1.4 is misleading insofar as it might suggest that testing for HIV can occur without regard to the constitutional imperatives. ... Clause 7.1.4 implies that Labour Court authorisation is required even if employees consent. It ignores the right of everyone to control their own body. ... [T]here is

no basis on which the Labour Court can interfere once the employees have given informed consent to HIV testing, that is, when they have exercised their constitutional right in terms of section 12(2)(b)." (pages 488-489)

"The constitutional requirement is that the consent must be informed. Consent must obviously also be voluntary. ... In my respectful view however, once employees give informed consent to testing they also consent to the terms and conditions of such testing and the basis on which they choose to exercise their rights in terms of section 12(2) of the Constitution. The Labour Court cannot interfere in the exercise by employees of, not only their constitutional right, but also in this instance, the freedom of the parties to contract on terms that are not in conflict with constitutional values." (page 489)

Pillay J then referred to international legal instruments, as well as to the law in Canada, the United States, Ireland and Namibia, and found these instruments to be consistent with the interpretation to be given to section 7(2) of the EEA (pages 490 – 492)

Pillay J then rejected a literal interpretation of section 7(2) of the EEA, which would require a Labour court order even for testing done voluntarily and with the consent of employees. (page 492)

"Section 7(2) is not a limitation on the right of employees to exercise control over their bodies in terms of section 12(2)(b) and to be subjected to experiment in terms of section 12(2)(c), if they voluntarily give informed consent to HIV testing, even if such testing is at the instance of the employer.

By choosing to submit to testing they exercise these very rights ... Consequently, if employees consent to HIV testing, it is not open to the Labour Court to interfere with such employees' exercise of control over their own bodies."

"The only material fact in this case is that the employees have given their informed consent to being tested for HIV. Once there is consent, there is no limitation of the right. If there is no limitation, there is no constitutional challenge. There is also no infringement of the EEA. That is the end of the matter." (page 493)

SELECTED ARTICLES

PAJA V LABOUR LAW (2005) 20 (2) SAPR/PL 413

This article discusses the debate about the link between administrative law and labour law. It begins by looking at the history of labour legislation in South Africa.

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

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

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

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

"Labour rights and protections have been accessed from the Constitution directly. The right is available to 'everyone' ... Thus where the LRA has excluded certain categories of workers ... or disputes ... from the application of labour laws, the Constitutional Court has extended the constitutional right to them". The author notes criticisms of these cases, on the basis that they "encourage parallel jurisprudence; one under the Constitution and the other under the LRA." (page 416)

The article then deals with conflict between labour law and administrative law in relation to decisions of the CCMA.

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

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

The author argues further that the standard of review of CCMA and bargaining council decisions "would widen and become more complicated if consideration were also to be given to PAJA", and further blur the distinction between appeal and review. (page 420)

The article goes on to suggest that PAJA and the LRA also conflict in respect of review of purely administrative or ministerial acts, particularly in relation to the registration of organisations.

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

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

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

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

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

GIVING MEANING TO WORKPLACE EQUITY: THE ROLE OF THE COURTS (2003) 24 ILJ 55

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

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

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

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

"Commissioners and judges must apply the law and follow relevant and binding precedents. However, insofar as there arises a novel question of law, or if the law is ambiguous, vague or otherwise unclear, or if there is no precedent, or if there are conflicting authorities, or if the precedent predates the Constitution or legislation and is inconsistent with these instruments, then

adjudicators may create law by exercising their discretion consistently with the Constitution, legislation, the common law and customary law". (page 59)

The author then considers the approach of the Labour Courts and CCMA commissioners to the concept of equity:

"I wish now to look at some extracts from reported decisions of commissioners to illustrate the inappropriate use of the word or concept of equity. I distinguish between the use of the word and the concept of equity because in some situations the word is used merely as a convenient catch-all to mean whatever the commissioner wants it to mean without reflecting the conceptual depth that the word acquires in a constitutional context. The purpose of the exercise is not to embarrass commissioners or the parties but to learn from the mistakes made." (page 60)

After discussing a series of awards, the author remarks that:

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

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

LIST OF JUDGMENTS PUBLISHED

SALR

1. Firstrand Bank v Mvelase 2011 (1) SA 470 (KZP) also reported at (4096/10) [2010] ZAKZPHC 74.
2. Maharaj v Sanlam Life Insurance Ltd & others 2011 (6) SA 17 (KZD).
3. Standard Bank of South Africa Ltd v Dlamini 2013 (1) SA 219 (KZD); also reported at 2877/2011) [2012] ZAKZDHC 64.
4. Nulandis (Pty) Ltd v Minister of Finance and Another 2013 (5) SA 294 (KZP); also reported at (10760/12) [2013] ZAKZPHC 31.
5. Tshishonga v Minister of Justice and Constitutional Development 2007 (4) SA 135 (LC) also reported at (JS898/04) [2006] ZALC 104; and [2007] 4 BLLR 327 (LC).

SACR

6. De Koker v Minister of Safety and Security 2010 (2) SACR 595 (KZD).
7. Mudaly v Gwala & others 2011 (1) SACR 302 (KZD).
8. S v Mabaso 2014 (1) SACR 299 (KZP) also reported at (AR 250/12) [2013] ZAKZPHC 32 (KZP).

BCLR

9. Growthpoint Properties Ltd v SACCAWU & others 2011 (1) BCLR 81 (KZD), also reported at [2011] 1 All SA 537 (KZD; and (6467/2010) [2010] ZAKZDHC 38.
10. Sanyathi Civil Engineering and Construction (Pty) Ltd & another v Ethekwini Municipality & others; Group Five Construction (Pty) Ltd v Ethekwini Municipality & others 2012 (1) BCLR 45 (KZP); also reported at [2012] 1 All SA 200 (KZP); and [2011] ZAKZPHC 45.
11. MEC Department of Education Kwazulu-Natal v Khumalo and Another 2011 (1) BCLR 94 (LC); also reported at (D749/08) [2010] ZALC 79.

ILJ and LLD

12. Heyneke v Umhlatuze Municipality (2010) 31 ILJ 2608 (LC); also reported at (D908/09) [2010] ZALC 57.

13. Comtech Networking Solutions CC v Director-General of Department of Labour & another (2010) 31 ILJ 600 (LC); also reported at (J2614/08) [2009] ZALC 87.

14. Lind v KwaZulu-Natal Department of Health (2010) 31 ILJ 2918 (LC); also reported at (D498/08) [2010] ZALC 81.

15. City of Matlosana v SA Local Government Bargaining Council & others (2009) 30 ILJ 1293 (LC) also reported at (JR1626/08) [2008] ZALC 139.

16. SA Transport & Allied Workers Union & others v Maxi Strategic Alliance (Pty) Ltd (2009) 30 ILJ 1358 (LC); also reported at (JS572/05) [2008] ZALC 217.

17. Nampak Metal Packaging Ltd t/a Bevcan v National Union of Metalworkers of SA & others (2009) 30 ILJ 1610 (LC); also reported at (JR1949/08) [2008] ZALC 165.

18. SA Chemical Workers Union v Unitrans Supply Chain Solutions (Pty) Ltd t/a Unitrans Freight & Logistics & another (2009) 30 ILJ 2469 (LC); also reported at (JS585/06) [2009] ZALC 32.

19. Solidarity on behalf of Steyn v Minister of Correctional Services (2009) 30 ILJ 2508 (LC).

20. Makibinyane v Nuclear Energy Corporation of SA & another (2009) 30 ILJ 2731 (LC); also reported at [2009] ZALC 85; JS51/08.

21. Bootes v Eagle Ink Systems KwaZulu-Natal (Pty) Ltd (2008) 29 ILJ 139 (LC); also reported at (D781/05) [2007] ZALC 185.

22. Caravan & Pleasure Resort v SA Health & Care Trade Union on behalf of Bronkhorst & another (2008) 29 ILJ 1008 (LC); also reported at (J1057/06) [2007] ZALC 71.

23. National Teachers Union v Superintendent General: Department of Education & Culture, KwaZulu-Natal & another (2008) 29 ILJ 1727 (LC).

24. Wanless v Fidelity (Pty) Ltd (2008) 29 ILJ 2030 (LC); also reported at (D119/06) [2007] ZALC 107.

25. Independent Municipal & Allied Trade Union on behalf of Strydom v Witzenberg Municipality & others (2008) 29 ILJ 2947; also reported at (C558/2006) [2008] ZALC 68. (Overturned on appeal)

26. Hartslief v Lamontville Golden Arrows Football Club (2007) 28 ILJ 638 (LC)

27. Sappi Timber Industries (Pty) Ltd t/a Boskor Sawmill v Commission for Conciliation, Mediation & Arbitration & others (2003) 24 ILJ 846 (LC); also reported at (P502/02) [2003] ZALC 22.

28. Custance v SA Local Government Bargaining Council & others (2003) 24 ILJ 1387 (LC); also reported at (D114/02) [2003] ZALC 26.

29. Maidi v MEC for Department of Education & others (2003) 24 ILJ 1552 (LC); also reported at (J5675/00) [2002] ZALC 53.

30. CTL Group (Pty) Ltd v Memela & another (2003) 24 ILJ 1680 (LC); also reported at (D601/00) [2003] ZALC 34.

31. Hextex & others v SA Clothing & Textile Workers Union & others (2002) 23 ILJ 2267 (LC); also reported at (D1379/02) [2002] ZALC 80.

32. Midlands Pine Products (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union & others (2002) 23 ILJ 2276 (LC); also reported at (D1249/2002) [2002] ZALC 62; and [2002] 12 BLLR 1200 (LC).

33. Media Workers Association of SA & others v Independent Newspapers (Pty) Ltd (2002) 23 ILJ 918 (LC); also reported at (D426/2002) [2002] ZALC 31.

34. Wanenburg v Motor Industry Bargaining Council & others (2001) 22 ILJ 242 (LC); also reported at (J6084/99) [2000] ZALC 105.

35. Herbst & others v Fidelity Guards (2001) 22 ILJ 1828 (LC).

36. CRWUSA & others v Girlock SA (Pty) Ltd (2001) 22 ILJ 2008 (LC).

37. University of the Witwatersrand Johannesburg v Commissioner Hutchinson & others (2001) 22 ILJ 2496 (LC).

38. Maharaj v Bartel Kabel Werke (Pty) Ltd (2000) 21 ILJ 2269 (LC) (AJ).

39. Karachi v Porter Motor Group (2000) 21 ILJ 2043 (LC).

40. Geyser v MEC for Transport, KwaZulu-Natal (2001) 22 ILJ 440 (LC) (AJ).

41. KwaZulu-Natal South Coast Accommodation Association v Bargaining Council for the Liquor, Catering & Accommodation Trades & others (2004) 25 ILJ 2211 (LC); also reported at (D 85/04) [2004] ZALC 19; also reported at [2004] 8 BLLR 762 (LC).

42. Naicker v Q Data Consulting (2002) 23 ILJ 730 (LC); also reported at (D598/1999) [2001] ZALC 196.

43. Metrofile (Pty) Ltd v Commissioner for Conciliation, Mediation & Arbitration & others (2000) 5 LLD 521 (LC); also reported at (J555/99) [2000] ZALC 158.

44. Coin Security Group (Pty) Ltd v Machago (2000) 5 LLD 283 (LC); also reported at (J3304/98) [2000] ZALC 20.

BLLR

45. First National Battery (Pty) Ltd v CCMA & others [2010] 5 BLLR 534 (LC).
46. Enforce Guarding (Pty) Ltd v NASUWU & others [2003] 1 BLLR 9 (LC).
47. Rainbow Farms (Pty) Ltd v Ngidi & others [2001] 6 BLLR 664 (LC).
48. Western Cape Workers Association v Minister of Labour [2006] 1 BLLR 79 (LC).
49. Coates SA (Pty) Limited v CCMA & others [2004] 4 BLLR 353 (LC).
50. FAGWUSA & another v Hibiscus Coast Municipality & others [2003] 10 BLLR 996 (LC).
51. Sebenza Shipping Consultancy v Phakane [2003] 8 BLLR 832 (LC).
52. SACWTU v Coats SA (Pty) Ltd [2001] 8 BLLR 971 (LC).

53. Harrisawak v La Farge (South Africa) [2001] 6 BLLR 614 (LC).
54. Khanya & others v Cohen & others [2003] 8 BLLR 758 (LC).
55. Robinson v Eskom Holdings [2004] 9 BLLR 962 (LC).
56. Great North Transport v Legodi & others [2004] 1 BLLR 51 (LC).
57. Enforce Guarding (Pty) Ltd v NSUWU & Another [2001] 10 BLLR 1122 (LC).
58. Marine Cofee Shop & Another v Msomi [2001] 10 BLLR 1134 (LC).
59. SAMRI v Dlamini & Others [2001] 10 BLLR 1168 (LC).
60. Mpanzama v Fidelity Guards Holdings (Pty) Ltd [2000] 12 BLLR 1459 (LC).
61. Sappi Forests (Pty) Ltd v CCMA & others [2009] 3 BLLR 254 (LC).
62. Amalgamated Pharmaceuticals Ltd v Grobler NO & others [2004] 6 BLLR 537 (LC).
63. Telkom (Pty) Ltd v CCMA & others [2004] 8 BLLR 844 (LC).
64. CAWU v Grinaker Civil Engineering [2003] 1 BLLR 5 (LC).
65. NUMSA & Others v John Thompson Africa [2002] 4 BLLR 383 (LC); also reported at [2002] 7 BLLR 634 (LC).
66. Defy Appliances (Pty) Ltd v NUMSA & Others [2001] 12 BLLR 1328 (LC).
67. Pama and others v CCMA & Others [2001] 9 BLLR 1079 (LC).
68. Majola v MEC, Department of Public Works, Northern Province & others [2004] 1 BLLR 54 (LC).
69. Zabala v Gold Reef City Casino [2009] 1 BLLR 94 (LC).
70. Khoza v Premier of KwaZulu-Natal & another [2004] 3 BLLR 235 (LC).
71. Ntloko v CCMA & others [2002] 12 BLLR 1206 (LC).
72. Corobrik (Pty) Ltd t/a Brick & Tile v CCMA & Others [2002] 8 BLLR 738 (LC).
73. Baderbop (Pty) Ltd & Another v National Bargaining Council & Others [2001] 11 BLLR 1209 (LC).
74. CEPPWAWU & Others v Herber Plastics (Pty) Ltd & Another [2002] 1 BLLR 44 (LC).
75. Blue Ribbon Bakeries v Naicker & others [2000] 12 BLLR 1411 (LC).
76. Fynn v University of KwaZulu-Natal [2006] 11 BLLR 1099 (LC).
77. SA Post Office Ltd v Govender & others [2003] 8 BLLR 818 (LC).
78. Mthiyane & another v Banaris Investment CC t/a Essenwood Spar [2006] 12 BLLR 1177 (LC).
79. Jack v Director-General Department of Environmental Affairs [2003] 1 BLLR 28 (LC).

80. CEPPWAWU & others v R & B Timbers CC t/a Harding Treated Timbers [2002] 8 BLLR 733 (LC).
81. Transman v SAPO [2005] 8 BLLR 834 (LC).
82. IMATU v SA Local Government Bargaining Council & others [2010] 5 BLLR 536 (LC).
83. Shoprite Checkers (Pty) Ltd v CCMA & others [2005] 8 BLLR 816 (LC).
84. Jardine v Tongaat-Hulett Sugar Ltd [2003] 7 BLLR 717 (LC).
85. Kasipersad v CCMA & others [2003] 2 BLLR 187 (LC).
86. Pascoe & another v Minister for the Public Service & Administration & others [2002] 8 BLLR 791 (LC).
87. MWASA & Others v Independent Newspapers (Pty) Ltd [2002] 5 BLLR 452 (LC).
88. Crown Footwear (Pty) Ltd v NULAW & Others [2002] 2 BLLR 180 (LC).
89. Stojce v University of KZN (Natal) & another [2007] 3 BLLR 246 (LC).
90. Insurance & Banking Staff Association & another v Old Mutual Services & Technology Administration & another [2006] 6 BLLR 566 (LC).
91. Ngubane v Spray Fishing (Pty) Ltd [2003] 1 BLLR 66 (LC).
92. Standard Bank of SA Ltd v Fobb & others [2002] 9 BLLR 900 (LC).
93. UWCASU & Others v University of the Western Cape [2002] 5 BLLR 487 (LC).
94. KwaZulu Transport (Pty) Ltd v Mnguni & others [2001] 7 BLLR 770 (LC).
95. Els Transport v Du Plessis & others [2001] 6 BLLR 599 (LC).
96. SA Police Service v Zandberg & others [2010] 2 BLLR 194 (LC).
97. Ngutshane v Ariviakom (Pty) Ltd t/a Arivia.kom & others [2009] 6 BLLR 541 (LC).
98. Weltevrede Kwekery (Pty) Ltd v CCMA & others [2006] 7 BLLR 706 (LC).
99. Cassim v SAPS & others [2004] 8 BLLR 741 (LC).
100. Veary v Provincial Commissioner of Police & others [2003] 1 BLLR 96 (LC).
101. Perumal & another v Tiger Brands [2008] 1 BLLR 58 (LC).
102. Riverview Manor (Pty) Ltd v CCMA & others [2004] 2 BLLR 177 (LC).
103. Sibisi v Ganpath [2003] 4 BLLR 401 (LC).
104. Morag v Dortech (Pty) Ltd [2001] 8 BLLR 917 (LC).

105. Perumal v Minister of Safety and Security & Others [2001] 8 BLLR 953 (LC).
106. NEWU v Minister of Labour & others [2006] 10 BLLR 951 (LC).
107. Donato v MEC for Health & Welfare, Limpopo Province & others [2003] 8 BLLR 750 (LC).
108. NUM v Orleyn NO & others [2003] 3 BLLR 287 (LC).
109. Moslemany v Unilever PLC & another [2006] 12 BLLR 1167 (LC).
110. Jonker v Okhahlamba Municipality & others [2005] 6 BLLR 564 (LC).
111. HOSPERSA & another v MEC for Health [2003] 12 BLLR 1242 (LC).
112. Jele v Premier of the Province of KwaZulu-Natal & others [2003] 7 BLLR 723 (LC).
113. Ndokweni v Game Stores & others [2001] 6 BLLR 643 (LC).
114. CWIU & another v Ryan & others [2001] 3 BLLR 337 (LC).
115. SARS v CCMA & others [2010] 3 BLLR 332 (LC); also reported at (2010) 31 ILJ 1238 (LC).
116. National Teachers Union v Department of Education & Culture KZN & others [2006] 10 BLLR 941 (LC).
117. P Moeller & Co (Pty) Ltd v Levendal & others [2002] 8 BLLR 782 (LC).
118. CEPPWAWU obo Konstable & others v SAFCOL [2003] 3 BLLR 246 (LC).
119. Ncungama & others v Bargaining Council for the Liquor Catering & Accommodation Trades, South Coast, KwaZulu Natal & another [2002] 8 BLLR 766 (LC).
120. Co-operative Worker Association & another v Petroleum Oil & Gas Co-operative of SA & others [2007] 1 BLLR 55 (LC).
121. Serenite Wellness Centre (Pty) Ltd v CCMA & others [2003] 1 BLLR 81 (LC).
122. Rustenberg Base Metal Refiners (Pty) Ltd v Solidarity & others [2008] 12 BLLR 1223 (LC).
123. RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others [2008] 2 BLLR 184 (LC).
124. Stokwe v MEC, Department of Education, Eastern Cape Province & another [2005] 8 BLLR 822 (LC).

125. Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd & others [2005] 1 BLLR 104 (D).
126. Mohlaka v Minister of Finance & others [2009] 4 BLLR 348 (LC).
127. Shoprite Checkers (Pty) Ltd v CCMA & others [2007] 5 BLLR 473 (LC).
128. CEPPWAWU obo Gumede v Republican Press (Pty) Ltd [2006] 6 BLLR 537 (LC).
129. PSA obo Haschke v MEC for Agriculture & others [2004] 8 BLLR 822 (LC).
130. Gordon v Department of Health, KwaZulu-Natal [2004] 7 BLLR 708 (LC).
131. Mould v Roopa NO & others [2003] 1 BLLR 38 (LC).
132. Dlamini & others v Green Four Security [2006] 11 BLLR 1074 (LC); also reported at (LD671/03 , D671/2003) [2006] ZALC 4 (25 April 2006).
133. Kleinhans v Parmalat SA (Pty) Ltd [2002] 9 BLLR 879 (LC).
134. PFG Building Glass (Pty) Ltd v CEPPAWU & others [2003] 5 BLLR 475 (LC).
135. Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (LC).
136. Parry v Astral Operations Ltd [2005] 10 BLLR 989 (LC).
137. Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd [2007] 9 BLLR 845 (LC).
138. Standard Bank of South Africa v CCMA & others [2008] 4 BLLR 356 (LC).
139. Char Technology (Pty) Ltd v Mnisi & others [2000] 7 BLLR 778 (LC).
140. Ndhlela v Premier Soccer Club & another [2000] 7 BLLR 801 (LC).
141. NUM & others v Via Doro Manufacturing Ltd [2000] 7 BLLR 827 (LC).
142. Selela & others v Rand Water [2000] 11 BLLR 1355C).
143. Jones v Retail Apparel [2000] 6 BLLR 676 (LC).
144. De Beers Consolidated Mines Ltd v CCMA & others [2000] 5 BLLR 578 (LC).
145. Maada v MEC of the Northern Province [2000] 11 BLLR 1300 (LC).
146. Commissioner Staff Association obo Members v CCMA & others [2000] 8 BLLR 918 (LC).

147. Cementation (Africa Contracts) (Pty) Ltd v CCMA & others [2000] 5 BLLR 573 (LC).
148. Middleton and Others v Industrial Chemical Carriers (Pty) Ltd [2001] 6 BLLR 637 (LC).
149. National Union of Technikon Employees v Technicon SA [2000] 9 BLLR 1072 (LC).
150. Ntsabo v Real Security CC [2004] 1 BLLR 58 (LC).

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151. Resource Washing (Pty) Ltd v Zululand Coal Reclaimers Proprietary Limited and Others (10862/14) [2015] ZAKZPHC 21 (20 March 2015).
152. Mbete and Another v Registrar of Deeds Pietermaritzburg (12399/14) [2014] ZAKZPHC 53 (4 November 2014).
153. Nkwanyane v S (AR324/12) [2014] ZAKZPHC 52 (30 October 2014).
154. Sants Private Higher Education Institution v MEC For Department of Education KZN and Others (5374/2014) [2014] ZAKZPHC 42 (18 June 2014).
155. S v Zungu (SH 105/09) [2013] ZAKZPHC 14 (5 March 2013).
156. Rossitier and Others v Nedbank Ltd (8244/10) [2013] ZAKZPHC 13 (25 February 2013).
157. Shange v MEC for Education, KwaZulu-Natal (15860/08) [2013} ZAKZDHC 32 (17 May 2013).
158. Fraser NO and Others v Amalgamated Brokers CC (7806/2011) [2012] ZAKZPHC 78 (27 June 2012).
159. S v Pillay (AR 115/10) [2012] ZAKZPHC 48 (8 August 2012).
160. S v Ndwandwe (AR99/12) [2012] ZAKZPHC 47 (6 August 2012).
161. Akoo and Others v Master of the High Court and Others (5612/11) [2012] ZAKZPHC 45 (31 July 2012).
162. S v Hogg (R440/2012) [2012] ZAKZPHC 39 (26 June 2012).
163. Helen Roper Consulting v Toyota Tshusho Africa (1171/2010) [2012] ZAKZPHC 37 (21 June 2012).
164. Wannenburg v Madamu Techologies (Pty) Ltd (AR87/2012) [2012] ZAKZPHC 35 (13 June 2012).

165. Sants Private Higher Education Institution v MEC For Department of Education KZN and Others (5374/2014) [2014] ZAKZPHC 43 (18 June 2014).

166. D & E Trading (Pty) Ltd v Hilton Village Centre CC and Others (1342/13) [2013] ZAKZPHC 12 (19 March 2013).

167. Green v Amalgamated Brokers CC (7806/2011) [2012] ZAKZPHC 44 (26 June 2012).

168. S v Shaw [2011] ZAKZPHC 32; AR342/10 (1 August 2011).

169. S v Currin (AR 499/10) [2012] ZAKZPHC 46 (1 August 2012).

170. Naidoo and Another v Chetty and Others (6546/06) [2010] ZAKZPHC 104 (3 December 2010).

171. Gounden and Another v Master of the High Court and Others (3698/2014) [2015] ZAKZDHC 6 (18 February 2015).

172. S v Moyo (CC 98/12) [2013] ZAKZDHC 77 (8 August 2013).

173. Makwickana v Ethekwini Municipality and Others (11662/13) [2015] ZAKZDHC 7 (17 February 2015).

174. Venter v Khan and Others (14185/2011) [2014] ZAKZDHC 48 (3 November 2014).

175. Milliken v Road Accident Fund (4739/06) [2012] ZAKZDHC 65 (7 November 2012).

176. The Body Corporate of Dolphin Cove v Kwadukuza Municipality and Another (8513/10) [2012] ZAKZDHC 13 (20 February 2012).

177. Rodpaul Construction CC t/a Rods Construction v Ethekwini Municipality and Others (10075/13) [2014] ZAKZDHC 18 (2 June 2014).

178. Flack v National Director of Public Prosecutions and Others (15664/2007) [2012] ZAKZDHC 58 (2 October 2012).

179. North Global Properties (Pty) Ltd v Body Corporate of the Sunrise Beach Scheme (12465/2011) [2012] ZAKZDHC 47 (17 August 2012).

180. ABSA Bank Ltd v Pillay and Another (4552/2012) [2012] ZAKZDHC 63 (23 October 2012).

Labour court

181. Makibinyane v Nuclear Corporation of South Africa (NECSA) and Another [2009] ZALC 85; JS51/08 (5 March 2009).

182. Mabuza v Commission for Conciliation Mediation and Arbitration and Others (D 85/07) [2010] ZALC 315 (23 April 2010).

