

**APPLICANT: NARANDRAN KOLLAPEN J**

**COURT FOR WHICH APPLICANT APPLIES: CONSTITUTIONAL COURT**

**1. The candidate's appropriate qualifications:**

1.1. The candidate holds B.Proc (1978) and LLB (1981) degrees

1.2. Both degrees were obtained from the University of the Witwatersrand.

1.3. The candidate possesses the minimum requisite qualifications for the position for which he has applied.

**2. Whether the candidate is a fit and proper person**

2.1. There is nothing in the application or in the candidate's judgments that would suggest that the candidate is not a fit and proper person.

2.2. The candidate was appointed as a judge to the High Court of South Africa, Gauteng Division, on 11 May 2011 and has also acted in the Constitutional Court.

**3. Whether the candidate's appointment would help to reflect the racial and gender composition of South Africa**

3.1. The candidate is a 62-year-old Indian male.

3.2. At present there are eight permanent justices on the Constitutional Court. of these there are five men (four African men and one White man) and three women (two African women and one Coloured woman). The appointment of this candidate will enhance representivity of the Constitutional Court bench.

4. **The candidate's knowledge of the law, including constitutional law**

4.1. The candidate practised as an attorney for approximately 10 years, whereafter he was appointed as the National Projects Director and later the National Director for Lawyers for Human Rights.

4.2. In December 1996, the candidate was appointed as a Commissioner of the South African Human Rights Commission (SAHRC). The candidate spent the majority of his career (approximately 13 years) at the SAHRC where he also occupied the position of chairperson for about 7 years, before being elevated to the bench.

4.3. He was elevated to a permanent position on the bench in May 2011. He acted in the Constitutional Court between July 2017 and December 2017.

4.4. With specific regard to Constitutional Law, the reviewers refer to the following judgments, which illustrate a demonstrable knowledge of Constitutional Law:

4.4.1. *Quick Drink Co (Pty) Ltd and Another v Medicines Control Council and Others* 2015 (5) SA 358 (GP):

This case dealt with the manner in which the law is enforced. The candidate correctly reflected in the judgment that Courts will not readily interfere in the choices made by the law enforcement agencies but observed that the law has to be enforced within the spirit of equality (Section 9(2) of the

Constitution). The point is made that where a decision to enforce the law is taken, the law must be enforced equally and selective enforcement without rational ground for differential treatment may constitute unfair discrimination.

4.4.2. *Rahube v Rahube and Others* 2018 (1) SA 638 (GP):

In this matter the validity of Section 2(1)(a) of the Upgrading of Land Tenure Rights Act was challenged in as far as it allowed for the automatic conversion of certain land tenure rights into ownership. The candidate held that the provision was unconstitutional and invalid to the extent that it failed to afford opportunity, prior to conversion, to occupants and affected parties lacking tenure rights to make submissions to an appropriately established forum and that the scheme especially deprived women of such an opportunity. The order of constitutional invalidity was confirmed by the Constitutional Court, subject to certain variations.

4.4.3. *Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC):

The matter involved the deliberations of the Judicial Service Commission, which ordinarily would be part of a Rule 53 record, subject to confidentiality. In a dissenting judgment the candidate held that concerns about litigation in the dark did not arise in the present case since a

substantial record was made available to the Helen Suzman Foundation. Excluding the deliberations from the record would neither injure the Applicant's right to properly prosecute its review application nor impermissibly breach the principles of openness and transparency. Disclosure, however carried the real risk of causing substantial harm to dignity, privacy and reputational interests of many and therefore the appeal had to be dismissed.

4.4.4. *Food and Allied Workers' Union obo J Gaoshubelwe v Pieman's Pantry (Pty) Ltd* 2018 (5) BCLR 527 (CC):

The matter involved an unfair dismissal dispute and whether a claim for unfair dismissal constitutes a debt as contemplated in Section 16(1) of the Prescription Act. What needed to be established was whether the claim that had been asserted was a "debt" in terms of Section 16(1) of the Prescription Act and if so established, the next issue to determine was whether any inconsistency between the Labour Relations Act and the Prescription Act existed. The mere fact that the Prescription Act and the Labour Relations Act dealt with time periods or imposed conditions, did not demonstrate inconsistency. It merely triggered the risk of inconsistency. The time period in Section 191 of the Labour Relations Act dealt with when a litigant was expected to take the necessary

steps to resolve a dispute. These could not be regarded as inconsistent with the time periods in the Prescription Act which makes provision for the cut-off point when those steps could no longer be taken at all. The time periods in the two statutes sought to achieve different objectives.