183. G v Minister of Safety and Security and Another (D495/06) [2010] ZALC 312 (18 June 2010).

184. PPC Jupiter (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (JR169/08) [2010] ZALC 274 (11 May 2010).

185. Golden Arrow Bus Services v SATAWU (C588/2009) [2009] ZALC 258 (13 August 2009).

186. Coetsee and Another v Transnet Ltd and Others (D 76/09) [2009] ZALC 247 (16 March 2009).

187. MCL Ukhozi Recruitment Services CC v Khan and Others (D269/08) [2009] ZALC 245 (9 February 2009).

188. Health and Other Services Personnel Trade Union of South Africa ("HOSPERSA") and Others v MEC for Health, Kwazulu-Natal and Others (D844/09) [2009] ZALC 234 (18 December 2009).

189. Mankwe v Nowosenetz and Others (JR 483/06) [2009] ZALC 207 (16 September 2009).

190. Saunders v WACO Africa Ltd (D387/06) [2009] ZALC 115 (4 November 2009)

191. Ngozwane v Commission for Conciliation, Mediation and Arbitration and Others (D860/06) [2009] ZALC 46 (25 February 2009).

192. The Crazy Store (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (C373/2006) [2008] ZALC 236 (7 May 2008).

193. Trentyre (Pty) Ltd v National Union of Metalworkers of South Africa (NUMSA) and Others (C517/2006) [2008] ZALC 235 (7 May 2008).

194. South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others (D257/06) [2008] ZALC 233 (19 November 2008).

195. Hanekom v Stone NO and Others (D111/01) [2008] ZALC 230 (16 May 2008).

196. Unitrans Fuel and Chemical (Pty) Ltd v Naidoo and Others (D197/04) [2008] ZALC 229 (14 May 2008).

197. CTP Ltd v Statutory Council of the Newspaper, Printing and Packaging Industry and Others (D 52/2008) [2008] ZALC 228 (22 February 2008).

198. Early Bird Services v Commission for Conciliation Mediation and Arbitration and Others (D 30/03) [2008] ZALC 227 (6 February 2008).

199. Chetty v Rustenburg Platinum Mines Ltd and Others (D 663/05) [2008] ZALC 226 (24 October 2008).

200. Lewis Stores (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others (D669/09) [2008] ZALC 225 (17 October 2008).

201. National Union of Public Service and Allied Workers v Public Servants Union (D635/05) [2008] ZALC 224 (11 August 2008).

202. K W Plant Hire CC v Lambert and Others (D872/05) [2008] ZALC 221 (21 February 2008).

203. Unitrans Fuel and Chemical (Pty) Ltd v Naidoo and Others (D197/04) [2008] ZALC 175 (8 October 2008).

204. McCaffery v Ascot Venture Capital (C619/05) [2007] ZALC 200 (18 May 2007)

205. Smiths Manufacturing (Pty) Ltd v Dispute Resolution Centre and Others (D344/05) [2007] ZALC 193 (20 April 2007).

206. Eshowe Spar v Mkhwanazi and Others (D625/05) [2007] ZALC 192 (4 December 2007).

207. Edcon Ltd v Sithole (D522/04) [2007] ZALC 190 (20 March 2007).

208. Msomi v Commission for Conciliation Mediation and Arbitration and Others (D694/05) [2007] ZALC 189 (19 March 2007).

209. Nampak Products (Pty) Ltd v Stilwell and Others (D765/05) [2007] ZALC 186 (17 October 2007).

210. Mookeng v Tshwane University (J2252/06) [2007] ZALC 166 (9 March 2007).

211. Brown v Cashbuild and Others (JR169/07) [2007] ZALC 162 (4 September 2007).

212. Siddiz v Ralefatane NO (JR1556/04) [2007] ZALC 125 (7 February 2007).

213. National Union of Mineworkers v AFGEM Ltd and Others (J581/06) [2006] ZALC 133 (21 April 2006).

214. Mohale v Formica South Africa (JR1574/03) [2006] ZALC 112 (24 November 2006).

215. National Entitled Workers Union (NEWU) v Minister of Labour and Others (J2457/05) [2006] ZALC 59 (5 May 2006).

216. Mkhungo v Toyota South African Motors (D153/03) [2005] ZALC 53 (11 February 2005). (Marked 'not reportable')

217. Department of Public Works v General Public Service Sectoral Bargaining Council and Others (D1646/02) [2005] ZALC 52 (11 February 2005).

218. Koto and Another v General Public Service Sectoral Bargaining Council and Others (P254/03) [2005] ZALC 45 (1 February 2005).

219. National Union of Metal Workers of South Africa (NUMSA) v Dorbyl and Another (J1724/99) [2002] ZALC 204 (2 February 2002).

220. Kleinhans v Parmalat SA (Pty) Ltd (P151/01) [2002] ZALC 57 (27 June 2002).

221. Chemical Energy Paper Printing Wood and Allied Workers Union and Others v R & B Timbers CC t/a Harding Treated Timbers (D119/2001) [2002] ZALC 50 (7 June 2002).

222. University of Western Cape Academic Staff Union and Others v University of Western Cape (C801/2001) [2002] ZALC 29 (25 March 2002).

223. Richards v Umgeni Water Board (D669/03) [2009] ZALC 241 (4 November 2009).

224. Astral Operation Ltd v Bestel and Others (JR1502/05) [2008] ZALC 181 (28 May 2008).

225. Hills v Commission for Conciliation Mediation and Arbitration and Others (D254/05) [2007] ZALC 194 (30 April 2007).

226. Thekwini Security Services v Director General, Department of Labour (D576/05) [2007] ZALC 187 (8 February 2007).

227. UKD Marketing CC and Others v Commission for Conciliation Mediation and Arbitration and Others; Saxon Joinery and Others v

Commission for Conciliation Mediation and Arbitration and Others (D179/2001) [2002] ZALC 49 (3 June 2002).

228. Naidu and Others v South African Bureau of Standards (D238/08) [2009] ZALC 248 (16 March 2009).

229. Thompson Savage And company (Pty) Ltd v National Bargaining Council for the Clothing Manufacturing industry and Others (D 203/03) [2004] ZALC 67 (8 September 2004).

230. Grupo Antolin (Pty) Ltd v Numsa (D 356/03) [2004] ZALC 63 (2 September 2004).

231. Numsa and Individual Employees and Others v Lee Eletronics and Others (P 829/99) [2004] ZALC 61 (27 August 2004)..

232. Reddy v Scania and Others (D 317/03) [2004] ZALC 7 (10 February 2004); also reported at [2004] ZALC 50 (28 June 2004).

233. Mckonie v Mineworkers Development Agency (JS864/02) [2003] ZALC 111 (14 October 2003).

234. Kaynie v Credit Guarantee Insurance (J1107/02) [2003] ZALC 97 (10 September 2003).

235. Dannhauser and Others v Ethekwini Municipality (D332/03) [2003] ZALC 74 (26 June 2003).

236. Feltex Foam Converting, a division of Feltex Limited v SACTWU and Others (D279/02) [2003] ZALC 45 (2 May 2003).

237. Ncungama and Others v Bargaining Council for the Liquor, Caters and Accomodation Traders, South Coast, Kwazulu-Natal and Another (D608/2001) [2002] ZALC 37 (18 April 2002).

238. Oberem v Cotton King Manufacturing (Pty) Ltd and Another (D 318/03) [2004] ZALC 18 (16 February 2004).

239. Dos Santos and Other v Khuene Nagel SA (Pty) Ltd and Others (JR1549/02) [2003] ZALC 124 (3 March 2003).

240. Van Vuuren and Another v Provincial Commissioner, S.A.P.S. Free State and Others (J4790/02) [2002] ZALC 106 (19 December 2002).

241. Coates Brothers (SA) Ltd v Shanker and Others (D1735/01) [2002] ZALC 88 (23 October 2002).

242. Hlekwayo and Another v Secretary, Department of Finance and others (D277/99) [2002] ZALC 87 (23 October 2002).

243. Southern Sun Hotel Interest (Pty) Ltd t/a Breakers Resort v Shanker and Others (D335/02) [2002] ZALC 85 (21 October 2002).

244. Strauss v CCMA (JR1077/01) [2002] ZALC 82 (20 September 2002).

245. Fidelity Gurad Holdings v Commission for Conciliation Mediation and Arbitration and Others (D99/01) [2002] ZALC 6 (30 January 2002).

246. Chemical Paper Printing v Glass and Aluminium 2000 (Pty) Limited (J2052/99) [2000] ZALC 110 (29 September 2000).

247. CWIU v Fredricks and Another (D335/99) [2000] ZALC 100 (15 September 2000).

248. Prasad v Lebea and Others (J4015/99) [2000] ZALC 58 (29 June 2000).

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 723/2014

In the matter between:

ARNOLD DENZIL NUNDALAL	APPLICANT
and	
THE DIRECTOR OF PUBLIC PROSECUTIONS KZN	FIRST RESPONDENT
PRIVATE PROSECUTOR, NIEMESH SINGH	SECOND RESPONDENT
THE REGIONAL MAGISTRATE, A MAHARAJ NO	THIRD RESPONDENT
THE CLERK OF THE "U" REGIONAL COURT, DURBAN	FOURTH RESPONDENT

JUDGMENT

Date of hearing: 27 March 2015 Date of judgment: 8 May 2015

D. PILLAY J

Constitution of the Court

[1] This application for review serves before a full court of three judges by order of the erstwhile judge president granted on 28 November 2014. As a review of the administrative decisions of the first respondent, Director of Public Prosecutions KZN (DPP), and of the fourth respondent, Clerk of 'U' Regional Court (the clerk), it should serve before a single judge sitting as a court of first instance.[1] It should take the form of an application on notice of motion.[2]

[2] As a purported review of the decision of the third respondent regional magistrate, it should also follow r 53 read with r 6 of the Uniform Rules of Court. However, if it is not a review but a criminal or civil appeal, then it must serve before a full bench of not fewer than two judges.[3]

[3] Two or more judges constitute a full bench and three judges make up a full court.[4] This terminology is often used interchangeably[5] creating unnecessary confusion as might also have happened in this case. In terms of s 1 of the Superior Courts Act 10 of 2013 'full court' means a Division of the High Court

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[1] Section 14 (1) of the superior Courts Act 10 of 2013. Nevertheless the Judge President, inter alia, has discretion to direct that a matter be heard by a court consisting of not more than three judges.
[2] Uniform Rule 53 read with PAJA Rule 8 in Rules of Procedure for Judicial Review of Administrative Action published by Government Notice R. 966 of 9 October 2009 in Government Gazette No. 32622.
[3] Section 14(3) Superior Courts Act 10 of 2013 read with ss1 and 83 of Magistrates' Courts Act 32 of 1944.
[4] Section 16(1)(a) of the Superior Courts Act.
[5] See e.g the reference to 'full bench' constituted under s 14 of the Superior Courts Act 10 of 2013 in *Ronald Bobroff & Partners Inc v De La Guerre* 2014 (3) SA 134 (CC) 134 para 3; *De La Guerre v Ronald Bobroff & Partners Inc and Others* (22645/2011) [2013] ZAGPPHC 33 (13 February 2013.)

consisting of three judges.[6] Why after representation by the parties to the erstwhile judge president this matter now serves before a full court is unclear. Be that as it may both parties confirmed at the outset of the hearing that the court is properly constituted.

Background

[4] The second respondent private prosecutor, Niemesh Singh, seeks to prosecute the applicant, Arnold Denzil Nundalal, privately on charges of defeating the ends of justice and making a false statement. The private prosecutor obtained a certificate of *nolle prosequi* from the DPP. He caused the clerk to issue a criminal summons. The regional magistrate who presided at the criminal trial dismissed *in limine* challenges to the certificate, the non-payment of security in terms of s 9(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) and the validity of the summons. In this application the applicant seeks to review and set aside the *nollle*, the summons and the ruling of the regional magistrate. Do these reviews fall under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the common law exclusively, read with r 53? This application was brought exclusively under the common law read with the review provisions in s 22 of the Superior Courts Act and r 53 of the Uniform Rules of Court.

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[6] 14. Manner of arriving at decisions by Divisions.—(1) (a) Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine.
(b) A single judge of a Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division as contemplated in paragraph (a).' (my underlining)

Reviews under PAJA

[5] *Bato Star Fishing (Pty) Ltd V Minister Of Environmental Affairs And Others* 2004 (4) SA 490 (CC) offers the short answer to the question above:

> 'There are not two systems of law regulating administrative action - the common law and the Constitution - but only one system of law grounded in the Constitution. The Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself.'

Thus it is to PAJA that I turn.

[6] Section 1 of PAJA excludes from the definition of 'administrative action' any decision taken or any failure to take a decision by an organ of state excluding:

> '(ee) the judicial functions of a judicial officer of a court...
>
> (ff) a decision to institute or continue a prosecution.'

[7] Subsection (ee) would exclude the regional magistrate's ruling from the definition of 'administrative action'. Therefore it is not subject to PAJA. As for the summons the clerk is not a judicial officer performing judicial functions when he or she issues a summons. Section 1 of Superior Courts Act defines 'judicial officer' to mean any person referred to in s 174 of the Constitution of the Republic of South Africa, 1996 which deals with the appointment of judicial officers. The act of issuing a summons in a private prosecution is therefore administrative action of an organ of state as defined in s 1(a) of PAJA.

[8] The converse of a decision to institute or continue with a prosecution (i.e. to refuse to prosecute) is not excluded under sub s 1(ff) of PAJA. The DPP's decision to issue a certificate is an administrative decision. Merely because the decision to issue a certificate takes place in the context of criminal law does not strip it of its essential character as an administrative act. In *Buthelezi*

and Others v Attorney General, Natal 1986 (4) SA 377 (D) three judges of this division found that an accused had a right to a hearing before the prosecution issues a certificate refusing bail in term of s 30(1) of the Internal Security Act 74 of 1982. Applying the *audi alteram partem* principle the court acknowledged that the decision to issue that certificate was administrative. Issuing a *nolle* also involves prosecutorial discretion. Accordingly PAJA applies to review and set aside the certificate.

Uniform Rule 53

[9] Section 22 of the Superior Courts Act prescribes a limited range of 4 grounds of review of proceedings of any Magistrates' Court.[7] The applicant has not pleaded any ground of review. None of the 4 grounds apply to the ruling of the regional magistrate. Because the applicant challenges the reasoning and result it is at most an appeal.

[10] However, the issues before the regional magistrate are the same issues before this court. Any decision of this court will be binding on the regional court. Furthermore the record of the proceedings in that court is before a full court. The respondent has not objected in terms of either r 30 or 30A to the procedure, form and non-compliance with the Uniform Rules pertaining to reviews from the Magistrates' Court. All the issues are conveniently consolidated in one application and can be disposed of simultaneously.

The Certificate

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[7] They are : ' (a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding office;
(c) gross irregularity in the proceedings; and
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[11] I deal first with the review of the certificate and the summons under PAJA before turning to consider the decision of the regional magistrate. The proper procedure for reviewing administrative action is prescribed in PAJA and its rules. Section 6(2) lists the grounds on which administrative actions may be reviewed. Section 7 prescribes a time limit of 'not later than 180 days' from which the person concerned who was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. [8]

[12] Whenever administrative action is challenged the starting point is to ascertain the reasons for the decision. Without reasons the decision cannot be tested for rationality[9] and reasonableness[10] and therefore justification, both standards being set by the CC.

[13] Additional to the reasons must be the record of the material that served before the decision-maker on the basis of which she decided to issue the certificate. Neither the DPP's reasons nor the record of the proceedings are before this court. What the court has is a copy of the certificate, and correspondence and memoranda from senior counsel and attorneys for the private prosecutor exchanged with the DPP. Without the DPP's reasons for issuing the certificate there is no clarity as to why she issued the certificate and whether these documents informed her decision.

[14] The applicant invited the DPP in his notice of motion to dispatch the record and reasons to the registrar of the high court. She did not respond. The applicant did not follow through with an application to compel the DPP to

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[8] Section 7(1)(b).
[9] *South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) paras 94 and 141.
[10] *Bato Star Fishing Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 43-49; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) paras 107-110.

produce the record with reasons to support its application to review and to set aside the certificate. If he had and it transpired that the reasons were that there was insufficient evidence or that the matter was *de minimis,* both of which are distinct possibilities in this case, the applicant would have been able to make short shrift of the private prosecution.

[15] Another defect in this review is that this application was launched on 11 October 2013. The DPP issued the certificate on 24 August 2012. This was considerably more than the 180 days prescribed in s 7(1)b of PAJA. No application for condonation for the delay accompanies this application for review.

[16] Notwithstanding the glaring procedural flaws the private prosecutor has not objected to the application on the grounds that the applicant has not complied with the above 2 procedural requirements of PAJA. In fact neither counsel seemed to be aware that PAJA would apply in an application to set aside the certificate and the summons. Counsel for the applicant doubted its application.

[17] Had the private prosecutor resisted the application with a challenge to these defects, the challenge might have been dispositive of this aspect of the application. As he failed to do so and as there are more pressing substantive considerations the application survives notwithstanding its procedural defects.

[18] Turning to the substantive complaint about the certificate the applicant's challenge is that the private prosecutor failed to satisfy the jurisdictional prerequisites for a private prosecution[11] by furnishing the DPP with proof that he had some substantial and peculiar interest in the issue of the trial arising out of some injury that he suffered as a result of the commission of the

[11] Section 7(1)(a) of the CPA.

offence.[12] The DPP failed to apply her mind to the jurisdictional prerequisites for instituting a private prosecution.[13] She hastily issued the certificate as a result of the private prosecutor threatening to obtain a mandamus against DPP.[14] So it was submitted for the applicant.

[19] Erroneously, the applicant and his counsel conflate the jurisdictional prerequisites for a private prosecution[15] with the circumstances in which the DPP may decline to prosecute. A certificate is quiet simply confirmation that the DPP declines to prosecute, nothing more nothing less. It is not a tarot foretelling that the private prosecutor has 'substantial and peculiar interests' and has been injured personally as a consequence of the offence.

[20] Du Toit interprets s 7(2)(b) of the CPA to require the prosecuting authority to issue the certificate provided that the requisites in s 7(1) are met. [16] Respectfully this is not what s 7(2)(b) states. Section 7(2)(b) states:

> 'The attorney-general[17] shall, in any case in which he declines to prosecute, at the request of the person intending to prosecute, grant the certificate referred to in paragraph (a).'

[21] It merely refers to the person intending to prosecute in s 7(1). The scheme of s 7 is such that the DPP must issue the certificate before the private prosecutor can begin a prosecution. It is not as Du Toit seems to suggest that the DPP has to issue the certificate because the private prosecutor has established the requisite interest. Whether the private prosecutor has such an

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[12] Para 12.1 and 59 of the founding affidavit.
[13] Para 61 of the founding affidavit.
[14] Para 62 of the founding affidavit.
[15] *Ellis V Visser* 1954 (2) SA 431 (T) 434E-F:'The private party concerned must show (1) some substantial and peculiar interest, (2) in the issue of the trial, (3) arising out of some injury, (4) which he individually has suffered by the commission of the offence.'
[16] Du Toit et al *Commentary on the Criminal Procedure Act* 1-57.
[17] Read as Director of Public Prosecutions.

interest does not inform the DPP's decision to issue the certificate. Noting that 'private prosecutions were unusual and a departure from the basic law that criminal prosecutions must be conducted by a public prosecutor' a single judge held in *Singh v Minister Of Justice And Constitutional Development And Another* that the prosecuting authority is not obliged by the provisions of s 7(2) to issue a certificate.[18] The prosecutor's obligation is to decide whether the statements can result in a conviction for the State. The certificate in terms of s 7(2)(a) is *prima facie* proof that the DPP has seen the statements or affidavits found in the case but he declines to prosecute.[19] Whether the private prosecutor fulfills the jurisdictional requirements is not the DPP's concern. Nor is it her concern what the person requesting the certificate plans to do with it. For employment or other purposes he could request it simply as proof that he is freed from prosecution. Contrast this with the DPP's extensive powers to be consulted and to appoint the prosecutor when issuing a certificate under s 8(2) in a private prosecution under statutory right. She could instruct a local senior prosecutor to hold a watching brief to inform her if and when the prosecution is instituted. She might even intervene by way of application to stop a prosecution so that the State can commence or continue the prosecution.[20] However, the decision to institute a private prosecution under s 7 is entirely that of the private prosecutor to be properly taken only when he is able to meet the jurisdictional requirements for a private prosecution.

[22] A certificate is issued for a specific offence. It has a lifespan of three months after which it lapses.[21] This helps to enhance certainty and prevent

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[18] *Singh v Minister Of Justice And Constitutional Development And Another* 2009 (1) SACR 87 (N) at 92F

[19] Du Toit 1-57.
[20] Section 13 of the CPA.
[21] Section 7(2)(3) of the CPA.

abuse of private prosecution.[22] The court may interdict a private prosecution on various grounds including the private prosecutor's lack of *locus* and under the Vexatious Proceedings Act 3 of 1956.[23]

[23] Paragraph 4(c) of the NPA Manual Policy, a public Government Document,[24] requires a prosecutor to prosecute if there is sufficient evidence for reasonable prospects of a conviction. In exercising its discretion the prosecuting authority must have regard to the nature and seriousness of the offence, the interests of the victim and the broader community and the circumstances of the offender.[25]

[24] Du Toit summarises the circumstances in which the prosecuting authority may decline to prosecute.[26] If a prosecutor declines to prosecute a possible inference is that there is no *prima facie* case to justify the continuation of the prosecution. A *prima facie* case is one in which the allegations are supported by statements and real and documentary evidence upon which a court should convict. Even if *prima facie* evidence exists a prosecutor may refuse to prosecute on the grounds of the triviality of the offence.[27] Prosecutors are urged to distinguish between *prima facie* weak cases from stronger ones and to decline to prosecute in weak cases[28] in order to avoid congesting court rolls and to preserve public resources.[29] Not every insult to dignity that founds a civil action is necessarily serious enough to justify a criminal prosecution.[30] Persisting with a weak case in order to influence an accused to pay an

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[22] *Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T); Du Toit 1-57.
[23] Van Deventer *v Reichenberg and Another* 1996 (1) SACR 119 (C) at 128B-C; Du Toit 1-58
[24] *S* v *Shaik* and *Others* 2008 (1) SACR 1 (CC) at 33.
[25] Du Toit 1-38.
[26] Du Toit 1-36.
[27] *S v Visagie* 2009 (2)SACR 70 (W).
[28] Van Zyl 'Pre-Trial Detention in South Africa: Trial and Error' in von Kempen (ed) *Pre-Trial Detention: Human Rights, Criminal Procedure Law and Penitentiary Law Comparative Law* (2012) 661 at 692.
[29] Du Toit 1-39
[30] Du Toit 1-37; *Ryan v Petrus* 2010 (1) SACR 274 (ECG) at 281F–G.

admission of guilt fine to be rid of the worry, inconvenience and expense of fighting a criminal charge and not because of being guilty is improper because an admission of guilt fine remains on the criminal record as a previous conviction with potentially serious consequences. Thus a prosecution for even a trivial offence is a serious matter.

[25] These are the considerations that should have informed the prosecutor's decision not to continue with the prosecution of the applicant. Whether the private prosecutor has a substantive and peculiar interest and has suffered any injury personally from the offence are neither considerations nor prerequisites for issuing a certificate. Without the DPP's reasons and the record that served before her this court can make no definitive findings on what considerations informed her decision to issue the certificate. To say that the private prosecutor's threats of a mandamus induced her to issue the certificate is pure speculation.

[26] A point not raised by either party is the right to a hearing before the prosecutor decides to issue the certificate. Prosecution policy anticipates input from both the victim and the offender in deciding on whether to prosecute or not.[31] There is no evidence that the applicant participated in the production of the DPP's decision to issue the certificate. Ordinarily he should have been pleased not to be facing a public prosecution. He seeks to set aside the certificate because it is a jurisdictional prerequisite for a private prosecution. Setting it aside would spare him of that prosecution.

[27] Without the reasons and the record serving before the DPP being filed in this application the court finds that the applicant has failed to set up the legal

[31] See item 3.A. of the Prosecution Policy.

and evidential basis for reviewing and setting aside the certificate in terms of s 7(2) of the CPA. The certificate stands.

The Summons

[28] The applicant challenges the issuing of the summons on formal, procedural and substantive grounds.[32] They are:

a) The summons was not issued in the name of the private prosecutor.[33]
b) The summons does not describe the private prosecutor with certainty and precision.[34]
c) The summons is not signed.[35]
d) The summons was issued before the private prosecutor produced the certificate to the clerk.[36]
e) The summons was issued before the private prosecutor deposited with the Magistrates Court, Durban an amount determined by that court as security for the costs which may be incurred in respect of the applicant's defence to the charge.[37]
f) The summons was issued without the private prosecutor proving some substantial and peculiar interest in the issue of the trial arising out of some injury that he individually suffered in consequence of the commission of the offence.[38]

[29] The first three grounds attack the private prosecutor's non-compliance with the formalities of a validly issued summons. The latter three grounds

[32] Para 12 of the founding affidavit.
[33] Section 10(1) of the CPA.
[34] Section 10(1) of the CPA.
[35] Section 10(2) of the CPA.
[36] Section 7(2)(a) of the CPA.
[37] Section 9(1)(b) of the CPA.
[38] Section 7(1)(a) of the CPA.

attack the private prosecutor's non-compliance with the jurisdictional requirements for a private prosecution. Sections 7 and 9 prescribe these jurisdictional prerequisites that must exist before the clerk issues a summons. Whether a private prosecutor has a substantial and peculiar interest and has suffered an injury personally as a result of the offence is not only the most important substantive statutory prerequisite for a private prosecution but also the crux of the dispute between the parties. Without it the private prosecution collapses altogether. I will return to the jurisdictional requirements after disposing of the formal procedural challenges.

Procedural challenges to summons

[30] Constitutionally established under s 179 of the Constitution the prosecuting authority's importance in the administration of justice is entrenched. It has the potential to trench on rights in the Bill of Rights. Subsection 2 entrenches its power to institute criminal proceedings on behalf of the State. Foreshadowed in subsection 3 is national legislation to detail the implementation of the exercise by the prosecuting authority of its powers and its functions. National legislation prescribes its obligations when a person seeks a private prosecution. The statutory requirements for a private prosecution in s 7 seek to avoid frivolous and vexatious prosecutions for the same reasons discussed above that public prosecutors may decline to prosecute. Usually they must be adhered to strictly to ensure a fair trial. A criminal prosecution, private or public, has consequences potentially invasive and destructive of an accused's substantive rights to, amongst other things, personal freedom and security and the rights to a fair trial, of which the right to be informed of one's accuser[39] and the nature of the accusations[40] are paramount. As a general proposition the obligation to provide an accused with

[39] *S v Stefaans* 1999 (1) SACR 182 (C) at 188A.
[40] *S v Essop* 2014 (2) SACR 495 (KZP) para 12.

the name, description and signature of the private prosecutor would be fundamental to the rights of an accused to a fair trial, not least because the CPA prescribes them.

[31] Section 10 of the CPA provides:

> **'10. Private prosecution in name of private prosecutor**
>
> (1) A private prosecution shall be instituted and conducted and all process in connection therewith issued in the name of the private prosecutor.
>
> (2) The indictment, charge-sheet or summons, as the case may be, shall describe the private prosecutor with certainty and precision and shall, except in the case of a body referred to in section 8, be signed by such prosecutor or his legal representative'

[32] Manifestly, the name, description and signature of the private prosecutor must be evident from the summons. The use of the word 'shall' in s 10(1) and 10(2) is imperative and peremptory. Reasons for such statutory prescription becomes obvious with reference to s 35 of the Constitution and s 20 of the National Prosecuting Authority Act 32 of 1998. Section 35 of the Constitution lists the rights of everyone who is arrested for allegedly committing an offence, who is detained and who is an accused person facing a trial. The right to fair trial in subsection 3 of the Constitution includes the rights to be informed of the charge with sufficient detail to answer it.

[33] The face of the summons does not disclose who the prosecutor is but that it is a private prosecution. The only reference to private prosecution and the identity of the private prosecutor emerges in an addendum to the charge sheet. Neither the charge sheet nor the addendum to it provides any description of the private prosecutor. Given that the parties knew each other these defects in the summons are not fatal, notwithstanding the

peremptoriness of s 10. Besides, the non-compliance can be cured with a request for further particulars.

[34] The private prosecutor concedes that he did not sign the summons but contends that this was not a material defect. The signature to the charge sheet could be a material requirement. Without it a private prosecutor could disassociate himself from the prosecution e.g. if an applicant sued for malicious prosecution. The signature indicates that the process is valid, serious and that the accused's attendance in court is required. An accused may justifiably ignore an unsigned summons resulting in inconvence to the court and the administration of justice. However the private prosecutor's failure to issue and serve a signed summons can be remedied by him signing and having it re-served on the applicant. This defect too is not fatal in the circumstances of this case.

Production of Certificate

[35] Did the private prosecutor lodge a certificate when he lodged his summons for issue by the clerk? Section 7(2)(a) of the CPA states:

> 'No private prosecutor under this section shall obtain the process of any court for summoning any person to answer any charge unless such private prosecutor produces to the officer authorized by law to issue such process a certificate signed by the attorney-general that he has seen the statements or affidavits on which the charge is based and that he declines to prosecute at the instance of the State.'

[36] Manifestly, production of the certificate is a peremptory statutory prerequisite for a private prosecution.

[37] On 21 November 2012 the applicant received the summons directing him to appear in 'U' Regional Court Durban. At his first appearance on 12 December 2012 he established that the private prosecutor had not lodged a certificate with the clerk when issuing the summons.

[38] When the hearing commenced in the regional court on 24 June 2013 the applicant's counsel invited the private prosecutor to disclose the process he had followed in having the summons issued against the applicant. The legality of the process was already in issue. His counsel declined to provide the information despite the fact that his client bore the onus of proving that he had complied with all the jurisdictional prerequisites for a private prosecution.

[39] The private prosecutor bore the onus of proving that he had lodged the certificate with the clerk when he sought to have his summons issued against the applicant. In rebuttal the applicant filed an affidavit by the clerk of the court denying any knowledge of the summons in the case against the applicant.[41] The private prosecutor's defence that the clerk would never have issued the summons without seeing the certificate is speculation. To discharge his obligation all he had to do was produce the certificate bearing the clerk's stamp. If he had a stamped certificate he would have produced it. Clearly he did not have it. He would have ensured that the certificate bore the clerk's stamp if he was mindful that lodging the certificate was a statutory requirement in terms of s 7(2)(b). He was unable and refused to produce a certificate stamped by the clerk or some other proof that he had lodged the certificate prior to or simultaneously with having the summons issued.

[40] The private prosecutor's failure to lodge the certificate is non-complainace with a jurisdictional requirement amounting to a material defect in the private prosecution of the applicant.

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[41] Annexure ADN7 page 154 of the pleadings.

Security Deposit

[41] Did the private prosecutor deposit security with the court? At his appearance on 12 December 2012 the applicant established that the private prosecutor had not deposited any amount as security for costs as required under s 9(1)(b) of the CPA. His attorney agreed with the attorney for the private prosecutor that the latter would secure an amount of R90 000 privately for costs. The applicant persisted that the private prosecutor had to lodge security in the magistrate's court prior to issuing a summons, with that court determining the amount of the security for costs.

[42] Again failing to appreciate his statutory obligation the private prosecutor vented that by their agreement the applicant had waived this statutory provision which was permissible. Haranguing on that the applicant was making a mockery of his own agreement, thus demonstrating how desperate he was to avoid the merits of the prosecution at all costs, the private prosecutor irrelevantly questioned how the applicant had ascertained that security had not been determined by the court and that the moneys had not been paid into court.

[43] If the private prosecutor had obtained a determination by the court and paid the moneys into the court before issuing the summons as he was statutorily obliged to there would have been no need for any extra curial agreement between the attorneys after the summons had been issued. Correspondence commencing on 24 January 2013 and continuing until 8 April 2013 illustrate the negotiations between the attorneys to settle the amount of the security for costs. Finally reserving all the applicant's rights his attorney

accepted an undertaking that the funds would be retained in the trust account of the private prosecutor's attorney.[42]

[44] On the facts the private prosecutor failed to lodge security as prescribed in s 9(1)(b) of the CPA. The negotiations between the attorneys was a stopgap measure to safeguard the interests of the applicant who would otherwise have no security at all.

[45] The private prosecutor's failure to lodge security in the magistrate's court is non-compliance with a jurisdictional requirement amounting to a material defect in the private prosecution of the applicant. [43]

Substantial and peculiar interest and injury

[46] What is the meaning of substantial and peculiar interest in the context of s 7(1) which provides as follows?

> **'7. Private prosecution on certificate *nolle prosequi***
>
> (1) In any case in which a Director of Public Prosecutions declines to prosecute for an alleged offence-
>
> (a) any private person who proves some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually suffered in consequence of the commission of the said offence;
>
> (b) a husband, if the said offence was committed in respect of his wife;
>
> (c) the wife or child or, if there is no wife or child, any of the next of kin of any deceased person, if the death of such person is alleged to have been caused by the said offence; or

[42] Annexure PP1-PP4 pages 92 – 97 of the pleadings.
[43] *Van Deventer v Reichenberg and Another* 1996 (1) SACR 119 (C) at 128I-129D

(d) the legal guardian or curator of a minor or lunatic, if the said offence was committed against his ward;

may, subject to the provisions of section 9 and section 59(2) of the Child Justice Act, 2008, either in person or by a legal representative, institute and conduct a prosecution in respect of such offence in any court competent to try that offence. '

[47] The Concise Oxford English Dictionary defines 'substantial' to mean 'of considerable importance, size, or worth'.[44] '[S]ubstantial' occurs in many statutes. It is unhelpful to suggest as counsel for the applicant did that 'substantial' means the same as it does in 'substantial and compelling circumstances' to avoid the imposition of a prescribed minimum sentence. 'Substantial' must garner its meaning from the particular context in which it is used. In the context of s 7 'substantial' must refer to the interest being such as to be capable of resulting in a conviction. A public prosecution will not commence or continue unless a conviction is possible.[45] There is no rational basis for setting a different threshold for a private prosecution. [46] Irrespective of whether the prosecution is public or private, for a fair trial an accused cannot be expected to mount any defence other than to stave of a conviction. Anything else would amount to shifting the goal posts in a private prosecution thus creating uncertainty about what standard an accused must meet. A standard that differs between public and private prosecution and from one private prosecution to the next will not be a foundation for a fair trial.

[48] Correlatively, if the private prosecutor fails to prove that he has a substantial interest then no private prosecution can ensue. An example of an insubstantial interest is, if the issue is *de minimis* or frivolous and vexatious.[47]

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[44] (2011) 12th ed.
[45] See item 3.A. of the Prosecution Policy.
[46] *Ellis V Visser* 1954 (2) SA 431 (T) at 436D-E;
[47] Van Deven*ter v Reichenberg and Another* 1996 (1) SACR 119 (C) at 125D and cases cited there.

The interest does not have to be of such a nature as to give rise to a civil claim.[48]

[49] 'Peculiar' in the context could mean 'unusual', 'abnormal', 'atypical', 'different', 'distinctive' and 'unique', some of the meanings given in the Thesaurus.[49] Reinforced by the words 'private person' and 'individually suffered', 'peculiar' must mean 'unique' in s 7(1)(a). The close personal relationships for which private prosecutions are permitted in subsections (b) to (d) bolster the uniqueness and exclusivity of the private prosecutor in subsection (a). Only private prosecutors in sub-sec (a) have to prove the interest and personal injury; for all other private prosecutors in s 7 their relationships to the victims qualify them.

[50] In *Mullins and Meyer v Pearlman* the full court of the TPD opined that the private prosecutor must show actual damages suffered. [50] In *Ellis v Visser* the full court in the TPD opined in 1953 that 'injury ...must be construed in its legal sense' [51] to mean 'an invasion of a legal right', [52] 'an actionable injury'. [53] If all that the private prosecutor can say 'amounts to little more than that 'his feelings have been outraged and his good name injured,' it should be interpreted restrictively.[54] If the private prosecutor has no civil remedy, if he has suffered no actionable wrong then he has no title to prosecute, even if he has suffered prejudice.[55] Furthermore 'interest in the issue of the trial' means

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[48] *Makhanya v Bailey* NO 1980 (4) SA 713 (T); *Mullins and Meyer v Pearlman* 1917 TPD 639 and *Ellis v Visser* 1954 (2) SA 431 (T) which were wrongly decided.
[49] www.thesaurus.com.
[50] *Mullins and Meyer v Pearlman* 1917 TPD 639 at 640

[51] *Ellis V Visser* 1954 (2) SA 431 (T) at 436F-G.
[52] *Ellis V Visser* 1954 (2) SA 431 (T) at 43D-E.
[53] *Ellis V Visser* 1954 (2) SA 431 (T) at 438B-C.
[54] *Ellis V Visser* 1954 (2) SA 431 (T) at 437E-G, and cases cited there.
[55] *Ellis V Visser* 1954 (2) SA 431 (T) at 437C-D and cases cited there.

a direct interest.' [56] If the private prosecutor's reputation has suffered there is no assurance that it will not continue to suffer if the applicant is convicted. [57]

[51] On the facts in *Ellis v Visser* the accused and the private prosecutor were members of a trade union committee responsible for procuring a property for the union. The accused fraudulently obtained the private proscutor's consent to proceed with a purchase that a commission of enquiry subsequently found was tainted by secrecy and corruption. [58]

[52] Twenty-seven years later the TPD differently constituted in *Makhanya v Bailey* and confronting a different set of facts but the same legal question concluded:

> '(W)here it is clear that a legal right of a person is infringed by an offence of this nature, or any nature, then the question of a civil remedy arising from it is no longer a relevant consideration and that the provisions of s 7 (1) *(a)* would then be satisfied.' [59]
>
> And
>
> 'The question of whether a civil remedy which sounds in money, or any other civil remedy would exist, is irrelevant in my view.'[60]

On the facts the private prosecutor was an employee who alleged that her employer committed an offence under s 25 of the Wage Act 5 of 1957 by victimising and dismissing her for her trade union membership.[61]

[53] Respectfully the later opinion should prevail regarding the relevance of a civil remedy. As the private prosecutor bears the onus of proving that he has

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[56] *Ellis V Visser* 1954 (2) SA 431 (T) at 437G-H.
[57] *Ellis V Visser* 1954 (2) SA 431 (T) at 437H.
[58] *Ellis V Visser* 1954 (2) SA 431 (T) at 433E-4E.
[59] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 717C;
[60] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 718A;
[61] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 715A-6A;

met all the requirements for a private prosecution he has to show that he has a substantial and peculiar interest and that he 'individually' suffered some injury personally as a consequence of the commission of the offence.[62] There must be a causal connection between the injury he suffered and the offence.[63] These prerequisites found a private prosecutor's *locus standi* to prosecute. As such they must exist when the summons is issued. The private prosecutor must be ready to prove his interest and injury at any stage once he decides to cause a summons to be issued. Nothing in s 7 calls for a more restrictive meaning than the text itself. Having a civil or any other remedy is not a requirement under s 7. That the private prosecutor must have 'individually suffered' must mean nothing less than having actually suffered an injury. A person whose feelings and good name are injured has the right to prosecute privately if he actaullay suffers an injury. It should be obvious or at least prima facie the charges when the summons is issued that the private prosecutor meets all the requirements of s 7.

[54] Usually an accused would raise non-compliance with the jurisdictional requirements under s 106(1)(h) of the CPA as a plea to the prosecution's lack of title to prosecute.[64] As jurisdictional prerequisites and matters of standing, non-compliance can be raised at any stage of the prosecution. The court may determine the issue of title in limine or after hearing evidence. However, a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution. If he meets all the requirements for a private prosecution under the CPA and the right to prosecute is not hit by the

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[62] Du Toit 1-56; *Singh v Minister of Justice and Constitutional Development* and *Another* 2009 (1) SACR 87 (N) at 94; *Mweuhanga* v *Cabinet* of *Interim Government of South West Africa and Others* 1989 (1) SA 976 (SWA) at 982F in which a wife had an interest in the prosecution of soldiers who allegedly killed her husband; Du Toit 1-57.

[63] *Phillips v Botha* 1999 (1) SACR 1 (SCA) at 9F

[64] *Makhanya v Bailey No* 1980 (4) SA 713 (T) at 714H-I; Du Toit 1-56.

limitation in s 36, the private prosecution should be allowed to proceed. Regretably neither party raised this vital constitutional question.

[55] Surving since its origins in the Cape Ordinance 40 of 1828, a creature of statute and not the common law, [65] s 7 jealously guards the state's right to prosecute in criminal matters. Section 7 offers a safety valve for the prosecution of crimes in which the public prosecutor has declined to prosecute but in which an individual who has suffered an injury arising from the offence has a substantial, personal, private, individual and exclusive interest. Countervailingly it balances the interests of an accused by protecting him from private prosecutions from all and sundry who have the means, time and inclination to prosecute but not a substantial and peculiar interest. It also aims

> 'to curb, in other words, the activities of those who would otherwise constitute themselves public busybodies.'.[66]

[56] The CPA does not prescribe the form of summons for a private prosecution. However, the clerk must be satisfied that the private prosecutor complies with the requirement in s 7(1)(a) in that he has some substantial and peculiar interest in the trial and the personal injury he suffered arising from the commission of the offence which he seeks to prosecute. Usually the interest and injury would be apparent from the nature of the charges. Given the low level discretion the clerk would exercise when issuing a summons, the charges could prima facie present as meeting the interest and injury requisites. However, it would be open to an accused to challenge the private prosecutor's purported compliance with s 7(1)(a) from the outset.

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[65] *Mullins and Meyer v Pearlman* 1917 TPD 639 at 642

[66] Van Deven*ter v Reichenberg and Another* 1996 (1) SACR 119 (C) at 127G

[57] In count 1 the private prosecutor alleges that the applicant exerted improper pressure on Eugene Ramnarayan 'in an attempt to secure an affidavit' from the latter stating that he witnessed the private prosecutor tampering with the access control mechanism to a property in La Lucia. Subsequently the applicant induced Mr Ramnarayan to depose to such an affidavit. The applicant relied on this affidavit in litigation concerning an insurance claim in the High Court. Arising from count 1, count 2 relates to making a false declaration knowing it to be false in contravention of the Justice of the Peace and Commissioners of Oaths Act, 1963. The charge of defeating the ends of justice in count 3 relates to the applicant obstructing the course of justice. The private prosecutor alleges that the applicant tendered, referred to and relied on an unsigned and corroborating affidavit of Johnathan Perumal, another witness on the list of witnesses, knowing that Mr Perumal sought to corroborate Mr Ramnarayan's affidavit which the applicant knew was false. Neither Messrs Perumal nor Ramnarayan are co-accused in the private prosecution.

[58] The background to the charges were the following: The applicant on behalf of Aon, his erstwhile employer allegedly procured the false testimony in an application for a spoliation order against the private prosecutor's company. As a substantial property owner with tenants such as Toyota South Africa and Delta Motors South Africa the damage to his good name and reputation is allegedly incalculable. He would not be able to face his tenants if they believed that he surreptitiously and clandestinely broke into his own property. The applicant procured false evidence that the private prosecutor was on the property at a time when the closed circuit television evidence clearly demonstrated that he only attended hours later.[67] So it was alleged.

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[67] para 95 of the answering affidavit

[59] Without any information about the spoliation order the court may reasonably infer that the private prosecutor is saddled with the spoliation order that he did not challenge successfully or at all on the grounds that it was improperly obtained with false evidence. If his version is demonstrably true as the closed circuit television evidence would allegedly show he fails to attest to why his version was not before the court hearing the spoliation order. If he presented his version fully in the spoliation proceedings and the court hearing that matter erred or misdirected itself then the applicant's remedy lies in an appeal.[68] On appeal s 19(b) and (c) of the Superior Courts Act allows him to introduce new evidence.[69]

[60] Although he has another remedy that is no reason to deny him his right to also privately prosecute the applicant on criminal charges if he meets all the jurisdictional requirements.[70] However, the applicant also has rights as an accused under s 35 of the Constitution irrespective of whether he is prosecuted privately or publicly. The first right implicated in this instance is the right to have the trial commence and conclude without unreasonable delay.[71]

[61] The DPP issued the certificate only after a protracted attempt to prosecute the applicant.[72]The applicant was arrested on 31 December 2009 on charges of defeating the ends of justice and making false statements. He appeared in the district court, Durban on various occasions incurring substantial legal costs which were paid by Aon and costs to his health. Notwithstanding the passage of more than two and a half years the public prosecutor withdrew the charges against him on 28 August 2012 by direction of the DPP issued on 2

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[68] Van Deventer *v Reichenberg and Another* 1996 (1) SACR 119 (C) at 126A-C
[69] *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC), *S v Shaik and Others* 2008 (1) SACR 1 (CC) and *S v Romer* 2011 (2) SACR (SCA) paras 3-10.
[70] *Solomon v Magistrate, Pretoria, And Another* 1950 (3) SA 603 (T)
[71] *Wild and Another v Hoffert NO And Others* 1998 (3) SA 695 (CC).
[72] Para 14–17 of the founding affidavit.

July 2012. If the evidence against the applicant was sufficient the prosecution would have been done and dusted without the delay of two and a half years let alone it ending with the prosecutor withdrawing the charges. The reasons for the delay will become aparent.

[62] A list of witnesses apparently attached to the charge sheet feature names that also appear in the addendum to the charge sheet in the private prosecution. One would expect to see statements or affidavits from the witnesses attached to the pleadings as documents that ought to have served before the DPP. There are no such statements. On 7 August 2012 the prosecutor called for the names of witnesses and their statements.[73] The following day the private prosector declined to supply them saying through his attorneys that he was not aware of any law that required him to submit such information but nevertheless advised that he would rely on nothing more than the witnesses and the statements already in the prosecutor's docket.[74]

[63] The public prosecutors were frustrated 'in trying to close the apparent gaps in the matter through further investigation'.[75] They had 'some ... reservations linked to a successful prosecution'. Having regard to the charges the private prosecutor should have been able to produce the evidence such as the closed circuit television recordings which were allegedly decisive. Correspondence from the private prosecutor's legal team to the prosecuting authority continued throughout the public prosecution. Notwithstanding, the public prosecution failed.

[64] One of the reasons the public prosecution might have failed is because of insufficient evidence to sustain a prosecution not least because the private prosecutor as the complainant in that prosecution refused to give the DPP the

[73] Annexure PP20 page 138 of the pleadings.
[74] Annexure PP21 page 142 of the pleadings.
[75] Annexure PP8 page 117 of the pleadings.

information she asked for. Considering that the alleged offences occurred in mid-May 2009 the prospect of procuring such information let alone proving the charges would have become more remote with the passing of each day. It is now 6 years since the alleged offences were committed.

[65] On the charges Mr Ramnarayan would be the main witness for the prosecution. If Mr Ramnarayan was previously induced to testify falsely the private prosecutor would have a hard row to hoe to persuade a court that this time around Mr Ramnarayan was being truthful.

[66] Notwithstanding the fact that direct imprisonment may be imposed[76] the offences are trivial in comparison to murder, robbery and rape which fall in the jurisdiction of the regional court. Predictably, therefore, the public prosecution proceeded in the district court. By filing in the regional court the private prosecutor seeks to elevate the seriousness of the matter unjustifiably for reasons best know to himself, and at unnecessary costs to the administration of justice.

[67] As for any personal injury he may have or is likely to suffer, in the cut and thrust of the modern business world allegations and counter allegations are made by and about business men and women. Litigating over minor offences is not the core activity of successful people in business. The private prosecutor has not adduced any evidence that his reputation has actually suffered a setback. With the passage of 6 years since the offences were allegedly committed, there should be some evidence of injury if he had suffered any. By reviving memories of his failed spoliation case in a fresh round of litigation he risks injury especially as he cannot be sure of winning. Any prospects of success he might have had have dissipated altogether as

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[76] *S v W* 1995 (1) SACR 606 (A); *S v Andhee* 1996 (1) SACR 419 (A).

the spectre of subjecting the applicant to an unfair trial looms large, as will emerge from the discussion below.

The right to a fair trial

[68] Every accused without distinction has a constitutional right to a fair trial. This right must apply equally to accused in public and private prosecutions. If it does not then the right to equality before the law and to equal protection and benefit of the law would be impugned. Equality includes the full and equal enjoyment of all rights and freedoms.[77] A hallmark of a fair trial is the independence of the prosecutor who must act without fear, favour or prejudice.[78] A prosecutor who does not exude these qualities cannot assure the accused of a fair trial.[79] In the nature of a private prosecution it is a hard ask of a private prosecutor to maintain the same degree of independence and impartiality as a public prosecutor who is uninvolved personally in the dispute. Not least for this reason and to overcome the awkwardness of a private prosecutor also being a witness in his prosecution he engages counsel.

[69] Professionally trained to be impartial, independent, objective and dispassionate, counsel should be able to bring these qualities to a private prosecution to ensure a fair trial. Counsel having these qualities would be able to filter the emotion and acrimony of the private prosecutor to focus dispassionately on the law and facts.

[70] The applicant turned to the DPP for her to produce the correspondence exchanged with the private prosecutor. Arising from the correspondence the

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[77] Section 9(1) and (2) of the Constitution.
[78] *S v Van Der Westhuizen* 2011 (2) SACR 26 (SCA) and see also s 32(2)(a) of the National Prosecuting Authority Act with regards to oath and affirmation.
[79] Du Toit 1-48; *Bonugli and Another v Deputy National Director of Public Prosecutions and Others* 2010 (2) SACR 134 (T) at 142I-J.

applicant contended that the private prosecutor's legal representatives improperly obtained the certificate from the DPP. The private prosecutor's bias evident in the correspondence with the DPP obscures all prospects of an impartial, objective and fair prosecution of the applicant, the applicant persisted.[80]

[71] Disconcertingly, senior counsel for the private prosecutor involved himself personally in correspondence on his letter head to the DPP proclaiming by way of introduction as follows:

> 'I am a senior counsel based at the Durban Bar. I have also been an acting judge for over 10 (ten) years and several of my stints on the bench have been in criminal sessions.'[81]

Senior counsel met the prosecuting authority at their offices in Pietermaritzburg on 30 March 2011 following the private prosecutor's offer to assist in the criminal prosecution.[82]

[72] The private prosecutor's legal team comprising of his attorney and junior and senior counsel held a watching brief over the public prosecution of the applicant.[83] They sought to persuade the DPP to engage senior counsel to prosecute the matter at the complainant's expense

> 'but without the senior counsel being told the complainant was carrying the costs'.[84] (*sic*)

The attorney urged that the senior counsel to be engaged should not be apprised

> 'of the fact that the complainant is in fact carrying his or her charges... the complainant would be amenable to entering into a binding and confidential

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[80] Para 39 of the founding affidavit.
[81] Annexure PPS page 100 of the pleadings.
[82] Annexure PP8 page 116 of the pleadings.
[83] Annexure PP6 page 104 of the pleadings.
[84] Annexure PP6 page 105 of the pleadings.

agreement with the office of the director and of lodging any and all monies necessary with the director's office before senior counsel is briefed'.[85]

Such a request is so obviously unethical especially in a constitutional democracy based on openness, accountability and transparency in which the prosecuting authority is constitutionally compelled to function 'without fear, favour or prejudice'.[86]

[73] Eventually when pleadings had to be filed in this application generous dozes of vitriol oozing from private prosecutor's affidavit dispel any hope of a fair trial for the applicant. Unembarrassed, the private prosecutor declared himself to be a wealthy man thus tainting his assertion that his pursuit of the applicant arises from his quest for justice. That the private prosecutor is using his wealth to avenge the applicant's victory in the spoliation proceedings cannot be discounted. Dragging the applicant, a man who cannot afford to pay his legal costs, through years of litigation, at costs to time, energy, expenses and most importantly, state resources are disproportionate to the alleged offences. As an allegedly successful businessman the private prosecutor should realise from a cost-benefit analysis that the costs of this litigation simply do not justify the benefits. There are other cost effective ways of clearing his name if it has been tarnished.