- 4.5. The candidate was also part of the bench of the Constitutional Court in a number of matters where he did not write the judgments.
- 4.6. The candidate has an excellent understanding of constitutional jurisprudence and the proper approach thereto.

## 5. **The candidate's commitment to the values of the Constitution**

- 5.1. The candidate, as is evident from his extensive involvement with the SAHRC and the content of his judgments, has demonstrated a firm commitment to the values of the Constitution and to the rule of law.
- 5.2. The candidate's contribution to human rights has been recognised in the form of an honorary degree from the Durban University of Technology and he also received a Citizen's Excellence Award in the category 'Human Rights' from the Mayor of Tshwane.

## 6. **Whether any judgments have been overturned on appeal**

- 6.1. *Premier Foods (Pty) Ltd v Manoim NO and Others* 2016 (1) SA 445 (SCA)

6.2. *Brouze and Others v Wenneni Investment (Pty) Ltd and Another* 2015 (4) All SA 543 (SCA)

6.3. *S v Musiker* 2013 (1) SACR 517 (SCA)

6.4. *Business Partners Limited v Silverstar Trading* 245 CC 2015 JDR 0728 (SCA)

6.5. *De Haas v Fromentin and Others* 2013 (6) SA 621 (SCA)

6.6. *First National Bank v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 (9 March 2015)

## 7. **The extent and breadth of the candidate's professional experience**

7.1. The candidate has extensive experience as an attorney, commissioner of the South African Human Rights Commission, and a High Court Judge.

## 8. **The candidate's linguistic and communication skills**

8.1. From the candidate's judgments, it is clear that he has excellent written linguistic skills in English.

## 9. **The candidate's ability to produce judgments promptly**

9.1. 87 judgments handed down by the candidate were considered.

9.2. All of these judgments were delivered promptly.

9.3. The candidate in paragraph 16.5 lists two judgments still outstanding. Judgment in the matter of *Werner Begere v Tecmed Africa (Pty) Ltd* was handed down on 19 January 2021. Judgment in the matter of *Price Waterhouse Coopers Inc. and*

*Another v Minister of Finance and Another* was handed down on 2 February 2021.

**10. The candidate's fairness and impartiality**

10.1. The candidate's fairness and impartiality are evident from the judgments that he has written.

**11. The candidate's independent mindedness**

11.1. There is nothing to suggest that the candidate is not independently minded.

**12. The candidate's ability to conduct court proceedings**

12.1. There is nothing which is suggestive of an inability to conduct court proceedings.

**13. The candidate's administrative ability**

13.1. No adverse comments have been received in this regard.

**14. The candidate's reputation for integrity and ethical behaviour**

14.1. One can infer from the candidate's experience on the Human Rights Commission and as a Judge, that the candidate has a reputation for integrity and ethical behaviour.

14.2. The reviewer is unaware of any aspect which may impugn the candidate's reputation.

**15. The candidate's judicial temperament**

15.1. The reviewer is unaware of any matter which is suggestive of an inappropriate judicial temperament on the part of the candidate.

**16. The candidate's commitment to human rights, and experience with regard to the values and needs of the community**

16.1. The candidate's application reveals that he has held various positions in organisations and institutions committed to the protection and promotion of human rights.

16.2. The candidate's commitment to human rights, and experience with regard to the values and needs of the community cannot be doubted.

**17. The candidate's potential**

17.1. The candidate has excellent potential as a Constitutional Court Justice.

**18. The message that the candidate's appointment would send to the community at large**

18.1. In light of the candidate's experience and demonstrable commitment to the values of the Constitution the candidate's appointment would send a positive message to the community at large.