[74] Disappointingly his legal team has not disuaded him from persisting with this debilitating excerise. Indulging the private prosecutor because he has the means to litigate is grossly unfair and disproportionate to its impact on the public purse, the allocation of state resources and the administration of justice. As a review of administrative decisions this case should have proceeded before a single judge sitting as a court of first instance. The review or appeal from the magistrates' court would be superfluous once this court

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[85] Page 108 of the pleadings.
[86] Section 179(4) of the Constitution.

sets aside the summons. Furthermore a full bench of 2 judges would have sufficed to hear it. The parties have had the privilege of a full court of 3 judges. Whatever representations counsel made to the erstwhile judge president did not justify the matter proceeding before a full court, as they should have known.

[75] I find that the private prosecutor has a peculiar but not a substantial interest. He has also not shown that he has suffered any personal injury. He fails to discharge the onus of proving that his alleged interest and injury are such that they would result in the conviction of the applicant.

Conclusion

[76] To summarise, my findings are as follows:

i) The certificate cannot be reviewed and set aside.

ii) The private prosecutor has failed to satisfy the jurisdictional requirements for a valid private prosecution by lodging with his summons the certificate and proof of payment of security for costs. He has neither shown that he has both a substantial and peculiar interest in the issues giving rising to the trial nor that he has suffered an injury as a result of the alleged offences.

iii) The findings in the preceding paragraphs lead to the further finding that the clerk should not have issued the summons without the certificate and the security for costs. Even if the charges did present prima facie a substantial and peculiar interest and injury suffered this application proves otherwise. Consequently the summons should be reviewed and set aside.

iv) Against these substantive findings it follows automatically and for completeness that the judgment of the regional magistrate should be set aside.

v) Usually costs in a private prosecution would be no different from a public prosecution. That is the accused is not entitled to costs if he is acquitted 'save where the appeal or the prosecution, as the case may be, was unfounded and vexatious'. [87] This is not the prosecution but an application to stop it. Nevertheless the conduct of the parties leading up to this application is relevant. By prosecuting in the regional court a matter that deserved the attention of no higher a court than the magistrates' court, by doing so with out complying with the elementary statutory prerequisites of lodging a *nolle* certificate and security for costs, despite having the privilege of a legal team of no less than 3 lawyers is an abuse of process and state resources. Although these are grounds for imposing a punitive cost order, the applicant has not been prudent and strategic. He failed to comply with PAJA timeously, which might have stalled the private prosecution commencing at all. Moreover the applicant has not asked for a punitive costs order.

The order

a) The application to review and set aside the certificate of *nolle prosequi* is dismissed.
b) The summons issued by the clerk of 'U' Regional Magistrates' Court is reviewed and set aside.
c) The ruling of the regional magistrate of 'U' Regional Magistrates' Court is set aside.
d) The private prosecutor, Niemesh Singh, shall pay the applicant's costs.

D Pillay J

[87] *Ellis V Visser* 1954 (2) SA 431 (T) at 441D-F.

I agree :

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T Sishi J

I agree:

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B Mnguni J

It is so ordered.

APPEARANCES

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South Africa: Kwazulu-Natal High Court, Durban

Venter v Khan and Others (14185/2011) [2014] ZAKZDHC 48 (3 November 2014)

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION,

DURBAN

CASE NO: 14185/2011

DATE: 03 NOVEMBER 2014

In the matter between:

ANDRE VENTER **PLAINTIFF**

And

AYESHA KHAN **1ST DEFENDANT**

BUBALUBA PROPERTIES CC **2ND DEFENDANT**

JUDGMENT

Date of hearing: 17-18 September 2014

Date judgment delivered: 3 November 2014

D. PILLAY J

Introduction

[1] The plaintiff is Andre Venter. The first defendant is Ayesha Khan (the defendant). The plaintiff employed the defendant as a transport broker at Cee Vee Transport Consultants under various contracts of employment. As a performance incentive, the plaintiff agreed to transfer annually portions of his member's interest in Bubaluba Properties CC, the second defendant, to the defendant if she met certain conditions (the 2002 agreement). On 27 February 2008 the parties extended the 2002 agreement to 31 December 2015 (the extension agreement). The only asset in Bubaluba is a house purchased for the defendant. The defendant occupies the house. She resigned in October 2011. She alleges that the plaintiff constructively dismissed her thus terminating her fixed term employment contract prematurely.

[2] The plaintiff instituted action for transfer of the defendant's member's interest in Bubaluba back to him. The defendant resisted with a counter-claim for the transfer of the balance of his interest in Bubaluba, underpayment of remuneration and other relief.

The Issues

[3] The issues for the court to determine were narrowed down to the following:

a. Is the plaintiff entitled to rectification of clause 7 of the extension agreement so as to read that the employee, not the employer, forfeits the benefits of the agreement?

b. Do the benefits referred to in clause 7 relate to the benefits in the extension agreement exclusively or do they also relate to the benefits in the 2002 agreement?

c. Is the plaintiff entitled to the transfer of the defendant's membership interest in Bubaluba, or is the defendant entitled to 55% or any portion thereof of the plaintiff's membership interest in Bubaluba?

d. Did the defendant resign voluntarily or did the plaintiff dismiss her constructively?

e. Is clause 7 a penalty stipulation in terms of the Conventional Penalties Act 15 of 1962? If 'yes', what would be an appropriate penalty?

The 2002 Agreement

[5] The defendant commenced working for the plaintiff about 1999. For personal reasons she left his employment twice. She returned in August 2001 and remained employed until October 2011.

[6] During July 2002 the parties negotiated the terms of the defendant's remuneration and benefits. On 14 August 2002 they recorded the terms in the 2002 agreement. The plaintiff agreed to buy a property for R230 000 for the defendant via Bubaluba and thereafter to transfer annually 15.38% of his membership in Bubaluba to the defendant if she met her targets. To that end the plaintiff undertook to sign the membership transfer forms and lodge them periodically with the Registrar of Close Corporations for registration in favour of the defendant. In exchange for the member's interest in Bubaluba the defendant undertook to remain employed at Cee Vee for 78 months from 14 August 2002, the date of the 2002 agreement.

[7] Regarding the property, they agreed that the plaintiff would pay 60% of the rates and the defendant would pay 40%, the percentages to switch when they reached the midpoint in their ownership. They agreed to share the transfer costs of the property equally. The defendant undertook to pay R1 000 per month in lieu of rental to the plaintiff.

[8] The only penalty stipulation in the 2002 agreement was the forfeiture by the defendant of 1.28% per month membership interest if she failed to achieve the minimum target of 75 loads per month for three consecutive months. Confident of reaching high net income targets the defendant set them for herself.

[9] The defendant's remuneration was to increase or decrease by the percentage by which she exceeded or missed the targets she had predicted for herself. In 2002 her net salary was R7 000 per month. By September 2003 the defendant had exceeded her annual target by 141%. Accordingly her basic salary of R7 000 should have increased by 141%. She should have been paid R16 870 per month. Instead, the plaintiff paid her R14 000 per month. She queried the short payment of her salary. It remained unchanged until 2004. Clearly the plaintiff had underestimated the defendant's potential.

[10] If the plaintiff had implemented the 2002 agreement correctly for 78 months he would have had to pay the defendant the amounts in the third column of the schedule below based on the percentage increase of her target. What he actually paid her ranged between the amounts in the fourth column. Except for July 2004 when the plaintiff paid the defendant R17 318.56 which, together with commission, barely exceeded her basic salary of R16 870, he would have underpaid her from September 2003 to August 2008 when the underpayment soared as high as 325%.

Year	% Increase in target	Salary 2002 agreement	Salary + commission range paid
September 2003 – August 2004	141%	R16 870.00	R12 334.48 -17 318.56

September 2006 – August 2007	62%	R68 870.09	R26 010.41-32 302.52
September 2007 – August 2008	83%	R126 032.26	R26 380.19 -38 754.75

The 2004 agreement

[11] On 19 March 2004 the plaintiff substituted the remuneration in the 2002 agreement with the 2004 agreement. The terms of the 2004 agreement were as follows: The defendant's basic salary would increase by R3 000 per annum[1] provided she attained the targets in the 2002 agreement. If she did not attain her targets her salary would be reduced by R3 000 per annum. She would earn commission at 5% and 10% depending on the amount of the profit. The 2004 agreement was rendered retrospective to 1st September 2003.

[12] The obvious effect of the 2004 agreement was to reduce the defendant's remuneration substantially and retrospectively, which the plaintiff persistently denied under cross-examination. The plaintiff dropped her basic salary from R14 000 to R10 000. Taking into account that her basic salary should have been upwards of R16 870 for 78 months in terms of the 2002 agreement, the defendant's loss of income was considerable under the 2004 agreement, as tabulated above.

[13] The plaintiff denied that he presented the 2004 agreement as a prerequisite for payment of her March salary. The defendant contended that she signed the 2004 agreement under duress. She alleged that she submitted to the reduction of her remuneration because she thought that she had no choice. As the sole breadwinner she could not risk being unemployed.

[14] No employee will voluntarily agree to a reduction in remuneration. Usually, the risk of losing their jobs in the face of retrenchment would be an example when agreement would be voluntary. I find that the plaintiff having underestimated the defendant's potential forced her to agree to a reduction in her remuneration.

The extension agreement

[15] The plaintiff's decision to relocate to Cape Town so that his son could complete his schooling there precipitated the extension agreement. He needed the defendant's assurance that she would remain with the business. After he relocated to Cape Town his attendance on the business at Pennington was to diminish to about once a month.

[16] The parties concluded the extension agreement on 28 February 2008. In exchange for the defendant agreeing to extend her employment to 31 December 2015 the plaintiff paid her R300 000 up front. Generous as this amount seems it was considerably less than what she would have earned by then if the 2004 agreement had not replaced the 2002 agreement. Although the extension agreement records that the defendant was entitled by that stage to 70% of the membership interest in Bubaluba, it is now common cause that the figure should have been 76.9%.

[17] Under the extension agreement the defendant's basic salary was agreed as follows:

Year	Salary per month	Annual Figures
February 2010	R29 500	R1 165 782
February 2011	R31 000	R1 206 000
February 2012	R32 500	R1 246 000
February 2013	R34 000	R1 286 000
February 2014	R35 500	R1 326 000
February 2015	R37 000	R1 366 000
February 2016	R38 500	R1 406 000

[18] In addition, commission was agreed as follows:

5% for loads with profit of R500,

10% for loads with profit of R1 000,

12½ % for loads with profit of R1 500 and

15 % for loads with profit of R2 000.

The 2011 agreement

[19] Even though the extension agreement was to endure until December 2015, in January 2011 the parties began renegotiating the terms of the defendant's remuneration again. Having offered his properties in Selborne Estate to other employees the plaintiff considered it would be unfair not to extend the offer to the defendant.

[21] The negotiations continued until 21 June 2011 when the defendant offered to reach a monthly target of R230 000 profit for July 2011 – June 2012 with an increase of 5% every year thereafter until the end of the extension agreement in February 2016. Furthermore, her salary was to be based on the old structure of R31 000 basic per month, plus commission for the first R100 500 as per the extension agreement, to increase accordingly as set out above. On the balance of the profit she wanted 24% commission. If she did not reach her target of R230 000 then that percentage should be reduced by 5%. She refused to extend the contract for the member's interest in Bubaluba further. She wanted six months to resolve the problem of bad debts.

[22] The plaintiff unequivocally accepted her terms by email on 21 July 2011. He instructed the salaries clerk to implement the new salary from July. The clerk calculated the commission on the first R100 500 to be R11 927.61. The plaintiff refused to pay the defendant any commission on the R100 500. Rejecting the clerk's calculation the plaintiff paid the defendant 24% on the balance of the profit after deducting R100 500 from the total profit she generated.

[23] By email dated 20 September 2011, the defendant asked him to look into the short payment of her commission. By email, four minutes later, the plaintiff explained that he had paid her basic wage of R31 000 for attaining R100 500 and then calculated commission on the balance at 24%. The plaintiff persisted in paying the defendant according to this formula. Consequently, he underpaid her commission for July (R11 927.61), August (R11 366.96) and September (R10 409.24). The parties met on 29 September 2011 to resolve the underpayment of her commission. The plaintiff refused to budge. He told the defendant to accept his offer or do as she saw fit. The 2011 agreement was their last agreement.

[24] Manifestly, the plaintiff reneged on their 2011 agreement recorded in writing by their exchange of emails. After some pressure under cross-examination the plaintiff finally conceded that he did not pay the defendant according to their 2011 agreement. Resignedly he sighed that there were so many negotiations that he was confused.

Build-up to resignation

[25] Sometime in May 2011 the defendant's husband injured himself in a household accident. He was hospitalised for a possible amputation of his leg. She visited him during working hours. After he was discharged she accompanied him to the wound clinic. She attended to him during working hours after arranging with the general manager to make up her time away from work by starting early and finishing late. Notwithstanding the stresses imposed upon her by her husband's condition, she met and even exceeded her targets.

[26] The plaintiff testified that he received a complaint that the defendant refused to inform the general manager of her comings and goings. In chief the plaintiff testified that he did not think it was a problem for as long as the work was done. Under cross-examination he conceded that she met her targets. Even though her productivity remained unaffected, he dispatched an email dated 4 August 2011 enquiring from the defendant what her understanding of her working hours were and how much leave she was entitled to. He also remarked that other staff saw how much of time she took off from work and enquired how he should respond to them if they took off as much time as she did.

was taking too much time off. If he were as sincere and fair-minded as he would have the court find, he would not have raised the issue at all. That would have been consistent with his evidence-in-chief. This inconsistency between what the plaintiff said or wrote and what he did is proving to be a pattern of behaviour that conduced to the defendant's resignation.

[28] He hurt the defendant deeply. Hence followed a highly charged exchange of emails between the parties resulting in her resigning. In summarising their contents I try as far as possible to allow their 'voices' to be heard. For it is what they thought, said and felt at that time that is an authentic explanation for the termination of their relationship.

[29] After the meeting on 29 September 2011 when the plaintiff refused to abide by their 2011 agreement the defendant retaliated emotionally by email the same day. She referred to the 'hours of work' email as an 'eye opener'. She accused the plaintiff of not empathising with her family, of treating her as 'just a means of making money', that the time that she spent and the income that she brought to his business did not count. If the plaintiff did not pay her as she requested in her email of 12 July 2011 then she wanted to revert to her extension agreement (even though this would have meant lower targets, less income but more time with her family). She vented on that new employees got more benefits than she did. She enquired whether this was because of her 'skin colour' or whether she was just too gullible. She declared that there was no point in her increasing her turnover by 125% if she was going to earn less than 24%. She complained that if he had paid her as he paid everyone else from the outset it would not have been necessary for her to extend her contract. She accused him of doing her in from the first year. She hated coming to work and suggested that it might be better if he made her an offer to buy out the percentage that she had in the member's interest in Bubaluba. She complained that he kept using the house as 'an excuse' when the house had been paid for over and over again. She thought that the time and loyalty she had given to the company would have meant something. She concluded 'DAMN HOW COULD I BE SO BLIND!'

[30] Absolutely amazed and astounded the plaintiff replied by email on 5 October 2011. He denied ever treating the defendant unfairly. She was always paid more than any other staff member. He pointed out that she had refused his offer of a share in the business. She had always received preferential treatment. Her working hours had never been monitored or checked (which was untrue in view of his 4 August email). She also received bonuses. Then he accused her of trading recklessly, resulting in bad debts which had never been taken off her account. He noticed that she had been unhappy for some time from her attitude towards other staff and clients. He then criticised her performance in relation to the CHEP contract.

[31] Regarding the house he informed her that she could not terminate her services until the end of 2015. If she did she would lose the entire house regardless of her membership interest in Bubaluba. He advised her to consult a lawyer if she disputed this. He denied changing his attitude or feelings towards her and said that it was she who was aggrieved. Nevertheless he threatened to enforce their agreements if she decided to leave. He invited her to take a month or even three months off to consider his proposal. He attempted to assure her that he admired her and that she was the best broker. He was disappointed that she accused him of taking advantage of her colour when he had looked after her as a friend and employee. He concluded by offering to fly her to Cape Town to resolve the issue.

[32] Ignoring the rest of the plaintiff's email the defendant honed in on the criticism about bad debts. She requested a list of the bad debts that she allegedly incurred for the business. Seven minutes later the plaintiff declined to give her a list but mentioned only Crossmoor in respect of which the business allegedly sustained a loss of R16 000. The defendant insisted on receiving a list of the bad debts. The plaintiff resisted, directing her instead to resolve their relationship problems.

she was 'naughty'. Although the defendant exposed the business to higher risk, she seems to have exercised good judgment because the plaintiff proved no loss to the business arising from her giving more credit than the system authorised.

[34] At 5:59 that afternoon the defendant sent a lengthy email in which she raised the following issues: The plaintiff questioning her about her working hours when she had to go to hospital for her husband and for herself; the plaintiff humiliating and demoting her by removing her from the privacy of a separate office and returning her to the general office with all its noise and distractions; the plaintiff being rude in his letters and conversations with her. She reflected that '(s)ometimes MONEY does not fix matters. Human kindness and respect is sometimes a more worthy reward than money'. She criticised him for seeming to be 'generous and kind' when in fact he had 'such an ego' that he thought it was a 'big deal' to buy someone a bunch of flowers or a box of chocolates. She repeated that respect and kindness could not be bought.

[35] Again she invited the plaintiff to 'pin point' complaints against her. If he was unable to substantiate the complaints she said she would assume that he was making up stories to make her 'feel inferior (as usual)'. Under cross-examination he conceded that he did not pin point the complaints against her. In re-examination he acknowledged that he emailed her about some bad debts. However he proved no losses to the business resulting from them.

[36] One of her main complaints against him was that he had a 'bombastic manner in which he tried to rule'. If she had an attitude towards the plaintiff it was because she found him to be 'so arrogant and so demanding'. She criticised him for being rude to her and to a customer who had settled an account early in exchange for a discount. She resented all the 'hammerings' that she got. She acknowledged that there were many issues that needed resolving. She contemplated taking his advice to consult an attorney.

[37] Shortly thereafter she sent a further email referring to the distasteful conversations they had exchanged in the past months when the plaintiff expressed dissatisfaction with her performance. She complained that in the past she was praised and appreciated for her hard work; now she was put under extreme pressure to bring in more money for the business. Work was no longer a pleasure for her and her health had suffered. She was miserable as a result of the circumstances created by the plaintiff. She tendered her resignation at the end of October but offered, if compelled, to work until the end of November 2011.

[38] The following morning (6 October 2011) she requested the plaintiff to give her a date when she had to move out of the house. At that stage the plaintiff had convinced her that she had no claim to the house when he said that a court of law would rule in his favour when it heard what she had been paid to sign the extension agreement. He informed her that he had no intention of asking her to leave her house. He could not understand why she was reacting in the way she did. Again he offered to fly her to Cape Town to chat with her. He did not want to fight or be hurtful, he said. In saying that he admired her and that she had a heart of gold he attempted to assure her that he was not trying to 'smooth over issues' between them.

[39] The defendant reiterated that she had made up her mind to leave the business. Furthermore, he had said that if she left work he would take the house back. She declared that it was all his fault. Again she requested a date to leave the house. She did not think there was any use in him coming to talk to her. She was not angry, just hurt.

[40] Later that day she persisted in resolving the issue of the house. She requested him to give her an amount to pay so that she could have the house. He repeated that she would lose the house if she left the business. He refused to discuss the house further. He also intimated that he

the plaintiff as a beneficiary under her insurance policy taken in terms of clause 5 of the extension agreement to secure the payment to her of the sum of R300 000.

[42] On 12 October 2011 the plaintiff met the defendant in his office in Pennington. He handed her a letter thanking her for her hard work, dedication and loyalty, remarking that she was a shining example to others in the business. On a personal note he expressed his admiration for her kindness, generosity and concern for others. He declared that he would miss her friendship. In stark contrast to these warm and conciliatory sentiments the plaintiff terminated her services with immediate effect. With the letter he gave her a Lunch Bar. He testified that he could not recall but did not dispute that he might have given her the chocolate. However, he denied any intention to slight her.

[43] In the context of terminating summarily her employment and their friendship of almost twelve years, giving her a cheap chocolate bar was another insensitive and demeaning act. It humiliated her. The height of his insincerity was manifest from his unilateral decision to withhold her salary for October pending deductions he intended to make against it. That was unlawful under **s 34** of the **Basic Conditions of Employment Act 75 of 1997** firstly because she did not consent to the deductions. Secondly, he did not give her a fair opportunity to say why he should not make deductions from her salary before he withheld it for October 2011. In the course of this litigation he agreed to pay her for October. I include an order to that effect.

[44] On 24 October 2011 the plaintiff invited the defendant for a discussion at his home the following morning. His intention was 'to get to the bottom of her problem'. He had asked the staff but they could not help him understand what troubled her. He decided to meet her to ascertain from her personally what her problem was. Clearly, the import of her lengthy emails venting her anger, hurt and disappointment with him before she tendered her resignation was lost on him.

[45] They met at his home early the following day. He testified that she demanded that he should get rid of the general manager. He refused to accede to this request, claiming that the general manager was probably a better manager than he was. He proposed that he open a satellite office for her in Pennington. She informed him that her sister had invited her to establish a transport brokerage. The plaintiff offered to increase her package if she were to return to work for him. The defendant undertook to consider his offer and revert. Shortly she declined his offer and informed him that she would be taking up her sister's offer to start their own company from 1 November 2011.

[46] On 28 October 2011 the plaintiff emailed the defendant to enquire when she would be vacating the house, and if she wanted to stay there, for how long she would like to rent it. He asked her to sign the forms to transfer back her membership interest in Bubaluba to him. He enquired what her attitude was regarding his payment of the R300 000 to her. Then he complained about having to pass credits to various customers as a result of her errors and her exceeding the credit limit for a customer, My Transport, despite his instruction. He waxed on that any normal company would have dismissed her without hesitation; a court of law would have found her actions unacceptable and dismissed her. He hoped that My Transport would settle their account otherwise she would be personally liable as she had agreed to be. He then discussed deductions to her October salary. He wished her well.

[47] Under cross-examination he conceded that the defendant's dealing with My Transport did not result in any loss for his business. This concludes the factual background and my analysis of it.

[48] Clause 7 of the extension agreement reads:

'The parties record that it is a specific term of this agreement that should the Employee leave the employment of the Employer prior to the agreed period of employment (last day of December 2015) the Employer shall forfeit the benefits of this agreement and the member's interest transferred to the Employee shall revert to the Employer and the Employee hereby undertakes to sign all necessary documentation to transfer the member's interest back to the Employer upon presentation thereof.'

[49] The defendant did not read the extension agreement carefully. She merely browsed through it. She noticed the 70% in clause 3 because it was a figure. It 'jumped out at her' she said. In 2011 when the plaintiff drew her attention to clause 7, she could not understand it. He convinced her at the time that any court of law would rule in his favour.

[50] Clearly the word 'Employer' in the third line is a typographical error. It makes no sense as it stands. It should be rectified to read 'Employee'. Irrespective of whether the rectification is granted, the second part of the clause literally entitles the employer to the member's interest already transferred to the employee. Even if the reference to 'employer' instead of 'employee' was nonsensical, it was clear that her interests would revert to the plaintiff.

[51] The defendant denied agreeing to the contents of clause 7. She testified that she became aware of its contents only after the plaintiff brought it to her attention in October 2011. The plaintiff testified that the forfeiture was discussed during the negotiations for the 2002 agreement. That the 2002 agreement does not include forfeiture was an oversight by the drafters, he persisted.

[52] That cannot be true. Nowhere in the exchange of communications preceding the 2002 agreement was there any mention of forfeiture of the interest in Bubaluba. It is a clause potentially so prejudicial to the defendant that it had to feature expressly in their pre-agreement communications and eventually in the agreement. He accepted under cross-examination the defendant's contention that there was no discussion about forfeiture saying 'I don't think she would lie.' He also conceded that the only query she raised about the extension agreement was the 70% membership interest reflected in clause 3.

[53] However, even though she was unaware of the forfeiture clause the defendant had an opportunity to read the extension agreement. She chose to browse through it. The plaintiff was entitled to invoke the principle *caveat subscriptor*[2]. She is bound by virtue of her signature to the extension agreement.

[54] Although she cannot avoid clause 7, the fact that she simply browsed the extension agreement and signed it without reading it carefully tells of the high level of trust the defendant had in the plaintiff to prepare a document consistent with their negotiations and agreement. Her trust was clearly misplaced. The plaintiff slipped clause 7 into the extension agreement without alerting her to it. Not only the novelty of the clause but also its manifest prejudice were compelling reasons for alerting her because by 2008 the defendant owned more than 50% of the membership interest in Bubaluba. More on this issue in the discussion below on *contra bonos mores.*

Interpretation of the extension agreement

[56] The extension agreement refers to the 2002 agreement as 'the said agreement' in the preamble and as the 'original agreement' in clauses 1, 4 and 8. Clause 7 mentions 'this agreement' twice. In the context 'this agreement' could only refer to the extension agreement exclusively. The clearest evidence of the intention of the drafter to distinguish between both agreements appears in clause 8 which records that the terms and conditions contained in 'the original agreement' not affected by 'this agreement' shall remain binding.

[57] Even if clause 7 was ambiguous, which it is not, the plaintiff was responsible for having the contract drafted by his attorney. The Latin maxims *verba fortius accipiuntur contra proferentem*[3] and *verba contra stipulatorem interpretanda sunt*[4] apply.[5] The plaintiff suffers the consequence of the agreement being interpreted against him. As the party who claims forfeiture in his favour he should have ensured that the terms were clear; otherwise the defendant must have the benefit of the doubt. [6] Additionally, as the claimant he bears the onus of proving the forfeiture.

[58] On this construction therefore I find that if the defendant were to forfeit any benefits at all it will be only in terms of the extension agreement. This would be the 12% membership interest she had earned by October 2011. Although no benefits had been transferred to the defendant under the extension agreement it was common cause that an additional 12% of the member's interest in Bubaluba had accrued to her by virtue of her employment for three years since 2008.

Who is entitled to the members' interests in Bubaluba?

[59] In support of his claim to the membership interest the plaintiff relied on the defendant's resignation coupled with the forfeiture in clause 7. For the defendant, counsel submitted that clause 7 was *contra bonos mores.* Counsel referred to the plaintiff's two stratagems in the extension agreement to secure the defendant's employment. First, he paid her R300 000 upfront on the condition that she remained in his employment until December 2015. Second, he transferred portions of the member's interest in Bubaluba annually to the defendant. This was both to incentivise the defendant to strive for and maintain high profits and to remain employed with the plaintiff until February 2016.

[60] As counsel pointed out her acquisition of her membership interest was not exclusively time based as it would have been if it accrued to her only on termination of her employment in December 2015. If she did not achieve the target she would not have been entitled to a transfer of the member's interest for that year; but tenure would be unaffected. There was a direct correlation between the defendant's productivity and performance, the transfer of the member's interest and her remuneration package. During the various negotiations and both parties' testimony the house featured pertinently in the computation of her remuneration. Furthermore, the defendant paid initially 40%, then 60% and finally 100% of the rates and outgoings on the property, which she continues to occupy rent-free. The plaintiff has not claimed rental since February 2009. Nor has he reclaimed the R300 000. This signals that the house was part of her remuneration. To deny her the member's interest she earned would mean denying her remuneration. In these circumstances, is clause 7 *contra bonos mores* or against public policy as counsel for the defendant submitted?

[61] What is meant by public policy is best answered in *Sasfin (Pty) Ltd* v *Beukes* **1989 (1) SA 1** (A) at 71 – 9G, summarised in *Retha Meiring Attorney* v *Walley* **2008 (2) SA 513** (D) at paras 45-46. Paragraphs material to this case are the following three:

'[45.3] Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will, on the grounds of public policy, not be enforced (at 8D).

The learned judge adds at para 46 that:

> '(W)hen considering whether an agreement is against public policy, one has to look at 'the tendency of the proposed transaction, not its actually proved result' (*per* Innes CJ in *Eastwood v Shepstone* **1902 TS 294** at 302, quoted with obvious approval in *Sasfin* (supra) at 8I - 9A).'

Williston on Contracts 3rd ed para 1630 cited in *Sasfin* (supra) at 14D) cautions:

> '"Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power."'

Sasfin (supra) at 13I-14D concludes:

> 'An agreement ... [that constitutes exploitation and leaves one party at the mercy of another] is clearly unconscionable and incompatible with the public interest, and therefore contrary to public policy.'[7]

[62] In discussing the right of recovery of something delivered under an illegal contract the Appellate Division emphasised in *Jajbhay v Cassim* **1939 AD 537** at 544:

'I respectfully suggest that he should have approached the matter from the more fundamental point of view as to whether public policy was best served by granting or refusing the plaintiff's claim. If the learned Judge had so approached the case and had considered that as an equitable Judge he was free (as I think he was) to order the restoration of the cow, I cannot doubt that he would have granted the relief prayed. Indeed the facts of that case afford a typical example which called for a decision on which side public policy is best served. It may be said that contracts of that nature are more discouraged by leaving the bereft plaintiff unhelped and the doubly delinquent defendant in possession of his illgotten gains. I cannot agree with this view, which I think would not so much discourage such transactions but would tend to promote a more reprehensible form of trickery by scoundrels without such honour as even thieves are sometimes supposed to possess, and public policy should properly take into account the doing of simple justice between man and man.'

[63] In summary, clauses that public policy cannot tolerate include those that are 'draconian', 'so gratuitously harsh and oppressive',[8] that are 'clearly inimical to the interests of the community', that are 'contrary to law or morality', that 'run counter to social or economic expedience'[9] or are 'unconscionable and incompatible with public interest'.[10]

Developing the common law

[64] Should the common law concept of *contra bonos mores* be developed in order to comply with the Constitution of the Republic of South Africa, 1996?

[65] In *Johannesburg Country Club v Stott and Another*[11] the SCA anticipated without deciding that contracts incompatible with constitutional values may require adaptation of the common law to be consistent with the spirit purport and objects of the bill of rights.[12] In *Murray v Minister of Defence*[13] it unhesitatingly held:

omitted)

[66] Two years later in *South African Maritime Safety Authority v McKenzie*[14] the SCA doubted that it was even necessary to develop the common law to recognize an '"obligation of confidence and trust"' which is well-established in our law. The court pointed out:

'[54]...What is important to bear in mind is that the effect of any extended duty of fair dealing must be worked out in individual cases in the light of the statutory provisions giving effect to the constitutional guarantee of fair labour practices. .... *Murray* seems to me to be authority for no more than the proposition that an employee who is not subject to the LRA enjoys the same right as other employees not to be constructively dismissed, whatever else might have been said en passant. It is possible that there is some need to develop the common law by importing into the contract of such employees terms that give effect to their right to fair labour practices but that is not a matter that need now concern us.

[55] I do not think that any of the cases I have referred to can be said to have decided authoritatively that the common law is to be developed by importing into contracts of employment generally rights flowing from the constitutional right to fair labour practices. It is uncontroversial that the LRA is intended to give effect to that constitutional right and I see no present call, certainly not in this case, for the common law to be developed so as to duplicate those rights (at least so far as it relates to employees who are subject to that Act).'

[67] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [2007] ZACC 5; (2007 (7) BCLR 691) at para 28 settles the question of public policy and contracts as follows:

'Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our Constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.' (Footnotes omitted)

[68] In this case the plaintiff asserts a right to forfeiture that the defendant resists with a counterclaim for transfer of membership interests and underpayment of her remuneration. She claims under the common law the right to fair dealing[15] and to be protected against agreements that are *contra bonos mores*. [16] These rights are ingrained into our common law. Accordingly, I am in respectful agreement with *South African Maritime Safety Authority v McKenzie* that the common law needs no development in order for the defendant to assert these rights. These rights are also codified into our labour laws. Unlike Murray, an officer in the South African Defence Force, the defendant was protected by the Labour Relations Act 56 of 1995 (LRA). However, she does not assert her labour law right not to be constructively dismissed in order to claim the remedies under the LRA. In fact she does not refer to or rely on the LRA at all. She claims that the plaintiff constructively frustrated her fulfilment of her obligations under their agreements by leaving her no choice but to resign. Furthermore, her claims are not restricted to labour laws. Her counterclaim is one of a plethora of possible common law claims that overlap with or fall beyond the protection of labour laws. It is enforceable under the Constitution because she is not attempting to duplicate or circumvent the rights and remedies regulated under labour laws. [17]

[69] I now set out to investigate whether clause 7 is against public policy in circumstances in which an employee might be deprived of her remuneration.

[70] As to whether the defendant can be deprived of her remuneration under clause 7 I defer to Otto Kahn-Freund who famously observed that:

'[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment" The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.'[18]

[71] In endorsing Kahn-Freund's analysis of inequality in employment, the Constitutional Court (CC) urged:[19]

'In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a core value of the Constitution which has been given effect to by the LRA. This is a protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterizes employment in modern developing economies.' (Court's footnotes omitted)

[72] A respected labour law academic elaborates:

'A contract, in other words, presupposes agreement between equals – that is, between parties equally able to stipulate the terms that they find acceptable and walk away if the other party does not agree. Workers in general cannot do so; the labour market is a buyer's market far more often than a seller's market.'[20]

[73] Citing Kahn-Freund above *LAWSA* points to the link between employment and the Constitution in the following extract:[21]

'However, one needs to look at the personal and dependent nature of the employment relationship. The purpose of constitutionally guaranteeing labour rights is the protection of human beings, not of businesses, and the protection of vulnerable human beings, the workers.'

[74] Grogan illuminates that the inequality is definitional:

'(T)he courts regard the control actually or potentially exercised by the employer over the employee as one of the main characteristics, if not the key characteristic, of the employment relationship. This means that unless there is an element of hierarchical authority in the relationship, the parties are by definition not employers and employees. Apart from the fact that subordination is by definition a characteristic of the employment relationship, the relationship between the employer and employee is also in fact unequal. Historically, the requirements of the contract of employment reflect the unequal distribution of social and economic power out of which it emerged. …

Given the nature of South African society, very few, if any other than employees with rare and marketable skills, can realistically be described

'[Like] ... goods and services traded through markets, wages and other terms of employment are determined largely by supply and demand [t]here is no reason to suppose that the employer side of the market has inherent power over the employee side in determining wages and other conditions of employment'.[23]

[76] In my view, whatever market and other external forces may influence terms and conditions, ultimately it is the employer who wields the power to dismiss the employee for economic and other reasons and who decides whether he will pay the employee. Furthermore, Hogbin's conclusions are based on circumstances he found in Australia. In South Africa, the Employment Equity Commission's (EEC) Report 2012[24] illustrates the coincidence of race and gender on the one hand with low paying jobs that entrench poverty and powerlessness on the other hand.[25] Hogbin's thesis does not apply to these circumstances in which the supply side of low and unskilled labour predominate and dwarf the demand for such labour.

[77] Inequality inherent in the employment relationship is institutionalised into our economic system. *Biowatch Trust v Registrar, Genetic Resources* **2009 (6) SA 232** (CC) **(2009 (10) BCLR 1014)** para 17 responded as follows to systemic unfairness:

'It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation.'

[78] Calcified over centuries along class and racial lines such inequality has deepened the divide between rich, powerful owners of enterprises on the one hand and poor, powerless employees on the other hand. So structured the employment relationship collides again and again with the rights and values of equality and dignity in the Constitution. Consequently, the Constitution and labour laws recognise employees as a vulnerable status-based group discriminated under institutionalised socio-economic conditions. Labour laws passed under the Constitution are the most visible and forceful brake on *laizzes faire* employment agreements. Such recognition imports into public policy the protection of employees as a vulnerable group. When employees claim protections under the common law decision-makers should intervene 'to counteract the inequality of the bargaining power which is inherent and must be inherent in the employment relationship.'[26]

[79] The right to socio-economic equality and dignity might also be engaged. Socio-economic status is not a listed ground of discrimination. Discrimination on an unspecified ground exists if it is based on attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.[27] Socio-economic status is more than an unspecified ground of discrimination.[28] However, as this ground was not ventilated I take it no further.

[80] Our constitution is characterised as being transformative[29] precisely because it is intended for use as a tool to terminate socio economic inequality and injustices. Taking my cue from the authorities above, when interpreting and considering claims under employment contracts the relationship of inequality must inform the determination as to whether an agreement or the relief claimed is *contra bonos mores*. To ignore the inherent inequality and to rely on the formalism of consenting parties with the capacity to contract would deny to the Constitution its transformative function. This is not to say that a court should rescue a recalcitrant employee merely because he is an employee and therefore vulnerable. For instance, an employee who steals his employer's information in breach of a restraint of trade falls beyond the protection of the common law, labour law and the Constitution.[30] It simply means that when disputes about employment contracts are challenged under the common law, they should be scrutinised under the Constitution to ensure that they are not contrary to law

inseparable from socio-economic inequality;[32] hence the disproportionate concentration of poverty amongst women and black people, a fact borne out by the EEC report above. Socio-economic inequality is usually addressed by policy and through the political process such as promulgating labour laws. Hence courts are usually reticent about engaging in distributive issues. However, the learned author argues that separating status-based measures from redistributive measures limits the ability to make real equality of opportunity and genuine choice possible.[33] She motivates for a multi-dimensional conception of equality which incorporates both recognition and redistribution issues. Importantly, she underscores the interaction between equality and dignity, which play out in complaints against e.g. sexual harassment, racist abuse and the humiliation of old people.[34] She advocates a social democratic model to best synchronise redistribution and recognition.[35]

[82] Some judgments acknowledge that our Constitution is not libertarian[36] but 'promotes an entirely different vision of our society. A transformative constitution needs to engage with concepts of power and community.[37] With the Constitution entrenching third generation rights[38] such as access to housing and the right to education, and the CC having to give effect to them if it is to play a genuinely transformative role, it is hard to describe our Constitution as anything but inclining towards social democratic.

[83] In this case the controversy as to whether claims are justiciable is avoided. This case presents as justiciable claims arising from the interpretation of employment agreements the determination of which can be distributive if effect is given to constitutional values.

[84] The plaintiff as the owner of the business and employer held a position of power over the defendant, an isolated employee. The plaintiff described the defendant as an exceptional worker, with an amazing group of loyal clients and as an asset to the business. Yet she was easily replaced on her departure with several employees who were employed on a commission only basis. From the evidence it emerges that she stood her ground when bargaining for herself, but only up to a point. Initially she could not risk losing her job. If she was aware at the time that the 2004 agreement reduced her pay in the 2002 agreement, she did not challenge it. By 2011 when she had boosted her bargaining position by her superior performance she was able to hold her ground better. Ultimately, the plaintiff terminated the bargaining for the 2011 agreement with his take it or leave it stance.

[85] The validity and enforceability of only clause 7 is disputed. The defendant has not placed in issue that under the extension agreement she was getting only 4% instead of 15.38% per annum of Bubaluba that she got under the 2002 agreement. Clause 7 is severable from the rest of the agreements. Having the security of almost another eight years employment until December 2015 was a right she would have wished to secure at that time. Therefore the extension agreement, excluding clause 7, cannot be said to be unconscionable or unjust. Consequently, she has no automatic right to the unearned portion of the member's interest.

[86] In contrast, clause 7 is a forfeiture of a portion of the remuneration she had earned. To permit the plaintiff to reclaim from the defendant her member's interest in Bubaluba, whether in terms of the 2002 agreement or the extension agreement, would mean denying her hard earned remuneration. Such remuneration also translated into the home she provided for herself, her unemployed husband and children. To permit the forfeiture of her 12% member's interest in Bubaluba would be improper, unconscionable, an injustice and importantly, contrary to social and economic expedience. Accordingly, I find that clause 7 is *contra bonos mores* and that the defendant is entitled to the transfer of the 12% member's interest in Bubaluba she earned under the extension agreement. Whether she is entitled to the unearned balance of the shares depends on whether she resigned voluntarily or was constructively dismissed.

Voluntary resignation or constructive dismissal

'... the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer ... had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.' ***[39]***

[88] In the case of a breach of trust by an employee for say, stealing or some other act of dishonesty, the employer's default position of dismissing the employee is generally unassailable.**[40]** Conversely, when an employer is untrustworthy an employee should be free to resign and claim on the grounds of constructive dismissal.

[89] To substantiate her claims based on constructive dismissal the defendant supplied the following further particulars for trial which correspond substantially with her emails summarised above:

i. The plaintiff effectively demoted the defendant in her capacity as operations manageress by requiring her to vacate the upstairs office and to work on the ground floor where all labour brokers were located.

ii. The plaintiff levelled unfounded allegations alternatively insinuated without any lawful justification or basis that the defendant was not maintaining her working hours and that the defendant had recklessly incurred bad debts.

iii. The plaintiff imposed unreasonable targets, alternatively imposed unreasonable demands on the defendant rendering the defendant's continued employment with the plaintiff intolerable.

iv. The plaintiff made the defendant feel pressurised.

v. The plaintiff nagged the defendant about increasing her turn-over from approximately 100 to 300 loads a month.

vi. The plaintiff was not satisfied even when the defendant met the increased targets.

viii. The defendant was forced to spend hours away from her husband and children and not have leave approved when she applied for it.

ix. The plaintiff was seldom in his office to assist and when he was, he was pushy and agitated.

x. The defendant became depressed and suffered from sleeplessness.

xi. The defendant was, as a consequence, obliged to seek medical treatment.

[90] Significantly, these particulars omitted to mention breaches of their remuneration agreements, in particular the 2011 agreement that triggered the breakdown in their relationship. Her emails also downplay the remuneration issue. Clearly the plaintiff breached the 2011 agreement by underpaying her. The amendment now sought to fix this omission in the further particulars must be granted. However, the plaintiff's under-emphasis of the remuneration is a telling indicator that it was not the primary cause of the breakdown of the relationship. Her emails and the further particulars reveal more complex relationship issues.

[91] For context, something needs to be said about the relationship between the parties. The defendant had to leave school after attending standard six in order to help her father in their family business. The family business consisted of a grocery retail store with a small transport division. When she approached the plaintiff for a job he turned her down at the first interview. She returned shortly and insisted that he employ her. Taken aback by her confidence he did so. They became friends. She regarded him as a confidant and father figure. Mostly, they trusted each other. During his testimony he acknowledged that she would not lie. Although he also testified that he would not go back on his word, the evidence shows otherwise.

[92] The nature of the industry was pressurised and stressful. The defendant loved her work. She was highly motivated. She worked long hours. Initially, she willingly used the laptop from home to work well into the night. The joy of her job was as much if not a greater incentive than the higher remuneration it brought. She valued the respect and the dignity that came with the job and the relationship she had struck with the plaintiff.

[93] She did not challenge the plaintiff's underpayment of her wages with the reversal of the 2002 agreement by the 2004 agreement. Believing him at the time she was prepared to vacate the house or pay for it to stay on. Importantly, she did not institute these proceedings for underpayment for her wages. Nor is there evidence that she prosecuted an unfair dismissal claim under the LRA. It was the plaintiff who launched this action on 20 December 2011. By that stage many of her claims for underpayment of her wages had prescribed.

[94] She was not aware of the amount of profits she had generated since the 2002 agreement until her constructive dismissal. She became aware of it only when she started to prepare for this case. On the schedules that she generated it emerges that the defendant generated a profit of R16 748 714.41 for the business since September 2002. The plaintiff had testified that his aim was to remunerate her with a package that

[95] Sighing with apparent frustration the plaintiff testified that the defendant wanted to renegotiate the terms constantly. However, the evidence shows that it was he who initiated the variation of the 2002 agreement, the extension agreement and the 2011 agreement when an agreement was in place until December 2015. He attempted unsuccessfully to secure a restraint of a trade agreement with her in 2010.

[96] Against this background the host of relationship factors subsumed his underpayment of her remuneration. She was even prepared to sacrifice her income in order to have more time with her family. Her emails ooze with anger and hurt that he was more preoccupied with extracting money out of her than showing her human kindness and respect. She complained that work was no longer a pleasure for her. She raised the remuneration issue to point out that she was not prepared to increase her turnover by 125% if she was going to earn less than 24% of the profits. Furthermore, it aggrieved her that new employees got more benefits than she did. Her reference to 'skin colour' was obviously to her race as an Indian even though she denied in court that she implied that he was a racist. However, in a subsequent email she repeats her complaint that he made her feel inferior as usual and was rude to her.

[97] Their relationship began to unravel in 2011 when she confirmed that she would not be extending her contract beyond February 2016. About 2010 he had allowed her to occupy a private office upstairs away from the general floor of brokers and to renovate it at her expense. He permitted her to employ her own personal assistant whom she paid or contributed to from her own funds. After she refused to extend her contract in 2011 he instructed her to join the general pool of brokers. In his opinion, the brokers had to work as a team. If her genuinely believed this to be the case it does not explain why he offered to re-establish her in a satellite office in Pennington after she resigned. Unsurprisingly therefore to her this was a demotion not only in her mind but it was also apparent from the way her subordinates responded to her. Unhappy as she was she obeyed his instruction.

[98] At the inception of their relationship when the defendant could not afford napkins for her child, the plaintiff willingly paid for flights for her, her husband and child to return from Zambia to work for him. In 2011 when he offered to fly her to Cape Town to discuss their problems with him there, to take as much as three months leave and finally offering her a new deal after her resignation, commercial considerations remained at stake. As the manageress of the transport brokers and the highest performer she would have been a loss to his business if he did not secure her employment. If she started her own business she would have been a threat. His hypocrisy was all too evident in the syrupy sweetness of his letter terminating her services with immediate effect and withholding her October salary. In none of her emails does she complain about the general manager or demand that the plaintiff get rid of him. She accounted to the plaintiff directly and it was he who hurt her deeply.

[99] In my diagnosis the underpayment of her wages was miniscule in comparison to the plaintiff breaking her trust, treating her as an inferior Black person and being unappreciative of the sacrifices she made for the business at the expense of her family. Notwithstanding the detailed explanations she proffered in her emails, the plaintiff had not fathomed even at their meeting on 26 October 2011 why she had retaliated against him so antagonistically. Her reasons were fully explained in her emails. Clearly the plaintiff refused to acknowledge them. In summary, she resigned because she found the inequality in their relationship intolerable and his treatment of her was an affront to her dignity. She wielded the only weapon in her hand. That was to resign and start her own business in competition with him.

[100] The plaintiff conceded that by February 2009 the defendant would have acquired the entire membership interest in Bubaluba but for the extension agreement. As the plaintiff precipitated her resignation the doctrine of fictional fulfilment applies. I have no hesitation in finding that the plaintiff constructively dismissed the defendant by his own dishonourable conduct. But for her dismissal, the defendant would have been entitled to the transfer of all the membership interest in Bubaluba. Consequently, I conclude that the plaintiff should transfer all his membership interest to the defendant.

Penalties Act. However, the submission by counsel for the plaintiff that clause 7 was an incentive and not a penalty invites the court's response. The incentive in the extension agreement appears in paragraph 3 in which the plaintiff agreed to transfer the remaining shares over eight years at 4% annually. Clause 7 is unambiguously a forfeiture of benefits in favour of the employer. As such it is a penalty.

[102] If any penalty were to be imposed on the defendant at all it must be proportional to the prejudice suffered by the plaintiff.[41] In *Botha* and *Another* v *Rich N.O* and *Others*[42] the CC found it would be a disproportionate sanction to deprive the debtor of the opportunity to have the property transferred to her in view of the considerable portion of the purchase price she had already paid. It balanced this view with imposing a condition upon her to pay the arrears and outstanding amounts in rates, taxes and service fees.

[103] The plaintiff did not prove any prejudice he suffered on the premature termination of the defendant's employment. To reverse the transfer of shares in Bubaluba would be grossly unfair and prejudicial to the defendant.[43] It is common cause that she had acquired 76.9% plus 12% of the membership interest but only 45% of it had been transferred into the name of the defendant. The defendant earned all the membership interest by remaining in employment for long as she did. Furthermore, I found above that it was the plaintiff who dismissed her constructively and unlawfully. Consequently, no penalty should be imposed on the defendant.

[104] I am indebted to counsel for helpfully narrowing down the issues in dispute, relieving me of the task of deciding questions such as outstanding leave and other pay. Counsels' heads of argument and the bundles also facilitated my judgment.

ORDER

Plaintiff's Claim

[A] The plaintiff succeeds to the extent that clause 7 is rectified to read 'employee' instead of 'employer' on line three of the extension agreement.

[B] The plaintiff's claim for the transfer of the membership interests to the second defendant from the first defendant is dismissed with costs.

Defendant's Counter-Claim

[C] The first defendant is granted leave to amend paragraph 1 of her Further Particulars for Trial dated 7 February 2014 by adding the following:

'1.10 the plaintiff failed to effect payment to the first defendant of her agreed remuneration for the months of July, August and September 2011;

[D] Judgment is granted in favour of the first defendant and against the plaintiff for:

1. the payment of the sum of R104 964.22 made up as follows:

July commissions R11 927.61

August commissions R11 366.96

September commissions R10 409.24

October salary including commissions R53 911.90

Leave pay (by agreement)

(12,125 days 48,4 hours x R168.33) R17 348.51

R104 964.22

2. interest in the amounts of:

2.1. R11 927.61 at the rate of 15.5% per annum with effect from 31 July 2011 until 31 July 2014 and thereafter at the rate of 9% per annum to date of payment;

2.2. R11 366.96 at the rate of 15.5% per annum with effect from 31 August 2011 until 31 July 2014 and thereafter at the rate of 9% per annum to date of payment;

2.3. R10 409.24 at the rate of 15.5% per annum with effect from 30 September 2011 until 31 July 2014 and thereafter at the rate of 9% per annum to date of payment;

2.4. R53 911.90 at the rate of 15.5% per annum with effect from 31 October 2011 until 31 July 2014 and thereafter at the rate of 9% per annum to date of payment;

2.5. R17 348.51 at the rate of 15.5% per annum with effect from 31 October 2011 until July 2014 and thereafter at the rate of 9% per annum to date of payment.

"The parties confirm that to date hereof the employer is liable to transfer to the employee 76.9% of the member's interest in Bubaluba Properties CC. It is further agreed that the Employer shall for the remaining eight (8) years transfer to the employee a further four (4%) per cent members interest annually from the end of February 2009"

[F] The plaintiff shall sign all documents and do all such things as may be necessary in order to effect registration of transfer from the name of the plaintiff into the name of the first defendant of 55% of the membership interest in the second defendant.

[G] Failing compliance by the plaintiff with the preceding paragraph of this order within 10 (ten) days from the date of this order, the sheriff of this honourable court is authorised and directed to do all such things as may be necessary on behalf of the first defendant to give effect to such order;

[H] Costs of suit including all reserved costs and the costs of senior counsel.

D. Pillay J

APPEARANCES

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Ref: SJ K173

[2] *Burger* v *Central* SAR **1903 TS 571** at 578. See also *Malherbe v Ackerman and Others (2)* **1944 OPD 91** at 94; and *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* **[1992] ZASCA 56**; **1992 (3) SA 234** (A) at 239H-I.

[3] 'Words are interpreted against (to the disadvantage) of the party uttering them'.

[4] 'Words should be interpreted against the stipulator'.

[5] This court has considered the warning of Potgieter JA in *Jonnes v Anglo-African Shipping Co* 1972 (2) 827 (A) at 835B-F.

[6] EA Kellaway *Principles of Legal Interpretation of Statutes, Contracts and Wills* (1995) at 468.

[7] See also *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* **2011 (4) SA 276** (SCA) para 23.

[8] Botha (now Griessel) v Finans Credit (Pty) Ltd **1989 (3) SA 773** at 728I-783C

[9] *Sasfin* at 8C-D.

[10] *Freddy Hirsch* at 287A; *[zRPz]Jugal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* **2004 (5) SA 248** (SCA) para 11.

[11] *Johannesburg Country Club v Stott and Another* **2004 (5) SA 511** (SCA) para 12.

[12] *Tsung v Industrial Development Corporation of SA Ltd* **[2006] ZASCA 28**; **2006 (4) SA 177** (SCA) para 11.

[13] **2009 (3) SA 130** (SCA) ([2008] **[2008] ZASCA 44**; **6 BLLR 513**; **[2008] 3 All SA 66)** para 5.

[14] *South African Maritime Safety Authority v McKenzie* **2010 (3) SA 601** (SCA) para 53-54.

[15] *Murray v Minister of Defence* **2009 (3) SA 130** (SCA) ([2008] **[2008] ZASCA 44**; **6 BLLR 513**; **[2008] 3 All SA 66)** para 5; *South African Maritime Safety Authority v McKenzie* **2010 (3) SA 601** (SCA) para 54.