## ANNEXURE: LIST OF JUDGMENTS CONSIDERED

### Reported decisions:

*Nabuvax (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality and Others* (31875/13) [2013] ZAGPPHC 181; [2013] 3 All SA 528 (GNP) (2 July 2013)

Urgent Interdict – the Constitutional Court’s order of invalidity of the Development Facilitation Act – PAJA – well-researched judgment – heard on 25 & 26 June 2013 and judgment promptly delivered on 2 July 2013.

*Quick Drink Co (Pty) Ltd and Another v Medicines Control Council and Others* (64056/2014) [2014] ZAGPPHC 904; 2015 (5) SA 358 (GP) (11 November 2014)

Urgent interdict – e-cigarettes seized - elective enforcement - Section 9(1) and Section 9(2) of the Constitution (guarantee of equality) – well reasoned judgment applying constitutional values and principles – unable to determine how long it took to deliver the judgment – date of hearing not reported.

*Rahube v Rahube and Others* 2018 (1) SA 638 (GP)

Constitutional law - Upgrading of Land Tenure Rights Act 112 of 1991 – the Act perpetuated the exclusion of women, from the rights of ownership in so far as it provided for automatic conversion and failed to provide any mechanism in terms of which any other competing rights could be considered and assessed and a determination made - Section 2(1) of the Act declared unconstitutionally invalid

The order of constitutional invalidity was confirmed by the Constitutional Court, subject to certain variations - *Rahube v Rahube and Others* (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC) (30 October 2018)

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

Constitutional Court – penned by Kollapen J – unanimous judgment

Non-compliance with maintenance obligations — rule 46(1)(a)(ii) — writ of execution against immovable property — non-compliance with court orders.

Proceedings analogous to formal contempt — Biowatch principle on costs not applicable — costs on attorney client scale — punitive cost order.

*African Development Bank v Nseera; In re: Nseera v Nseera* (A479/2017) [2018] ZAGPPHC 672; [2018] 3 All SA 646 (GP) (15 June 2018)

Heard on 15 May 2018

Appeal. Judgment written by Kollapen J. Dealt with employer seeking to rescind a judgment which would require them to attach emolument payments in respect of an employee. Found that just because granted ex parte did not violate audi alterem – other ways in which this could be satisfied. Found that the “immunity” the bank professed (in respect of an agreement signed between various African countries) did not cover legal matters of this nature.

*Afriforum and Another v Chairperson of the Council of the University of Pretoria and Others* (54451/2016) [2016] ZAGPPHC 1030; [2017] 1 All SA 832 (GP) (15 December 2016)

Heard on 1 December 2016

Appeal. Kollapen wrote judgment. Afriforum opposed decision taken by Tuks for English to be the main language. Considered Constitution “29 (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable.” Held that integration and

transformation can be construed as forming part of consideration into being “reasonably practicable”. Not considered to be discriminatory simply by seeking to cease to offer a language – the decision was taken to level the playing field.

*BS v MS and Another* 2015 (6) SA 356 (GP)

Heard on 16-17 April and 17 June 2015.

Legal convictions of community. Child nearly drowned. Brain damage. Must go to reasonable lengths to ensure safety of property. The owners issued a verbal warning. This suffices.

*KT v MR* 2017 (1) SA 97 (GP)

Forfeiture of property rights.

The plaintiff (wife) instituted a divorce action against the defendant (husband), to whom she had been married in terms of customary law, in community of property. The husband contended that he was entitled to an order that the wife forfeited her patrimonial benefits of the marriage. In terms of s 9(1) of the Divorce Act 70 of 1979 (the Act) a court may make a forfeiture order if, ‘having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, [it] is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited’.

The key issue was whether the benefit was ‘undue’, the determination of which required the court to investigate the considerations mentioned in s 9(1) of the Act. As to the circumstances giving rise to the breakdown of the marriage, the court found that both parties were at fault. Kollapen J held that in the present case the factors relating to substantial misconduct and the

circumstances giving rise to the breakdown of the marriage were not decisive in determining whether a benefit was undeserved. As a result, so the court reasoned, the consideration of a fault-neutral factor such as the duration of the marriage should be based on considerations of proportionality.