[16] See for example *Den Braven SA (Pty) Ltd v Pillay and Another* **2008 (6) SA 229** (D) ([2008] **3 All SA 518)** para 34; *SAMSA v McKenzie* **[2010] 3 All SA 1** (SCA) para 35.

[17] *South African Maritime Safety Authority v McKenzie* **2010 (3) SA 601** (SCA) para 54-56.

[18] O Kahn-Freund *Labour and the Law* (1972) 8, and see also Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 18.

[19] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* **[2007] ZACC 22**; **2008 (2) SA 24** (CC);(2007) 28 ILJ 2405 (CC) para 72.

[20] Darcy Du Toit 'Extending the frontiers of employment regulation: The case of domestic employment in South Africa' *Law, Democracy & Development* Vol 14 (2010) 210.

[21] *LAWSA* (2014) 2nd ed vol 5(4) para 186.

[22] Grogan *Workplace Law* 2009 10th ed at 43-44.

[23] Geoff Hogbin 'Power in Employment Relationships' at vii, First published in 2006 by the New Zealand Business Roundtable PO Box 10–147, The Terrace, Wellington, New Zealandhttp://www.nzbr.org.nzISBN 1–877394–06–8© 2006 edition: New Zealand Business Roundtable.

[24] Commission for Employment Equity Annual Report 2011-2012 Chapter 3. .http://www.labour.gov.za/DOL/downloads/documents/annual-reports/employment-equity/2011-2012/12th%20CEE%20Report.2012.pdf.

[27] *Harksen v Lane NO and Others* [1997] ZACC 12; 1997 (11) BCLR 1489 (CC) para 46.

[28] Sandra Fredman 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *SAJHR* 214; Sandra Liebenberg et al 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *SAJHR* 335 at 347.

[29] See for example Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146; *Residents of Joe Slovo Community, WC v Thubelisha Homes (Centre on Housing Rights & Evictions, Amici Curiae)* 2010 (3) SA 454 (CC) (2009 (9) BCLR 847) para 142; *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC) (2009 (10) BCLR 1014) para 17; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C) ([2007] 4 All SA 1368) para 30.

[30] *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth and Another* 2005 (3) SA 205 (N) (2004 (1) BCLR 39).

[31] *Sasfin* at 9G, *Retha Meiring* at 45.10.

[32] Sandra Fredman 'Redistribution and Recognition: Reconciling Inequlaities' (2007) 3 *SAJHR* at 215.

[33] Sandra Fredman 'Redistribution and Recognition: Reconciling Inequlaities' (2007) 3 *SAJHR* at 215.

[34] Fredman at 225.

[35] Fredman at 223.

[36] *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C) ([2007] 4 All SA 1368) para 30;

[37] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) contrast with *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) ([2008] 3 All SA 518).

[38] See Hüter der Verfassung 'Guardian of the Constitution – Constitutional Review and the South African Constitutional Court' (2009) 24 *SAPR/PL* 136 at 146-7; MP Olivier & LG Mpedi 'Co-ordination and integration of social security in the SADC region: developing the social dimension of economic co-operation and integration' 2003: 28(3) *Journal for Juridical Science* 10 at 25.

[39] Applied in *South African Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA) para 53-54.

[40] See for example *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 2455 (LAC) para 17; and *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) para 7.

[41] *Van Staden v Central SA Lands* and *Mines* 1969 (4) SA 349 (W) at 352 - 353

[42] *Botha* and *Another* v *Rich N.O* and *Others* 2014 (4) SA 124 (CC) at 49 and 51

[43] *Botha* and *Another* v *Rich N.O* and *Others* 2014 at 51

South Africa: Kwazulu-Natal High Court, Durban

Standard Bank of South Africa Ltd v Dlamini (2877/2011) [2012] ZAKZDHC 64; 2013 (1) SA 219 (KZD) (23 October 2012)

IN THE HIGH COURT OF SOUTH AFRICA, DURBAN

REPUBLIC OF SOUTH AFRICA

Case no.: 2877/2011

In the matter between

STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**

and

MBUYISENI DLAMINI **Defendant**

JUDGEMENT

Heard August 2012

Handed down:23 October 2012

D. PILLAY J

[1] Mbuyiseni Dlamini bought a 2004 Toyota Corolla 160i GLE on credit from Standard Bank for R85 745.02 on 3 June 2010.

[2] On 5 October 2010 Scorpion despatched a letter to the dealership demanding the refund of the deposit of R15 000 and cancellation of the agreement. On 21 October 2010 the Bank's attorneys sent a notice in terms of s 129 of the National Credit Act 34 of 2005 (the NCA) addressed to Mr Dlamini but to an incorrect address demanding payment in terms of the credit agreement. On 3 March 2011 the Bank had summons issued for judgment to be entered against Mr Dlamini confirming the termination of the agreement, ordering the return of the vehicle, costs of suit and the costs of locating, removing, storing and disposing of the vehicle.

[3] In support of its claims, the Bank relied on clause 10.6 in its credit agreement which provided that if the agreement was not entered into at the Bank's registered business premises, Mr Dlamini could, within five business days after signing the agreement, terminate it on notice to the Bank's vehicle and asset finance division head office at fax number 011 6313168, and return or tender the return of the vehicle. If he terminated the agreement in this way he was obliged to pay the rental for the use of the vehicle for the time that he had it and any reasonable costs the Bank might incur to have the vehicle returned or restored to a saleable condition. What the agreement did not record was that he was also entitled to a refund in terms s 121(3)(a) of the NCA.

[4] In short, the Bank relied on s 121 the NCA read with reg 37 of the National Credit Regulations, GN R713, *GG* 28893, 31 May 2006 (the NCR). Because Mr Dlamini did not notify the Bank of the termination in the manner prescribed by clause 10.6 of the agreement and reg 37, the Bank contended that the termination was a voluntary surrender contemplated in s 127(5) to (9) of the NCA.

[5] Clause 10.3 which provides for termination by voluntary surrender, entitles the Bank to sell the vehicle, account to Mr Dlamini and claim any shortfall due by him under the agreement. In the circumstances, finding the basis for the termination is important to determine the consequences and remedies each party has on termination.

[6] In his defence, Mr Dlamini denied that he surrendered the vehicle. He alleged that he returned it because it broke down. On driving it from the dealership he had noticed that it was jerking and smoking. He consulted his cousin, a mechanic who testified in corroboration. After they test drove it for about two kilometres they diagnosed that it would not last for more than 30 kilometres. They discovered that the vehicle was rebuilt following an accident. As predicted, it broke down and they had it towed back to the dealership.

[7] In his answering affidavit to the summary judgment application Mr Dlamini elaborated on his defence that he was unaware that he had to notify the Bank of the termination of the agreement in the prescribed manner. He alleged that it was only Sibusiso Mthetwa who attended to him at the dealership at all times. Mr Mthetwa created the impression that he worked for both Starlight and the Bank when he assisted Mr Dlamini to complete the paperwork to arrange the loan from the Bank. Mr Dlamini denied that Mr Mthetwa or anyone else had explained the terms of the agreement to him. If he had known that he had to telefax notice to the Bank at the number provided in the agreement informing it that he terminated the agreement and tendered the return of the vehicle he would have complied.

[8] As it was common cause that Mr Dlamini did not notify the Bank of the termination of the agreement by fax as prescribed in the agreement, the only issue in dispute on the facts was: did Mr Dlamini know and understand the terms of the agreement?

[9] On the facts, the only material witnesses for the Bank were the persons from the dealership who interacted with Mr Dlamini when he bought and returned the vehicle. Mr Dlamini persisted that it was Mr Mthetwa who attended to him on both occasions. However, the Bank first called Nomuso Eugenia Ndlela, an employee in its legal department, to testify about how credit agreements were usually concluded at motor dealerships, the importance of receiving notice of termination in the prescribed way, how the vehicle had been repossessed from Starlight in September and that it has yet to be resold

been so for the convenience of not the consumer, but of the Bank.

[11] Much of Ms Ndlela's evidence was unnecessary as Mr Dlamini admitted his signature to the agreement and did not dispute that the agreement was what it purported to be. The interpretation of the termination clause and its materiality were also not disputed. Ms Ndlela's evidence could easily have been curtailed, if not dispensed with altogether, if the parties had defined the issues in dispute precisely at their pre-trial conference.

[12] At the end of Ms Ndlela's evidence the Bank signalled its intention to call Ms N. Marimutho whose signature appeared on the agreement on behalf of the Bank. Mr Dlamini vehemently denied having any dealings with Ms Marimutho at all.

[13] On resumption, the Bank abandoned Ms Marimutho as its witness and called Mr Mthetwa instead. The gist of Mr Mthetwa's evidence was that he was the salesman who sold the vehicle to Mr Dlamini. He informed Mr Dlamini that the dealership could arrange finance from one of several institutions including Standard Bank. He took Mr Dlamini to Ms Marimutho and left him with her to complete the application for finance. The only conversation he heard between them was Ms Marimutho asking Mr Dlamini in English whether he was Mr Dlamini. They were together for 25 minutes. He alleged that it was neither his function to explain the agreement to Mr Dlamini nor to complete the forms for applying for credit and concluding the credit agreement. Besides, Mr Dlamini had not brought a copy of the contract with him when he returned the motor vehicle.

[14] Mr Mthetwa studiously avoided accepting any responsibility for interpreting and explaining the terms of the agreement to Mr Dlamini. Even if Mr Dlamini did not bring the agreement, it was a standard credit agreement. Mr Mthethwa had earlier testified that Starlight was an agent for several banks including Standard Bank. The probabilities of Starlight not having a standard term credit agreement for Standard Bank are remote. It should at least have had its own copy as a record of the transaction for which it received R15 000 as deposit but reflected only R13 000 in the agreement.

[15] There is no evidence that Ms Marimutho spoke IsiZulu. Considering that Mr Mthetwa was the salesman and the person who spoke IsiZulu at Starlight the probabilities favour Mr Dlamini's version that only Mr Mthetwa communicated with him.

[16] Mr Mthetwa confirmed that Mr Dlamini had towed the vehicle back to the dealership. Mr Dlamini was angry and informed him that he did not want that or any other vehicle that Starlight offered him. Mr Mthetwa surmised that Mr Dlamini might change his mind in due course. However, he conceded that nothing from what Mr Dlamini said or did suggested that Mr Dlamini might change his mind and return to the dealership.

[17] The vehicle was repaired by the in-house mechanic employed by the dealership. This was usually done for all defective vehicles in the dealership. Authority from the Bank as the owner was not specifically sought to repair the vehicle.

[18] Unsurprisingly, Mr Mthetwa denied that Mr Dlamini demanded the return of his deposit of R15 000. To admit the demand Mr Mthetwa would have had to explain why Starlight or the Bank had not refunded the deposit. As the salesman, Mr Mthetwa earned commission income only. The termination of the agreement meant that he and Starlight would lose their commission.

[19] In response to questions from the court, Mr Mthetwa testified for the first time that when Mr Dlamini returned the vehicle he took Mr Dlamini aside and informed him that he should notify the Bank of the termination of the agreement and that if he could not see what was in the agreement then he should get his child to read it for him. This was vital evidence that he should have given in chief. The Bank knew that Mr Dlamini's defence was that he was not aware that he had to notify it in any prescribed manner. If Mr Mthetwa was being truthful about advising Mr Dlamini as he alleged, he would have given this evidence in chief.

[21] The Bank's designated agent, Ms Marimuthu, the only person authorised to enter into the contract with Mr Dlamini, failed to testify. At the end of the Bank's case there was no evidence that anyone explained the terms of the agreement to Mr Dlamini. More specifically, no one informed him on signing the agreement and especially when he terminated it, that he had to notify the Bank by telefax. No one established whether Mr Dlamini knew what it means to fax.

[22] According to Mr Dlamini all he was told about the Standard Bank documentation was that it was about the sale of the vehicle and that he would be required to pay an instalment with effect from the 1st of July 2010. His answering affidavit to the application for summary judgment is vague about the documents he signed. He understood that they were necessary to enable him to get the money to purchase the vehicle and that he was required to pay instalments. That was the information that was imparted and understood by Mr Dlamini at the point of the sale.

[23] Mr Dlamini is functionally illiterate and does not understand English. This is as obvious to me as it was to Mr Mthetwa. Mr Dlamini completed schooling at standard one. At 52 years, he is an unsophisticated African male. He had difficulty in the witness stand engaging with the documents. He had become so excited about the purchase of a vehicle that he paid little attention to the repayment plan. He relied on the Bank to deduct reasonable instalments. He did not expect the Bank to deduct a high amount that left him without the means to support himself, his wife and his two little children. He expected to discover what the amount of those instalments would be when the Bank deducted its first instalment from his account. He trusted his bank. On discovering that he bought a defective vehicle he returned it intuitively to the person who sold it to him.

[24] Initially when he testified, Mr Dlamini tended to deny almost everything that was put to him, including facts that were common cause or the basis of his defence. I warned him that it did not assist him to deny facts that he knew to be true and that I could find him to be evasive. Thereafter, he made a conscious effort to give a considered response to questions put to him. His illiteracy, lack of sophistication and general discomfort at being in a courtroom rather than deliberate mendacity caused him to lapse into the easy option of simply denying everything.

[25] On these facts I find firstly that Mr Dlamini terminated the agreement by returning the vehicle because it was so defective that it could not be driven. A voluntary surrender is usually triggered by a consumer's inability to comply with the credit agreement. Not a whiff of evidence suggested that Mr Dlamini was unable to pay for the vehicle or that he returned it for any reason other than it being incapable of being driven The Bank failed to establish a factual basis for any finding that the termination was a voluntary surrender. Mr Dlamini's mere non-compliance with the procedural formality of faxing notice of termination does not lead to the inference that he terminated the agreement by voluntarily surrendering the vehicle.

[26] Secondly, the Bank and its agents caused Mr Dlamini to enter into a credit agreement without reading, interpreting and explaining the material terms to him which he did not know and understand. Could he nevertheless in law be held to have assented to the agreement by virtue of his signature?

[27] Turning to the law, the Bank relied on the common law principles of quasi-mutual consent and *caveat subscriptor* and the cases in which these principles were invoked.[1] However, when the NCA applies, the constitutional right to equality comes to my mind immediately. The Preamble to the Constitution and to the NCA connect them. What then is the interface between the Constitution, NCA and the common law principles of *caveat subscriptor* and *quasi* mutual consent?

[28] In its Preamble the Constitution recognises the injustices of our past. It commits to healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens. The founding values of the Constitution include human dignity, achieving equality, advancing human rights and

[29] Academics Fredman *et al* observe:

> 'In many countries, equality legislation initially sought to free individuals from the negative effects of these group characteristics, believing that in a colour-blind and gender-neutral world individuals could thrive and develop their potential free from stereotypical assumptions. But this view of equality was narrowly circumscribed. It was a relative principle dependent upon identifying an appropriate comparator. It also operated symmetrically so that the benefits provided to a disadvantaged group could be challenged as a violation of the principle of equality. Moreover, it assumed that the only legitimate role of state action was negative, to stop discrimination, rather than requiring positive steps and measures to be taken to remedy disadvantage. The failure of this formal view of equality to address deeply entrenched and complex patterns of group disadvantage led to sustained criticism by feminist and other writers, and to calls for formal equality to be replaced with substantive equality. Substantive equality, unlike formal equality, requires attention to context, the intersection of different grounds of disadvantage, difference, and positive obligations upon the state.[4]

[30] Our Constitutional Court (CC) has repeatedly endorsed the substantive approach to equality.[5] Likewise, national legislation contemplated in the equality clause aimed at preventing or prohibiting unfair discrimination[6] must also be interpreted in ways that achieve substantive effect. Therefore achieving equality, non-discrimination and human rights through legislation are policy objectives flowing from the Constitution itself.

[31] One category of legislation promulgated includes the obvious examples of the **Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000** and the **Employment Equity Act 55 of 1998**. These Acts target specific groups of people discriminated on recognised grounds of discrimination. As the learned authors Fredman and others point out, substantive equality looks beyond the recognised grounds to context and positive obligations. Accordingly, the legislature did not stop with this category in pursuit of its transformative agenda.

[32] Another category of legislation includes the NCA, the Consumer Protection Act 68 of 2008 (CPA) and even the Companies Act 71 of 2008 (the CA) which 'promote(s) compliance with the Bill of Rights...in the application of company law.'[7] Socio-economic status and illiteracy are not listed grounds of discrimination. Discrimination on these grounds is often indirect and therefore harder to diagnose and prove. Hence the NCA and CPA are but two statutes on a raft of national legislation aimed specifically at consumers to reverse historical socio-economic inequalities and adjust the imbalances.

[33] The preamble of the NCA begins:

> 'To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; ....to regulate credit information; ... to establish national norms and standards relating to consumer credit; ...'

[34] Section 3 elaborates that the purposes of the NCA are to promote and advance the social and economic welfare of South Africans, to promote a fair transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers by, amongst other things, promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.[8] Importantly, its purpose is also to address and correct:

> '. . . imbalances in the negotiating power between consumers and credit providers by -

[35] Section 2 of the NCA requires the Act to be interpreted in a manner that gives effect to the purposes of s 3. Section 2(6) acknowledges that a person is historically disadvantaged if that person is one of a category of natural persons who, before the Interim Constitution of the Republic of South Africa, 1993 came into operation, were disadvantaged by unfair discrimination on the basis of race.

[36] Section 121 applies to an instalment agreement entered into at any place other than the registered business premises of the credit provider. Furthermore, the section gives a consumer the right to terminate the credit agreement within five business days after the date on which it was signed by the consumer, by firstly, delivering a notice in the prescribed manner to the credit provider; and secondly, tendering to return any money or goods, or paying in full for any services received by the consumer.

[37] When a credit agreement is terminated in terms of s 121, the rights of the credit provider and consumer are balanced by subsecs (3)(a) and (b) as follows:

> '. . . the credit provider -
>
> '(a) must refund any money the consumer has paid under the agreement within seven business days after the delivery of the notice to terminate; and
>
> (b) may require payment from the consumer for—
>
> i. the reasonable cost of having any goods returned to the credit provider and restored to saleable condition; and
>
> ii. a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession,....'

[38] Clause 10.6 of the agreement paraphrases s 121(1), (2) and (3)(b) of the NCA but studiously excludes any reference to subsec (3)(a) which gives the consumer the right to a refund from the credit provider. Subsection (3)(b) clearly favours the Bank; the consumer has to pay the Bank. Subsection (3)(a) which favours the consumer because the Bank must to pay the consumer is omitted.

[39] Rescission of an agreement referred to in the heading of s 121 of the NCA and termination of an agreement at the instance of the consumer under s 122 of the NCA have distinctly different causes and consequences. Rescission aims to restore the contracting parties to the status ante quo. In other words the agreement is revoked or withdrawn. Termination retains and enforces the agreement. The remedy to which Mr Dlamini was entitled when he discovered that the Bank's agent sold him a vehicle that could not be driven at all was a refund in terms of subsec (3)(a).

[40] Despite the agreement being silent about rescission and a refund the Bank does not deny that Mr Dlamini has a right arising from the NCA to rescind the agreement. Clause 8 of form 20.2 which reg 30 of the NCR prescribes for small agreements, is headed 'Consumer's right to rescind the agreement (*if applicable*)'.The Bank does not deny that it is applicable. However, the Bank contends that he may only invoke the right to rescind after he delivered a notice to rescind in terms of reg 37 of the NCR. If such notice was important to the Bank then it should have included it in the agreement as a material procedural step not only to surrender but also to claim a refund. It should also have ensured that Mr Dlamini was aware of it.

[41] Non-disclosure of s 121(3)(a) violates the right of consumers to education and information in terms of s 3. The Bank's selection of what parts of s 121 of the NCA it should record in the agreement and what it should exclude is deliberate and deceptive. The heading of s 121 highlights its purpose as the 'Consumer's right to rescind credit agreement'. Instead of informing the consumer of this right, the Bank pitches it as an onerous bundle of obligations on the consumer to pay the Bank the costs of renting and recovering the vehicle. Projecting the consumer's obligations whilst understating his rights discourages rescission which is the consumer's statutory right.

[43] The Bank could not have misunderstood Mr Dlamini's reasons for returning the defective vehicle. Any doubt it had should have dissipated once it knew that it could not gainsay the fact that Starlight sold Mr Dlamini a seriously defective vehicle.

[44] The Bank gave Starlight no mandate to report vehicles that were returned within five days in terms of the termination clause 10.6. Such a business practice makes credit transactions unduly onerous and a veritable trap for poor, illiterate and disadvantaged people who intuitively would return defective goods to a supplier and ask for a refund.

[45] Given the importance of the notice to the Bank of the basis of the termination, the Bank should have mandated its agent to assist consumers like Mr Dlamini to fax the notices. Even if the Bank and its agents provided this service at a fee it would have been far cheaper than litigating to determine the basis of the termination. Imposing such a duty on the agents would also acknowledge the potential conflict of interest between an agent that sells defective vehicles and the consumer. Although the legal obligation to notify the Bank rested on Mr Dlamini, the Bank cannot absolve Starlight of its duty to act in good faith to notify the Bank in the ordinary course of commercial practice. The Bank should hold its agent accountable for not reporting immediately that the vehicle was towed back and that it could not be driven.

[46] Another two consumer rights are important in the context of this case. The first is the consumer's right to information in an official language in terms of s 63 of the NCA. Section 63(1) gives consumers a right to receive any document that is required in terms of the NCA in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicality, expense, regional circumstances and the needs and preferences of the population ordinarily served by the person required to deliver that document.

[47] The second is the right to information in plain and understandable language in terms of s 64 of the NCA. Subsection (1)(b) requires the producer of a document that is required to be delivered to a consumer in terms of the NCA to provide that document in the prescribed form, if any, for that document, or in plain language. For the purposes of the NCA, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance and import of the document without undue effort, having regard to, the organisation, form and style of the document, and the vocabulary, usage and sentence structure of the text.[10]

[48] Strictly interpreted neither s 63 nor s 64 of the NCA assists an illiterate consumer. Purposively interpreted they embody the right of the consumer to be informed by reasonable means of the material terms of the documents he signs. What is reasonable and material varies depending on the circumstances of each case. Amongst other things, the industry, regional circumstances or geographical location, price, nature of the goods and services and class of consumers likely to contract for them are relevant to determining what are reasonable means and material terms. Purposively interpreted, the credit provider bears the onus to prove that it took reasonable measures to inform the consumer of the material terms of the agreement.

[49] This transaction arose at a second hand car dealership in Pinetown, KwaZulu Natal. IsiZulu is the predominant African language. In the nature of such a business the Bank must anticipate that it will be dealing with historically disadvantaged persons. It enters into contracts in terms of which vehicles are returned for repairs and re-collection, for defects or as voluntary surrender because of the consumer's inability to pay the instalments. Establishing at the earliest opportunity what the basis is for the termination of an agreement is therefore important in the second hand car dealership industry. From the consumer's perspective the circumstances in which he is entitled on termination to a refund, or obliged to pay the Bank, are also important. Accordingly, the Bank should have had better measures in place to ensure that its historically disadvantaged customers are aware of their rights and responsibilities. Pitched as consumer rights, ss 63 and 64 impose the onus on credit providers to inform their consumers of their rights and responsibilities. Relying on agents whose interests as second hand car dealers conflicted with

[51] Regulation 30 of the NCR picks up the themes in ss 63 and 64 of the NCA of consent, clarity and certainty in the form and style of credit agreements. Regulation 30(1) prescribes that:

> 'A document that records a small credit agreement must contain all the information as reflected in Form 20.2.'

The agreement in this case does not disclose that Mr Dlamini had a right to rescind it. Furthermore, reg 30(2) states that:

> 'The information listed in Form 20.2 may be disclosed in the order of choice of the credit provider.'

I understand this to mean that the consumer may choose the order in which the terms of the agreement are recorded. Presumably this clause is aimed at vesting the consumer with this prerogative so that the credit provider does not conceal important clauses in obscure parts of the agreement. However, if consumers are uninformed of their rights and responsibilities and what agreements should contain, they cannot know how to order the information prescribed in Form 20.2. Furthermore, when the gap in the bargaining relationship between the consumer and the credit provider is huge (as in this case) the consumer may be reticent about exercising this prerogative.

[52] Form 20.2 prescribes the content of a small agreement. Although it merely offers the headings and brief references to particular sections of the NCA, its style and format is designed as a short document spanning over about two pages. In this case the form of the credit agreement presents a two-page A4 size document in size eight font. Part B of the agreement which incorporates the terms and conditions, an acceptance form and an authority to release goods form is seven pages. The terms and conditions span over five pages incorporating 18 main clauses with several sub-clauses. Clause 1 is a list of definitions usually found in complex agreements and legislation.

[53] For lawyers and lay persons alike, the form of the Bank's standard agreement is an unappetising formidable read. For a labourer like Mr Dlamini who did not read, write or understand English there might just as well have been no written agreement at all. Mr Dlamini was in a worse position than the purchaser who signed one page of an agreement but who was sued in terms of a clause appearing on the reverse of that page which had not been sent to him.[11]

[54] A credit agreement is also unlawful if it purports to waive any common law rights that apply to the credit agreement.[12] The above rights and protections for consumers under the NCA develop and ameliorate the potentially harsh impact on consumers of the common law principles of *caveat subscriptor* and quasi-mutual consent relied on by the Bank. These principles mean that a person who signs a document is taken to have assented to what appears above his signature.[13] The cases show that mutual consent is absent when a party is unaware of the terms of the agreement. A party may be unaware because the agreement contains terms that were not expected or were not disclosed. Or a party may be misled,[14] misinformed[15] or not informed; or the form and getup of the agreement is inaccessible.[16]

[55] In the three appellate decisions to which Mr Broster helpfully referred me, the court found that there was no consent by the signatories because their errors were justifiable. However, the uncertainty of how the common law principles are applied is evident in *Brink v Humphries and Jewell (Pty) Ltd 2005(2) SA 419 (SCA)* and *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* **[1992] ZASCA 56**; **1992 (3) SA 234** (A) 240J-241D. In *Brink v Humphries* the minority disagreed with the majority on findings of fact and consequently the inferences to be drawn from them. The minority found that the signatory failed to discharge the onus of showing that his error was justifiable. In *Sonap Petroleum v Pappadogianis* the appellate court disagreed with the findings of fact of the trial court. The trial court was under the impression that the signatory had not read the document presented to him. In

[56] Nevertheless the common law remains relevant. Case law developed the test for consent to be:

> '(D)id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?'[18]

The NCA does not dispense with this test. The norms and standards it prescribes for a valid agreement readjusts and clarifies the rights and responsibilities of the parties, the onus of proof and consequently, the statutory context in which the common law test applies.

[57] Mr Dlamini's defence is not that he did not intend to conclude the agreement but that he did not know that he had to notify the Bank in a prescribed manner of his intention to rescind it. Knowing about this formality would not have stopped him from signing the agreement. Therefore, his failure to comply with a purely procedural obligation was not due to an unwillingness to comply but rather an unawareness of such an obligation.

[58] In *Davids en Andere v ABSA Bank Bpk* **2005 (3) SA 361** (C) (headnote) in which the appellants alleged that they had signed deeds of suretyship in the *bona fide* but mistaken belief that it encapsulated a prior oral agreement limiting the liability of the appellants, the full bench held that a reasonable person in the position of the bank official would have explained the nature and content of the deeds to the appellants so as to ensure that they reflected the appellants' true intention. The bank official failed to do so. Consequently, he could not have been misled into believing that the deeds reflected the appellants' true intention. The court further held that public interest demanded that a complicated document be explained to the signatory especially if signing could result in drastic consequences.

[59] In *Home Fires Transvaal CC v Van Wyk and Another* **2002 (2) SA 375** (W) at 381 a full bench held:

> 'A party will not be held bound by his signature to a contract which he has not read, where the other party knew that he had not done so, was not misled by the signature and only had himself to blame for the other's ignorance of the contents of the document. (See *Van Wyk v Otten* **1963 (1) SA 415** (O) at 418A-419H; *Payne v Minister of Transport* **1995 (4) SA 153** (C) at 159G-160I'

[60] In *Diners Club SA (PTY) Ltd v Thorburn* **1990 (2) SA 870** (C) a full court remarked that:

> 'A signatory can be misled by the form and appearance of the document itself . . .'[19]

Reflecting on problems with exemption clauses Lord Denning remarked in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* **(1983) QB 284** 296 – 297, **1983 (1) ALL ER 108** (CA) 113:

> 'They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how reasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press. . . . Faced with this abuse of power, by the stronger against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it.'

Diners Club to have drawn to the defendant's attention the provisions of the enrolment form which imposed personal liability on him. Its failure to do so reasonably led to the defendant signing the enrolment form ignorant of incurring personal liability.

[62] In *Mercurius Motors v Lopez* **[2008] ZASCA 22**; **2008 (3) SA 572** (SCA) the conditions on which the appellant relied had not been brought to the attention of the respondent. Furthermore, the style and format of the lease agreement on which the cause of action was founded was misleading and framed in small print which was not easily accessible. Having regard to the item lost (a Jeep) and the amount of the claim (R245 000) it seems that the claimant Mr Lopez was educated, literate and economically well off.[21] Nevertheless the Supreme Court of Appeal found that he had been misled by the form of an agreement.

[63] In contrast, *Van Zyl v Kotze* **2007 JOL 19893** (T) differs from the facts of this case. There a full court found that the appellant failed to discharge the onus of proving her defence of common mistake which arose from her own negligence in that she failed to read the contract. Mr Dlamini's situation is distinguishable from that appellant. To begin with, the appellant was a relatively successful business woman who ran guest houses. Furthermore, she had been involved in a number of property transactions over a decade. The respondent in that case was a dentist and former neighbour of the appellant before emigrating. As the agreement related to the payment of occupational interest in a property transaction the appellant was either at an advantage or on par with her opponent as far as literacy and social and economic standing went.

[64] Applying the common law principles of *caveat subscriptor* and mutual consent, the Bank cannot hold Mr Dlamini bound to the agreement. The unpalatable form and get-up of the agreement would have been immaterial to Mr Dlamini because of his illiteracy. That was all the more reason why the Bank should have ensured that its agents explained the material terms to Mr Dlamini. As Mr Dlamini was ignorant of the prescribed notice requirements of the agreement, there was no mutual consent as regards this term. Accordingly, Mr Dlamini's defence succeeds under the NCA and the common law.

[65] The validity of the entire agreement is an issue that neither party addressed. A credit agreement must not contain an unlawful provision.[22] A provision is unlawful if its effect is to defeat the purposes or policies of the NCA or deceive the consumer[23] or if it directly or indirectly purports to waive or deprive a consumer of a right set out in the NCA or set aside or override the effect of any provision of the NCA. [24]

[66] As stated above the selective disclosure of Mr Dlamini's s 121 rights in terms of the NCA as a consumer to rescind the agreement was deceptive. Furthermore, the breach of his ss 63 and 64 rights in terms of the NCA to be informed of the contents of the agreement and his rights to an agreement that complies in form with reg 30 skewed the agreement in favour of the Bank. Distorting the balance created in the NCA in this way in the agreement is unlawful. It defeats the purpose and policy of the NCA and renders the entire agreement unlawful.

[67] An unlawful provision in any credit agreement is void. [25] The court must sever the unlawful provision from the agreement, or alter it to render it lawful, if it is reasonable to do so. [26] If the unlawfulness was confined only to not recording fully and communicating clause 10.6 of the agreement to Mr Dlamini, then clause 10.6 could have been altered to render it lawful. However, when the form and get-up of the agreement is inconsistent with the NCA and its regulations, and the Bank has not interpreted, translated or explained its material terms, severance is not an option. The entire agreement must be set aside.

[68] Turning to the jurisdiction of the court, Mr Luthuli who represented Mr Dlamini challenged the Bank's non-compliance with the jurisdictional prerequisite of giving proper notice in terms of s 129 of the NCA of its intention to enforce the agreement. The Bank denied that these proceedings amount to enforcement. On its behalf Mr Broster submitted that ss 127 and 129 of the NCA would apply only after the nature and extent of Mr Dlamini's liability was determined. That would be once the basis of the termination of the agreement is determined in this action. Hence delivery of its notice in terms of s 129 the NCA demanding

in this action is not for payment in terms of the agreement does not strip it of its character and effect as enforcement proceedings. Determining the basis of the termination of the agreement would be academic unless it was to enforce the agreement. There would be no purpose in issuing a s 129 notice and instituting this action if recovery of the debt was not the Bank's goal. As a tactic instituting action could intimidate a consumer into complying with the Bank's demand. This action merely separated liability from quantum. Confirmation of the Bank's intention to separate this action from determining quantum emerged on the morning of the hearing when the parties informed the court that the quantum of damages was being held over pending this action. Non-service of the notice means that the Bank has failed to comply with a jurisdictional prerequisite. For this reason alone the Bank should fail.

[70] An aspect of jurisdiction that the court raised and which the parties now concede is that this action falls within the jurisdiction of the civil regional court as the underlying amount is less than R300 000. Section 127(8)(a) of the NCA relied on by the Bank as the basis for this action specifically directs the Bank to commence proceedings in the Magistrates' Courts. It remains unexplained why the Bank instituted proceedings in this court. The lack of jurisdiction on this ground can be remedied by an appropriate order for costs if necessary and by alerting the litigants that they do not have to pay attorney-client costs on the High Court scale.

[71] The relief the Bank claimed in this action is strange considering the circumstances. Mr Dlamini unequivocally terminated the agreement orally and in writing. He ended the agreement orally within four days of purchasing the vehicle and in writing in October after he secured legal assistance. He informed Starlight that the reason for returning the vehicle was that it could not be driven.

[72] On 16 September 2010 the Bank's debt collector and tracing agent, Mr Leon William van den Burgh, repossessed the vehicle from Starlight. He attested to an affidavit from which the Bank would have known that the vehicle had been left with Starlight by September 2010. The Bank might not have known the reasons but it must have known of the termination or anticipated it before Mr van den Burgh's report because since June, Mr Dlamini paid nothing towards his purchase. The report recorded other reasons Mr Dlamini allegedly gave for the termination than those he gave at the trial. But as Mr van den Burgh did not testify none of those reasons count. So by the time the Bank issued summons on 3 March 2011 it was well aware that the agreement had been terminated and the vehicle repossessed. Consequently, this action for confirmation of the termination and the return of the vehicle was wholly unnecessary. Why the Bank framed its relief in these terms remains unexplained. Penalising and intimidating Mr Dlamini are aims that cannot be excluded.

[73] Once the agreement was terminated for whatever reason, the Bank had to sell the vehicle to mitigate losses. Its decision not to sell the vehicle pending this action is also unexplained. If the losses were for Mr Dlamini's account the Bank would have seriously prejudiced him by not reselling the vehicle for more than two years.

[74] The way in which the Bank conducted this litigation is equally puzzling. It was only at the pre-trial that the Bank conceded that the vehicle had been returned. Only after discussions on the morning of the trial did it become apparent that what the Bank actually wanted was a determination as to whether the termination was a rescission or voluntary surrender. This clarification seems to be an afterthought to rescue the action from being dismissed with costs. Mr Luthuli graciously acquiesced in the trial proceeding for this determination in the interest of finality. Mr Dlamini had already incurred trial costs including the costs of an interpreter.

[75] Pre-trial preparation was also inadequate. Rescission as the reason for the termination should have been obvious to the Bank at the pre-trial conference. At the conference, the parties were expected to discuss the witnesses they would call and ways of curtailing the proceedings. Apart from admitting that the Bank had regained possession of the vehicle no other material admissions were recorded. Mr Luthuli requested further particulars for trial. In response, the Bank denied knowing who assisted Mr Dlamini. It refused to admit that Mr Mthetwa assisted Mr Dlamini to enter into the agreement; that the agreement was in English which Mr Dlamini did not understand; and that Mr Mthetwa did not read and interpret the agreement to Mr Dlamini. The

[76] Cumulatively considering the unexplained tactics the Bank employed, this action is heavy handed intimidation in response to Mr Dlamini seeking to enforce his right to rescind the agreement and claim a refund. The Bank's conduct in initiating and pursuing this action is unlawful for the further reason that it is irrational. The unlawfulness on all the grounds established above is a breach of the right to equality in s 9(1) of the Constitution. The Bank conducted this transaction oblivious of the purposes of the NCA. Notwithstanding the manifest inequality in its relationship with its bargaining counterpart it sought to snatch an advantage.

[77] In passing I note that the CPA assented to on 24 April 2009 commenced on 31 March 2011. Although the agreement in this case was terminated before the general effective date of the CPA, i.e. 31 March 2011 the Bank, like most large corporations that invest in corporate social responsibility projects, had to be aware of the purposes of the CPA which was already in the public domain. The purposes of the CPA are:

> '. . . to promote and advance the social and economic welfare of consumers in South Africa by—
>
> . . .
>
> (c) promoting fair business practices;
>
> (*d*) protecting consumers from—
>
> i. unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
>
> ii. deceptive, misleading, unfair or fraudulent conduct;
>
> (*e*) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;...'[27]

[78] Institutions such as the Bank should welcome the framework proffered by the NCA and the CPA for bridging the socio-economic inequalities substantively and for reforming the credit industry, if for no reason but that sustained inequalities and need lead to unrest and social instability which is not good for business. Even though the CPA was not effective when the Bank sold the vehicle to Mr Dlamini it should have voluntarily acknowledged that as goods sold in terms of a credit agreement, s 5(2)(d) of the CPA would have applied to the sale. It should have been clear when the Bank issued summons on 3 March 2012 that consumer relations was no longer business as usually practised over its 150 year history in South Africa. Disappointingly, the Bank remained unresponsive to the CPA and its aspirations before it became enforceable. My interpretation and application of the provisions of the NCA above are fortified by the CPA.

[79] In conclusion, if the parties had applied themselves properly at the rule 37 pre-trial conference, the trial time could have been shortened by at least a day. As stated above, Ms Ndlela's evidence could easily have been dispensed with altogether. At the conference they could have exhausted settlement negotiations and avoided wasting three hours of court time on the morning of the trial resulting in the trial commencing only at 13h00. As a result of the parties' poor pre-trial preparation this matter which was set down on the expedited roll for one day had to be adjourned to continue the following week, at great inconvenience to the court.

[80] The order I grant is the following:

1. The defendant Mr Dlamini rescinded the credit agreement with the plaintiff Standard Bank.

Standard Bank shall pay the costs of the action

D.PILLAY J

Date of Hearing: 06 August 2012 and

14 August 2012

Date of Judgment: 23 October 2012

APPEARANCES

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1*Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA); *George v Fairmead* (Pty) Ltd 1958(2) SA 465 (A) at 471; *National and Overseas Distributors Corp (Pty) Ltd v Potato Board* 1958(2) SA 473 (A) at 479; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992(3) SA 234 (A) at 239I – 240B; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007(2) SA 599 (SCA).

2Section 1 of the Constitution of the Republic of South Africa, 1996..

3Section 9(1) of the Constitution.

4Catherine Albertyn, Sandra Fredman, Judy Fudge 'Introduction: Substantive equality, social rights and women: A comparative perspective' (2007) 23 *SAJHR* 209 p 209.

5For example *Minister of Finance and Another v Van Heerden* **[2004] ZACC 3**; **2004 (6) SA 121** (CC) para 146; *Pretoria City Council v Walker* **[1998] ZACC 1**; **1998 (2) SA 363** (CC) para 62.

6Section 9(2) of the Constitution.

7**Section 7(a)** of the **Companies Act 71 of 2008**.

8**Section 3(d)** of the NCA.

12S 90 (2) (c) (i) of the NCA.

13*Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA) para 1; *George v Fairmead (Pty) L*td 1958(2) SA 465 (A) at 470C-E.

14*Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA) para 11.

15*Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* **[1992] ZASCA 56**; **1992 (3) SA 234** (A) 240J-241D.

16*George v Fairmead (Pty) L*td 1958(2) SA 456 (A) at 470C-E.794d already secured the relief sumerlker 1998 ()4 ()

17*Sonap Petroleumv Pappadogianis* 241E – F – 242A-C

18Supra at 239 I – 240 B

19At 875B-C.

20At 495I.

21See also CJ Pretorius 'Exemption clauses and mistake *Mercurius Motors v Lopez* v **[2008] ZASCA 22**; **2008 (3) SA 572** (SCA)' **2010 (73) THRHR 491**-502.

22Section 90 (1) of the NCA.

23Section 90 (2) (a) (i) & (ii) of the NCA.

24Section 90 (2) (b) (i) & (iii) of the NCA.

25Section 90 (3) of the NCA.

26Section 90 (4) (a) of the NCA.

27Section 3 (1) of the CPA.

[Context] [Hide Context]

South Africa: Kwazulu-Natal High Court, Durban

Standard Bank of South Africa Ltd v Dlamini (2877/2011) [2012] ZAKZDHC 64; 2013 (1) SA 219 (KZD) (23 October 2012)

[Context] [Hide Context]

IN THE HIGH COURT OF SOUTH AFRICA, DURBAN

REPUBLIC OF SOUTH AFRICA

Case no.: 2877/2011

In the matter between

STANDARD BANK OF SOUTH AFRICA LIMITED **Applicant**

and

MBUYISENI DLAMINI **Defendant**

JUDGEMENT

Heard August 2012

Handed down:23 October 2012

D. PILLAY J

[1] Mbuyiseni Dlamini bought a 2004 Toyota Corolla 160i GLE on credit from Standard Bank for R85 745.02 on 3 June 2010.

[2] On 5 October 2010 Scorpion despatched a letter to the dealership demanding the refund of the deposit of R15 000 and cancellation of the agreement. On 21 October 2010 the Bank's attorneys sent a notice in terms of s 129 of the National Credit Act 34 of 2005 (the NCA) addressed to Mr Dlamini but to an incorrect address demanding payment in terms of the credit agreement. On 3 March 2011 the Bank had summons issued for judgment to be entered against Mr Dlamini confirming the termination of the agreement, ordering the return of the vehicle, costs of suit and the costs of locating, removing, storing and disposing of the vehicle.

[3] In support of its claims, the Bank relied on clause 10.6 in its credit agreement which provided that if the agreement was not entered into at the Bank's registered business premises, Mr Dlamini could, within five business days after signing the agreement, terminate it on notice to the Bank's vehicle and asset finance division head office at fax number 011 6313168, and return or tender the return of the vehicle. If he terminated the agreement in this way he was obliged to pay the rental for the use of the vehicle for the time that he had it and any reasonable costs the Bank might incur to have the vehicle returned or restored to a saleable condition. What the agreement did not record was that he was also entitled to a refund in terms s 121(3)(a) of the NCA.

[4] In short, the Bank relied on s 121 the NCA read with reg 37 of the National Credit Regulations, GN R713, *GG* 28893, 31 May 2006 (the NCR). Because Mr Dlamini did not notify the Bank of the termination in the manner prescribed by clause 10.6 of the agreement and reg 37, the Bank contended that the termination was a voluntary surrender contemplated in s 127(5) to (9) of the NCA.

[5] Clause 10.3 which provides for termination by voluntary surrender, entitles the Bank to sell the vehicle, account to Mr Dlamini and claim any shortfall due by him under the agreement. In the circumstances, finding the basis for the termination is important to determine the consequences and remedies each party has on termination.

[6] In his defence, Mr Dlamini denied that he surrendered the vehicle. He alleged that he returned it because it broke down. On driving it from the dealership he had noticed that it was jerking and smoking. He consulted his cousin, a mechanic who testified in corroboration. After they test drove it for about two kilometres they diagnosed that it would not last for more than 30 kilometres. They discovered that the vehicle was rebuilt following an accident. As predicted, it broke down and they had it towed back to the dealership.

[7] In his answering affidavit to the summary judgment application Mr Dlamini elaborated on his defence that he was unaware that he had to notify the Bank of the termination of the agreement in the prescribed manner. He alleged that it was only Sibusiso Mthetwa who attended to him at the dealership at all times. Mr Mthetwa created the impression that he worked for both Starlight and the Bank when he assisted Mr Dlamini to complete the paperwork to arrange the loan from the Bank. Mr Dlamini denied that Mr Mthetwa or anyone else had explained the terms of the agreement to him. If he had known that he had to telefax notice to the Bank at the number provided in the agreement informing it that he terminated the agreement and tendered the return of the vehicle he would have complied.

[8] As it was common cause that Mr Dlamini did not notify the Bank of the termination of the agreement by fax as prescribed in the agreement, the only issue in dispute on the facts was: did Mr Dlamini know and understand the terms of the agreement?

[9] On the facts, the only material witnesses for the Bank were the persons from the dealership who interacted with Mr Dlamini when he bought and returned the vehicle. Mr Dlamini persisted that it was Mr Mthetwa who attended to him on both occasions. However, the Bank first called Nomuso Eugenia Ndlela, an employee in its legal department, to testify about how credit agreements were usually concluded at motor dealerships, the importance of receiving notice of termination in the prescribed way, how the vehicle had been repossessed from Starlight in September and that it has yet to be resold

been so for the convenience of not the consumer, but of the Bank.

[11] Much of Ms Ndlela's evidence was unnecessary as Mr Dlamini admitted his signature to the agreement and did not dispute that the agreement was what it purported to be. The interpretation of the termination clause and its materiality were also not disputed. Ms Ndlela's evidence could easily have been curtailed, if not dispensed with altogether, if the parties had defined the issues in dispute precisely at their pre-trial conference.

[12] At the end of Ms Ndlela's evidence the Bank signalled its intention to call Ms N. Marimutho whose signature appeared on the agreement on behalf of the Bank. Mr Dlamini vehemently denied having any dealings with Ms Marimutho at all.

[13] On resumption, the Bank abandoned Ms Marimutho as its witness and called Mr Mthetwa instead. The gist of Mr Mthetwa's evidence was that he was the salesman who sold the vehicle to Mr Dlamini. He informed Mr Dlamini that the dealership could arrange finance from one of several institutions including Standard Bank. He took Mr Dlamini to Ms Marimutho and left him with her to complete the application for finance. The only conversation he heard between them was Ms Marimutho asking Mr Dlamini in English whether he was Mr Dlamini. They were together for 25 minutes. He alleged that it was neither his function to explain the agreement to Mr Dlamini nor to complete the forms for applying for credit and concluding the credit agreement. Besides, Mr Dlamini had not brought a copy of the contract with him when he returned the motor vehicle.

[14] Mr Mthetwa studiously avoided accepting any responsibility for interpreting and explaining the terms of the agreement to Mr Dlamini. Even if Mr Dlamini did not bring the agreement, it was a standard credit agreement. Mr Mthethwa had earlier testified that Starlight was an agent for several banks including Standard Bank. The probabilities of Starlight not having a standard term credit agreement for Standard Bank are remote. It should at least have had its own copy as a record of the transaction for which it received R15 000 as deposit but reflected only R13 000 in the agreement.

[15] There is no evidence that Ms Marimutho spoke IsiZulu. Considering that Mr Mthetwa was the salesman and the person who spoke IsiZulu at Starlight the probabilities favour Mr Dlamini's version that only Mr Mthetwa communicated with him.

[16] Mr Mthetwa confirmed that Mr Dlamini had towed the vehicle back to the dealership. Mr Dlamini was angry and informed him that he did not want that or any other vehicle that Starlight offered him. Mr Mthetwa surmised that Mr Dlamini might change his mind in due course. However, he conceded that nothing from what Mr Dlamini said or did suggested that Mr Dlamini might change his mind and return to the dealership.

[17] The vehicle was repaired by the in-house mechanic employed by the dealership. This was usually done for all defective vehicles in the dealership. Authority from the Bank as the owner was not specifically sought to repair the vehicle.

[18] Unsurprisingly, Mr Mthetwa denied that Mr Dlamini demanded the return of his deposit of R15 000. To admit the demand Mr Mthetwa would have had to explain why Starlight or the Bank had not refunded the deposit. As the salesman, Mr Mthetwa earned commission income only. The termination of the agreement meant that he and Starlight would lose their commission.

[19] In response to questions from the court, Mr Mthetwa testified for the first time that when Mr Dlamini returned the vehicle he took Mr Dlamini aside and informed him that he should notify the Bank of the termination of the agreement and that if he could not see what was in the agreement then he should get his child to read it for him. This was vital evidence that he should have given in chief. The Bank knew that Mr Dlamini's defence was that he was not aware that he had to notify it in any prescribed manner. If Mr Mthetwa was being truthful about advising Mr Dlamini as he alleged, he would have given this evidence in chief.

[21] The Bank's designated agent, Ms Marimuthu, the only person authorised to enter into the contract with Mr Dlamini, failed to testify. At the end of the Bank's case there was no evidence that anyone explained the terms of the agreement to Mr Dlamini. More specifically, no one informed him on signing the agreement and especially when he terminated it, that he had to notify the Bank by telefax. No one established whether Mr Dlamini knew what it means to fax.

[22] According to Mr Dlamini all he was told about the Standard Bank documentation was that it was about the sale of the vehicle and that he would be required to pay an instalment with effect from the 1st of July 2010. His answering affidavit to the application for summary judgment is vague about the documents he signed. He understood that they were necessary to enable him to get the money to purchase the vehicle and that he was required to pay instalments. That was the information that was imparted and understood by Mr Dlamini at the point of the sale.

[23] Mr Dlamini is functionally illiterate and does not understand English. This is as obvious to me as it was to Mr Mthetwa. Mr Dlamini completed schooling at standard one. At 52 years, he is an unsophisticated African male. He had difficulty in the witness stand engaging with the documents. He had become so excited about the purchase of a vehicle that he paid little attention to the repayment plan. He relied on the Bank to deduct reasonable instalments. He did not expect the Bank to deduct a high amount that left him without the means to support himself, his wife and his two little children. He expected to discover what the amount of those instalments would be when the Bank deducted its first instalment from his account. He trusted his bank. On discovering that he bought a defective vehicle he returned it intuitively to the person who sold it to him.

[24] Initially when he testified, Mr Dlamini tended to deny almost everything that was put to him, including facts that were common cause or the basis of his defence. I warned him that it did not assist him to deny facts that he knew to be true and that I could find him to be evasive. Thereafter, he made a conscious effort to give a considered response to questions put to him. His illiteracy, lack of sophistication and general discomfort at being in a courtroom rather than deliberate mendacity caused him to lapse into the easy option of simply denying everything.

[25] On these facts I find firstly that Mr Dlamini terminated the agreement by returning the vehicle because it was so defective that it could not be driven. A voluntary surrender is usually triggered by a consumer's inability to comply with the credit agreement. Not a whiff of evidence suggested that Mr Dlamini was unable to pay for the vehicle or that he returned it for any reason other than it being incapable of being driven The Bank failed to establish a factual basis for any finding that the termination was a voluntary surrender. Mr Dlamini's mere non-compliance with the procedural formality of faxing notice of termination does not lead to the inference that he terminated the agreement by voluntarily surrendering the vehicle.

[26] Secondly, the Bank and its agents caused Mr Dlamini to enter into a credit agreement without reading, interpreting and explaining the material terms to him which he did not know and understand. Could he nevertheless in law be held to have assented to the agreement by virtue of his signature?

[27] Turning to the law, the Bank relied on the common law principles of quasi-mutual consent and *caveat subscriptor* and the cases in which these principles were invoked.[1] However, when the NCA applies, the constitutional right to equality comes to my mind immediately. The Preamble to the Constitution and to the NCA connect them. What then is the interface between the Constitution, NCA and the common law principles of *caveat subscriptor* and *quasi* mutual consent?

[28] In its Preamble the Constitution recognises the injustices of our past. It commits to healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens. The founding values of the Constitution include human dignity, achieving equality, advancing human rights and

[29] Academics Fredman *et al* observe:

> 'In many countries, equality legislation initially sought to free individuals from the negative effects of these group characteristics, believing that in a colour-blind and gender-neutral world individuals could thrive and develop their potential free from stereotypical assumptions. But this view of equality was narrowly circumscribed. It was a relative principle dependent upon identifying an appropriate comparator. It also operated symmetrically so that the benefits provided to a disadvantaged group could be challenged as a violation of the principle of equality. Moreover, it assumed that the only legitimate role of state action was negative, to stop discrimination, rather than requiring positive steps and measures to be taken to remedy disadvantage. The failure of this formal view of equality to address deeply entrenched and complex patterns of group disadvantage led to sustained criticism by feminist and other writers, and to calls for formal equality to be replaced with substantive equality. Substantive equality, unlike formal equality, requires attention to context, the intersection of different grounds of disadvantage, difference, and positive obligations upon the state.[4]

[30] Our Constitutional Court (CC) has repeatedly endorsed the substantive approach to equality.[5] Likewise, national legislation contemplated in the equality clause aimed at preventing or prohibiting unfair discrimination[6] must also be interpreted in ways that achieve substantive effect. Therefore achieving equality, non-discrimination and human rights through legislation are policy objectives flowing from the Constitution itself.