*Maluka v S* (A197/2013) [2014] ZAGPPHC 862; 2015 (2) SACR 273 (GP)  
(31 October 2014)

The provisions of Section 77 of the Act relate to the criterion for fitness to stand trial, while the provisions of Section 78 of the Act relate to the question of criminal responsibility. Thus, in the context of the matter before court the report of the psychiatrists showed that while the accused was found to be capable of understanding court proceedings and to contribute meaningfully to his defence, they conclude however that at the time of the alleged offence he was, as a consequence of a mental illness, unable to appreciate the wrongfulness of his actions or to act in accordance with an appreciation of wrongfulness.

Court finding that as a matter of good practise Magistrates should refer orders made in terms of Section 78 (6)(ii)(aa) to the High Court for review.

*Economic Freedom Fighters and Others v Speaker Of The National Assembly And Another* 2018 (2) SA 571 (CC)

Constitutional law — Parliament — Motion for removal of President of Republic — National Assembly obliged to make rules specifically tailored for s 89(1) impeachment process — Ad hoc committee inappropriate as mechanism for removal of President — Constitution, s 89(1).

Constitutional law — Parliament — Obligations — National Assembly's obligation to scrutinise and oversee executive action and to hold it accountable — Constitutional Court finding that President Zuma had

violated constitutional obligations by failing to implement Public Protector's remedial action against him — Parliament obliged to determine whether grounds for impeachment existed in terms of s 89(1)(a) or (b) of Constitution — Failure to do so in breach of ss 89(1) and 42(3) — Constitution, ss 42(3) and 89(1).

*Ex Parte WH & Others* 2011 (6) SA 514 (GNP)

Minor — Surrogate mother — Surrogate motherhood agreement — Confirmation F by court — Information required by court — Affidavit should contain (1) all factors set out in Children's Act with documentary proof where applicable; (2) any previous applications for surrogacy; (3) reports by clinical psychologist in respect of commissioning parents and surrogate mother; (4) medical report regarding surrogate mother; (5) details and proof of payment of any compensation for services rendered; (6) all agreements G between surrogate and any intermediary; (7) full particulars if any agency was involved; and (8) whether any of commissioning parents have been charged with or convicted of violent crime or crime of sexual nature — Children's Act 38 of 2005.

*First National Bank, A Division of Firstrand Bank Ltd v Clear Creek Trading 12 (Pty) Ltd and Another* 2014 (1) SA 23 (GNP)

Credit agreement — Consumer credit agreement — Whether agreement subject to NCA — Parties to normally excluded agreement stating in agreement that it would be governed by NCA — Agreement subject to NCA.

*Gallagher Group Ltd and Another v IO Tech Manufacturing (Pty) Ltd and Others* 2014 (2) SA 157 (GNP)

Intellectual property — Patent — Revocation — On ground of material misrepresentation in declaration, knowing such to be false when made —

Whether curable by amendment — Misrepresentation to be assessed at time declaration made — Not possible to avoid consequences by subsequent amendment of patent specification — Patents Act 57 of 1978, s 61(1)(g).

*GF v SH and Others* 2011 (3) SA 25 (GNP)

Husband and wife — Divorce — Maintenance — Variation, by subsequent oral agreement between parties, of maintenance regime set out in settlement agreement which was made order of court and which contained non-variation clause — Whether Shifren principle to be relaxed to permit such variation — Variation permissible if in accordance with public policy — Best interests of minor children paramount.

*Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC)

Judge — Appointment — Judicial Service Commission — Selection process — Review — Record on review — Extent of record — Transcript of commission's post-interview deliberations forming part of record — Must be supplied to applicant — Uniform Rules of Court, rule 53(1)(b).

Review — Procedure — Record on review — Extent of record — Applicable rule to be interpreted to advance applicant's rights of access to courts and to equality of arms before it — Judicial Service Commission's post-interview deliberations on appointment to bench forming part of record on review — Must be supplied to applicant — Uniform Rules of Court, rule 53(1)(b).

*Heritage Hill Homeowners' Association v Heritage Hill Devco (Pty) Ltd* 2013 (3) SA 447 (GNP)

Township — Establishment — Subdivision of land — Erven making up township coming into existence on registration of general plan — Developer

becoming registered owner of individual erven in township — May be obliged to pay levies imposed by homeowner's association.