[31] One category of legislation promulgated includes the obvious examples of the **Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000** and the **Employment Equity Act 55 of 1998**. These Acts target specific groups of people discriminated on recognised grounds of discrimination. As the learned authors Fredman and others point out, substantive equality looks beyond the recognised grounds to context and positive obligations. Accordingly, the legislature did not stop with this category in pursuit of its transformative agenda.

[32] Another category of legislation includes the NCA, the Consumer Protection Act 68 of 2008 (CPA) and even the Companies Act 71 of 2008 (the CA) which 'promote(s) compliance with the Bill of Rights...in the application of company law.'[7] Socio-economic status and illiteracy are not listed grounds of discrimination. Discrimination on these grounds is often indirect and therefore harder to diagnose and prove. Hence the NCA and CPA are but two statutes on a raft of national legislation aimed specifically at consumers to reverse historical socio-economic inequalities and adjust the imbalances.

[33] The preamble of the NCA begins:

> 'To promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; ....to regulate credit information; ... to establish national norms and standards relating to consumer credit; ...'

[34] Section 3 elaborates that the purposes of the NCA are to promote and advance the social and economic welfare of South Africans, to promote a fair transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers by, amongst other things, promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers.[8] Importantly, its purpose is also to address and correct:

> '. . . imbalances in the negotiating power between consumers and credit providers by -

[35] Section 2 of the NCA requires the Act to be interpreted in a manner that gives effect to the purposes of s 3. Section 2(6) acknowledges that a person is historically disadvantaged if that person is one of a category of natural persons who, before the Interim Constitution of the Republic of South Africa, 1993 came into operation, were disadvantaged by unfair discrimination on the basis of race.

[36] Section 121 applies to an instalment agreement entered into at any place other than the registered business premises of the credit provider. Furthermore, the section gives a consumer the right to terminate the credit agreement within five business days after the date on which it was signed by the consumer, by firstly, delivering a notice in the prescribed manner to the credit provider; and secondly, tendering to return any money or goods, or paying in full for any services received by the consumer.

[37] When a credit agreement is terminated in terms of s 121, the rights of the credit provider and consumer are balanced by subsecs (3)(a) and (b) as follows:

> '. . . the credit provider -
>
> '(a) must refund any money the consumer has paid under the agreement within seven business days after the delivery of the notice to terminate; and
>
> (b) may require payment from the consumer for—
>
> i. the reasonable cost of having any goods returned to the credit provider and restored to saleable condition; and
>
> ii. a reasonable rent for the use of those goods for the time that the goods were in the consumer's possession,....'

[38] Clause 10.6 of the agreement paraphrases s 121(1), (2) and (3)(b) of the NCA but studiously excludes any reference to subsec (3)(a) which gives the consumer the right to a refund from the credit provider. Subsection (3)(b) clearly favours the Bank; the consumer has to pay the Bank. Subsection (3)(a) which favours the consumer because the Bank must to pay the consumer is omitted.

[39] Rescission of an agreement referred to in the heading of s 121 of the NCA and termination of an agreement at the instance of the consumer under s 122 of the NCA have distinctly different causes and consequences. Rescission aims to restore the contracting parties to the status ante quo. In other words the agreement is revoked or withdrawn. Termination retains and enforces the agreement. The remedy to which Mr Dlamini was entitled when he discovered that the Bank's agent sold him a vehicle that could not be driven at all was a refund in terms of subsec (3)(a).

[40] Despite the agreement being silent about rescission and a refund the Bank does not deny that Mr Dlamini has a right arising from the NCA to rescind the agreement. Clause 8 of form 20.2 which reg 30 of the NCR prescribes for small agreements, is headed 'Consumer's right to rescind the agreement (*if applicable*)'.The Bank does not deny that it is applicable. However, the Bank contends that he may only invoke the right to rescind after he delivered a notice to rescind in terms of reg 37 of the NCR. If such notice was important to the Bank then it should have included it in the agreement as a material procedural step not only to surrender but also to claim a refund. It should also have ensured that Mr Dlamini was aware of it.

[41] Non-disclosure of s 121(3)(a) violates the right of consumers to education and information in terms of s 3. The Bank's selection of what parts of s 121 of the NCA it should record in the agreement and what it should exclude is deliberate and deceptive. The heading of s 121 highlights its purpose as the 'Consumer's right to rescind credit agreement'. Instead of informing the consumer of this right, the Bank pitches it as an onerous bundle of obligations on the consumer to pay the Bank the costs of renting and recovering the vehicle. Projecting the consumer's obligations whilst understating his rights discourages rescission which is the consumer's statutory right.

[43] The Bank could not have misunderstood Mr Dlamini's reasons for returning the defective vehicle. Any doubt it had should have dissipated once it knew that it could not gainsay the fact that Starlight sold Mr Dlamini a seriously defective vehicle.

[44] The Bank gave Starlight no mandate to report vehicles that were returned within five days in terms of the termination clause 10.6. Such a business practice makes credit transactions unduly onerous and a veritable trap for poor, illiterate and disadvantaged people who intuitively would return defective goods to a supplier and ask for a refund.

[45] Given the importance of the notice to the Bank of the basis of the termination, the Bank should have mandated its agent to assist consumers like Mr Dlamini to fax the notices. Even if the Bank and its agents provided this service at a fee it would have been far cheaper than litigating to determine the basis of the termination. Imposing such a duty on the agents would also acknowledge the potential conflict of interest between an agent that sells defective vehicles and the consumer. Although the legal obligation to notify the Bank rested on Mr Dlamini, the Bank cannot absolve Starlight of its duty to act in good faith to notify the Bank in the ordinary course of commercial practice. The Bank should hold its agent accountable for not reporting immediately that the vehicle was towed back and that it could not be driven.

[46] Another two consumer rights are important in the context of this case. The first is the consumer's right to information in an official language in terms of s 63 of the NCA. Section 63(1) gives consumers a right to receive any document that is required in terms of the NCA in an official language that the consumer reads or understands, to the extent that is reasonable having regard to usage, practicality, expense, regional circumstances and the needs and preferences of the population ordinarily served by the person required to deliver that document.

[47] The second is the right to information in plain and understandable language in terms of s 64 of the NCA. Subsection (1)(b) requires the producer of a document that is required to be delivered to a consumer in terms of the NCA to provide that document in the prescribed form, if any, for that document, or in plain language. For the purposes of the NCA, a document is in plain language if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance and import of the document without undue effort, having regard to, the organisation, form and style of the document, and the vocabulary, usage and sentence structure of the text.[10]

[48] Strictly interpreted neither s 63 nor s 64 of the NCA assists an illiterate consumer. Purposively interpreted they embody the right of the consumer to be informed by reasonable means of the material terms of the documents he signs. What is reasonable and material varies depending on the circumstances of each case. Amongst other things, the industry, regional circumstances or geographical location, price, nature of the goods and services and class of consumers likely to contract for them are relevant to determining what are reasonable means and material terms. Purposively interpreted, the credit provider bears the onus to prove that it took reasonable measures to inform the consumer of the material terms of the agreement.

[49] This transaction arose at a second hand car dealership in Pinetown, KwaZulu Natal. IsiZulu is the predominant African language. In the nature of such a business the Bank must anticipate that it will be dealing with historically disadvantaged persons. It enters into contracts in terms of which vehicles are returned for repairs and re-collection, for defects or as voluntary surrender because of the consumer's inability to pay the instalments. Establishing at the earliest opportunity what the basis is for the termination of an agreement is therefore important in the second hand car dealership industry. From the consumer's perspective the circumstances in which he is entitled on termination to a refund, or obliged to pay the Bank, are also important. Accordingly, the Bank should have had better measures in place to ensure that its historically disadvantaged customers are aware of their rights and responsibilities. Pitched as consumer rights, ss 63 and 64 impose the onus on credit providers to inform their consumers of their rights and responsibilities. Relying on agents whose interests as second hand car dealers conflicted with

[51] Regulation 30 of the NCR picks up the themes in ss 63 and 64 of the NCA of consent, clarity and certainty in the form and style of credit agreements. Regulation 30(1) prescribes that:

> 'A document that records a small credit agreement must contain all the information as reflected in Form 20.2.'

The agreement in this case does not disclose that Mr Dlamini had a right to rescind it. Furthermore, reg 30(2) states that:

> 'The information listed in Form 20.2 may be disclosed in the order of choice of the credit provider.'

I understand this to mean that the consumer may choose the order in which the terms of the agreement are recorded. Presumably this clause is aimed at vesting the consumer with this prerogative so that the credit provider does not conceal important clauses in obscure parts of the agreement. However, if consumers are uninformed of their rights and responsibilities and what agreements should contain, they cannot know how to order the information prescribed in Form 20.2. Furthermore, when the gap in the bargaining relationship between the consumer and the credit provider is huge (as in this case) the consumer may be reticent about exercising this prerogative.

[52] Form 20.2 prescribes the content of a small agreement. Although it merely offers the headings and brief references to particular sections of the NCA, its style and format is designed as a short document spanning over about two pages. In this case the form of the credit agreement presents a two-page A4 size document in size eight font. Part B of the agreement which incorporates the terms and conditions, an acceptance form and an authority to release goods form is seven pages. The terms and conditions span over five pages incorporating 18 main clauses with several sub-clauses. Clause 1 is a list of definitions usually found in complex agreements and legislation.

[53] For lawyers and lay persons alike, the form of the Bank's standard agreement is an unappetising formidable read. For a labourer like Mr Dlamini who did not read, write or understand English there might just as well have been no written agreement at all. Mr Dlamini was in a worse position than the purchaser who signed one page of an agreement but who was sued in terms of a clause appearing on the reverse of that page which had not been sent to him.[11]

[54] A credit agreement is also unlawful if it purports to waive any common law rights that apply to the credit agreement.[12] The above rights and protections for consumers under the NCA develop and ameliorate the potentially harsh impact on consumers of the common law principles of *caveat subscriptor* and quasi-mutual consent relied on by the Bank. These principles mean that a person who signs a document is taken to have assented to what appears above his signature.[13] The cases show that mutual consent is absent when a party is unaware of the terms of the agreement. A party may be unaware because the agreement contains terms that were not expected or were not disclosed. Or a party may be misled,[14] misinformed[15] or not informed; or the form and getup of the agreement is inaccessible.[16]

[55] In the three appellate decisions to which Mr Broster helpfully referred me, the court found that there was no consent by the signatories because their errors were justifiable. However, the uncertainty of how the common law principles are applied is evident in *Brink v Humphries and Jewell (Pty) Ltd 2005(2) SA 419 (SCA)* and *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* **[1992] ZASCA 56**; **1992 (3) SA 234** (A) 240J-241D. In *Brink v Humphries* the minority disagreed with the majority on findings of fact and consequently the inferences to be drawn from them. The minority found that the signatory failed to discharge the onus of showing that his error was justifiable. In *Sonap Petroleum v Pappadogianis* the appellate court disagreed with the findings of fact of the trial court. The trial court was under the impression that the signatory had not read the document presented to him. In

[56] Nevertheless the common law remains relevant. Case law developed the test for consent to be:

> '(D)id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?'[18]

The NCA does not dispense with this test. The norms and standards it prescribes for a valid agreement readjusts and clarifies the rights and responsibilities of the parties, the onus of proof and consequently, the statutory context in which the common law test applies.

[57] Mr Dlamini's defence is not that he did not intend to conclude the agreement but that he did not know that he had to notify the Bank in a prescribed manner of his intention to rescind it. Knowing about this formality would not have stopped him from signing the agreement. Therefore, his failure to comply with a purely procedural obligation was not due to an unwillingness to comply but rather an unawareness of such an obligation.

[58] In *Davids en Andere v ABSA Bank Bpk* **2005 (3) SA 361** (C) (headnote) in which the appellants alleged that they had signed deeds of suretyship in the *bona fide* but mistaken belief that it encapsulated a prior oral agreement limiting the liability of the appellants, the full bench held that a reasonable person in the position of the bank official would have explained the nature and content of the deeds to the appellants so as to ensure that they reflected the appellants' true intention. The bank official failed to do so. Consequently, he could not have been misled into believing that the deeds reflected the appellants' true intention. The court further held that public interest demanded that a complicated document be explained to the signatory especially if signing could result in drastic consequences.

[59] In *Home Fires Transvaal CC v Van Wyk and Another* **2002 (2) SA 375** (W) at 381 a full bench held:

> 'A party will not be held bound by his signature to a contract which he has not read, where the other party knew that he had not done so, was not misled by the signature and only had himself to blame for the other's ignorance of the contents of the document. (See *Van Wyk v Otten* **1963 (1) SA 415** (O) at 418A-419H; *Payne v Minister of Transport* **1995 (4) SA 153** (C) at 159G-160I'

[60] In *Diners Club SA (PTY) Ltd v Thorburn* **1990 (2) SA 870** (C) a full court remarked that:

> 'A signatory can be misled by the form and appearance of the document itself . . .'[19]

Reflecting on problems with exemption clauses Lord Denning remarked in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* **(1983) QB 284** 296 – 297, **1983 (1) ALL ER 108** (CA) 113:

> 'They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how reasonable they were, he was bound. All this was done in the name of 'freedom of contract'. But the freedom was all on the side of the big concern which had the use of the printing press. . . . Faced with this abuse of power, by the stronger against the weak, by the use of the small print of the conditions, the judges did what they could to put a curb on it.'

Diners Club to have drawn to the defendant's attention the provisions of the enrolment form which imposed personal liability on him. Its failure to do so reasonably led to the defendant signing the enrolment form ignorant of incurring personal liability.

[62] In *Mercurius Motors v Lopez* **[2008] ZASCA 22**; **2008 (3) SA 572** (SCA) the conditions on which the appellant relied had not been brought to the attention of the respondent. Furthermore, the style and format of the lease agreement on which the cause of action was founded was misleading and framed in small print which was not easily accessible. Having regard to the item lost (a Jeep) and the amount of the claim (R245 000) it seems that the claimant Mr Lopez was educated, literate and economically well off.[21] Nevertheless the Supreme Court of Appeal found that he had been misled by the form of an agreement.

[63] In contrast, *Van Zyl v Kotze* **2007 JOL 19893** (T) differs from the facts of this case. There a full court found that the appellant failed to discharge the onus of proving her defence of common mistake which arose from her own negligence in that she failed to read the contract. Mr Dlamini's situation is distinguishable from that appellant. To begin with, the appellant was a relatively successful business woman who ran guest houses. Furthermore, she had been involved in a number of property transactions over a decade. The respondent in that case was a dentist and former neighbour of the appellant before emigrating. As the agreement related to the payment of occupational interest in a property transaction the appellant was either at an advantage or on par with her opponent as far as literacy and social and economic standing went.

[64] Applying the common law principles of *caveat subscriptor* and mutual consent, the Bank cannot hold Mr Dlamini bound to the agreement. The unpalatable form and get-up of the agreement would have been immaterial to Mr Dlamini because of his illiteracy. That was all the more reason why the Bank should have ensured that its agents explained the material terms to Mr Dlamini. As Mr Dlamini was ignorant of the prescribed notice requirements of the agreement, there was no mutual consent as regards this term. Accordingly, Mr Dlamini's defence succeeds under the NCA and the common law.

[65] The validity of the entire agreement is an issue that neither party addressed. A credit agreement must not contain an unlawful provision.[22] A provision is unlawful if its effect is to defeat the purposes or policies of the NCA or deceive the consumer[23] or if it directly or indirectly purports to waive or deprive a consumer of a right set out in the NCA or set aside or override the effect of any provision of the NCA. [24]

[66] As stated above the selective disclosure of Mr Dlamini's s 121 rights in terms of the NCA as a consumer to rescind the agreement was deceptive. Furthermore, the breach of his ss 63 and 64 rights in terms of the NCA to be informed of the contents of the agreement and his rights to an agreement that complies in form with reg 30 skewed the agreement in favour of the Bank. Distorting the balance created in the NCA in this way in the agreement is unlawful. It defeats the purpose and policy of the NCA and renders the entire agreement unlawful.

[67] An unlawful provision in any credit agreement is void. [25] The court must sever the unlawful provision from the agreement, or alter it to render it lawful, if it is reasonable to do so. [26] If the unlawfulness was confined only to not recording fully and communicating clause 10.6 of the agreement to Mr Dlamini, then clause 10.6 could have been altered to render it lawful. However, when the form and get-up of the agreement is inconsistent with the NCA and its regulations, and the Bank has not interpreted, translated or explained its material terms, severance is not an option. The entire agreement must be set aside.

[68] Turning to the jurisdiction of the court, Mr Luthuli who represented Mr Dlamini challenged the Bank's non-compliance with the jurisdictional prerequisite of giving proper notice in terms of s 129 of the NCA of its intention to enforce the agreement. The Bank denied that these proceedings amount to enforcement. On its behalf Mr Broster submitted that ss 127 and 129 of the NCA would apply only after the nature and extent of Mr Dlamini's liability was determined. That would be once the basis of the termination of the agreement is determined in this action. Hence delivery of its notice in terms of s 129 the NCA demanding

in this action is not for payment in terms of the agreement does not strip it of its character and effect as enforcement proceedings. Determining the basis of the termination of the agreement would be academic unless it was to enforce the agreement. There would be no purpose in issuing a s 129 notice and instituting this action if recovery of the debt was not the Bank's goal. As a tactic instituting action could intimidate a consumer into complying with the Bank's demand. This action merely separated liability from quantum. Confirmation of the Bank's intention to separate this action from determining quantum emerged on the morning of the hearing when the parties informed the court that the quantum of damages was being held over pending this action. Non-service of the notice means that the Bank has failed to comply with a jurisdictional prerequisite. For this reason alone the Bank should fail.

[70] An aspect of jurisdiction that the court raised and which the parties now concede is that this action falls within the jurisdiction of the civil regional court as the underlying amount is less than R300 000. Section 127(8)(a) of the NCA relied on by the Bank as the basis for this action specifically directs the Bank to commence proceedings in the Magistrates' Courts. It remains unexplained why the Bank instituted proceedings in this court. The lack of jurisdiction on this ground can be remedied by an appropriate order for costs if necessary and by alerting the litigants that they do not have to pay attorney-client costs on the High Court scale.

[71] The relief the Bank claimed in this action is strange considering the circumstances. Mr Dlamini unequivocally terminated the agreement orally and in writing. He ended the agreement orally within four days of purchasing the vehicle and in writing in October after he secured legal assistance. He informed Starlight that the reason for returning the vehicle was that it could not be driven.

[72] On 16 September 2010 the Bank's debt collector and tracing agent, Mr Leon William van den Burgh, repossessed the vehicle from Starlight. He attested to an affidavit from which the Bank would have known that the vehicle had been left with Starlight by September 2010. The Bank might not have known the reasons but it must have known of the termination or anticipated it before Mr van den Burgh's report because since June, Mr Dlamini paid nothing towards his purchase. The report recorded other reasons Mr Dlamini allegedly gave for the termination than those he gave at the trial. But as Mr van den Burgh did not testify none of those reasons count. So by the time the Bank issued summons on 3 March 2011 it was well aware that the agreement had been terminated and the vehicle repossessed. Consequently, this action for confirmation of the termination and the return of the vehicle was wholly unnecessary. Why the Bank framed its relief in these terms remains unexplained. Penalising and intimidating Mr Dlamini are aims that cannot be excluded.

[73] Once the agreement was terminated for whatever reason, the Bank had to sell the vehicle to mitigate losses. Its decision not to sell the vehicle pending this action is also unexplained. If the losses were for Mr Dlamini's account the Bank would have seriously prejudiced him by not reselling the vehicle for more than two years.

[74] The way in which the Bank conducted this litigation is equally puzzling. It was only at the pre-trial that the Bank conceded that the vehicle had been returned. Only after discussions on the morning of the trial did it become apparent that what the Bank actually wanted was a determination as to whether the termination was a rescission or voluntary surrender. This clarification seems to be an afterthought to rescue the action from being dismissed with costs. Mr Luthuli graciously acquiesced in the trial proceeding for this determination in the interest of finality. Mr Dlamini had already incurred trial costs including the costs of an interpreter.

[75] Pre-trial preparation was also inadequate. Rescission as the reason for the termination should have been obvious to the Bank at the pre-trial conference. At the conference, the parties were expected to discuss the witnesses they would call and ways of curtailing the proceedings. Apart from admitting that the Bank had regained possession of the vehicle no other material admissions were recorded. Mr Luthuli requested further particulars for trial. In response, the Bank denied knowing who assisted Mr Dlamini. It refused to admit that Mr Mthetwa assisted Mr Dlamini to enter into the agreement; that the agreement was in English which Mr Dlamini did not understand; and that Mr Mthetwa did not read and interpret the agreement to Mr Dlamini. The

[76] Cumulatively considering the unexplained tactics the Bank employed, this action is heavy handed intimidation in response to Mr Dlamini seeking to enforce his right to rescind the agreement and claim a refund. The Bank's conduct in initiating and pursuing this action is unlawful for the further reason that it is irrational. The unlawfulness on all the grounds established above is a breach of the right to equality in s 9(1) of the Constitution. The Bank conducted this transaction oblivious of the purposes of the NCA. Notwithstanding the manifest inequality in its relationship with its bargaining counterpart it sought to snatch an advantage.

[77] In passing I note that the CPA assented to on 24 April 2009 commenced on 31 March 2011. Although the agreement in this case was terminated before the general effective date of the CPA, i.e. 31 March 2011 the Bank, like most large corporations that invest in corporate social responsibility projects, had to be aware of the purposes of the CPA which was already in the public domain. The purposes of the CPA are:

> '. . . to promote and advance the social and economic welfare of consumers in South Africa by—
>
> . . .
>
> (c) promoting fair business practices;
>
> (*d*) protecting consumers from—
>
> i. unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and
>
> ii. deceptive, misleading, unfair or fraudulent conduct;
>
> (*e*) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour;...'[27]

[78] Institutions such as the Bank should welcome the framework proffered by the NCA and the CPA for bridging the socio-economic inequalities substantively and for reforming the credit industry, if for no reason but that sustained inequalities and need lead to unrest and social instability which is not good for business. Even though the CPA was not effective when the Bank sold the vehicle to Mr Dlamini it should have voluntarily acknowledged that as goods sold in terms of a credit agreement, s 5(2)(d) of the CPA would have applied to the sale. It should have been clear when the Bank issued summons on 3 March 2012 that consumer relations was no longer business as usually practised over its 150 year history in South Africa. Disappointingly, the Bank remained unresponsive to the CPA and its aspirations before it became enforceable. My interpretation and application of the provisions of the NCA above are fortified by the CPA.

[79] In conclusion, if the parties had applied themselves properly at the rule 37 pre-trial conference, the trial time could have been shortened by at least a day. As stated above, Ms Ndlela's evidence could easily have been dispensed with altogether. At the conference they could have exhausted settlement negotiations and avoided wasting three hours of court time on the morning of the trial resulting in the trial commencing only at 13h00. As a result of the parties' poor pre-trial preparation this matter which was set down on the expedited roll for one day had to be adjourned to continue the following week, at great inconvenience to the court.

[80] The order I grant is the following:

1. The defendant Mr Dlamini rescinded the credit agreement with the plaintiff Standard Bank.

Standard Bank shall pay the costs of the action

D.PILLAY J

Date of Hearing: 06 August 2012 and

14 August 2012

Date of Judgment: 23 October 2012

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1*Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA); *George v Fairmead (*Pty) Ltd 1958(2) SA 465 (A) at 471*; National and Overseas Distributors Corp (Pty) Ltd v Potato Board* 1958(2) SA 473 (A) at 479; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992(3) SA 234 (A) at 239I – 240B; *Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers* 2007(2) SA 599 (SCA).

2Section 1 of the Constitution of the Republic of South Africa, 1996..

3Section 9(1) of the Constitution.

4Catherine Albertyn, Sandra Fredman, Judy Fudge 'Introduction: Substantive equality, social rights and women: A comparative perspective' (2007) 23 *SAJHR* 209 p 209.

5For example *Minister of Finance and Another v Van Heerden* **[2004] ZACC 3**; **2004 (6) SA 121** (CC) para 146; *Pretoria City Council v Walker* **[1998] ZACC 1**; **1998 (2) SA 363** (CC) para 62.

6Section 9(2) of the Constitution.

7**Section 7(a)** of the **Companies Act 71 of 2008**.

8**Section 3(d)** of the NCA.

12S 90 (2) (c) (i) of the NCA.

13*Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA) para 1; *George v Fairmead (Pty) L*td 1958(2) SA 465 (A) at 470C-E.

14*Brink v Humphries & Jewell (Pty) Ltd* 2005(2) SA 419 (SCA) para 11.

15*Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* **[1992] ZASCA 56**; **1992 (3) SA 234** (A) 240J-241D.

16*George v Fairmead (Pty) L*td 1958(2) SA 456 (A) at 470C-E.794d already secured the relief sumerlker 1998 ()4 ()

17*Sonap Petroleumv Pappadogianis* 241E – F – 242A-C

18Supra at 239 I – 240 B

19At 875B-C.

20At 495I.

21See also CJ Pretorius 'Exemption clauses and mistake *Mercurius Motors v Lopez* v **[2008] ZASCA 22**; **2008 (3) SA 572** (SCA)' **2010 (73) THRHR 491**-502.

22Section 90 (1) of the NCA.

23Section 90 (2) (a) (i) & (ii) of the NCA.

24Section 90 (2) (b) (i) & (iii) of the NCA.

25Section 90 (3) of the NCA.

26Section 90 (4) (a) of the NCA.

27Section **3** (1) of the CPA.

[Context] [Hide Context]