Township — Developer — Rights and duties — Upon registration of general plan, developer becoming owner of individual erven making up township — Homeowners' association entitled to impose levies on developer in respect of unsold erven — Such right must emanate from articles of association.

*Investec Bank Ltd v Adriaanse and Others* NNO 2014 (1) SA 84 (GNP)

Trust — Contracts — Duties of outsiders — Though outsiders dealing with trust obliged to observe provisions of trust deed, primary responsibility for compliance on trustees — Development of higher standard of diligence for outsiders than for trustees objectionable — While outsiders have interest in self-protection, ultimate responsibility for compliance with formalities, for ensuring contracts lie within authority conferred by trust deed, and that contract for benefit of trust and its beneficiaries, lying with trust.

*Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC)

Immigration — Refugee — Asylum seeker permit — Whether, after rejection of asylum application, and exhaustion of internal review and appeal, and pending judicial review, refugee reception officer having power to extend permit — Whether, on being asked, officer having discretion to extend or not extend — Refugees Act 130 of 1998, ss 22(1) and 22(3).

*Section 27 and Others v Minister of Education and Another* 2013 (2) SA 40 (GNP)

Education — Right to education — Duties of state — Provision of textbooks — Failure to do so constituting violation of right to basic education — Court

would order provision of textbooks where state failed to deliver textbooks by middle of academic year — Constitution, s 29.

*SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Ltd and Others* 2019 (1) SA 370 (CC)

Competition — Competition Commission — Investigative powers — Merger control — Whether Commission may use its search and summons powers to investigate alleged notifiable merger between public and private television broadcasters — Whether such powers curbed by Competition Appeal Court order — Competition Act 89 of 1998, ch 5 part B; s 49A.

Media — Broadcasting — Television — SABC — Channel-distribution agreement with private broadcaster — Power of Competition Commission to investigate — Not restricted — Commission may use full search and summons powers — May interview those who signed agreement — Competition Act 89 of 1998, ch 5 part B; s 49A.

*South African National Defence Union v Minister of Defence and Others* 2012 (4) SA 382 (GNP)

Defamation — Who may sue or be sued — Trade union — May sue for defamation.

*Tasima (Pty) Ltd V Department of Transport and Others* 2013 (4) SA 134 (GNP)

Attorney — State attorney — Dereliction of duties in conduct of litigation — Conduct of state attorney labelled as reprehensible and prejudicial to administration of justice — Office of State Attorney, Pretoria, shown to be dysfunctional — Judgment forwarded to Minister of Justice, Parliamentary Portfolio Committee for Justice, and Law Society of Northern Provinces — Costs order de bonis propriis awarded.

Contempt of court — Disobedience of court order — By organ of state — Order relied upon doing no more than record terms of agreement between state and outside party — Not constituting direction by court to be implemented on pain of contempt — In any event, content of state's obligation to court not set out with specificity required for non-compliance to be visited with committal for contempt.

**Unreported decisions:**

*Mpotseng Infrastructure v Phetla* (24791/2015) [2018] ZAGPPHC 466 (12 April 2018)

Rescission application – judgment on Saffli not complete – requirements for rescission correctly stated.

*Msawu v S* (A832/2013) [2014] ZAGPPHC 739 (9 September 2014)

Criminal appeal against conviction and sentence – common purpose – duplication of charges – well reasoned judgment – succinct and to the point judgment - heard on 20 August 2014 9 September 2014 and judgment delivered promptly on 9 September 2014.

*Murrell and Another v Minister of Safety and Security* (24152/2008) [2010] ZAGPPHC 580 (2 February 2010)

Delict – wrongful arrest and detention – merits and quantum - succinct and to the point judgment- correctly applied the relevant legal principles.

*Mysleep (Pty) Ltd v Esterhuizen* (12162/2018) [2018] ZAGPPHC 465 (2 May 2018)

Urgent Interdict – restraint of trade & non-disclosure – principles relating to non-disclosure of confidential information correctly applied and supported

by relevant case law - succinct judgment - heard on 10 April 2018 and judgment promptly delivered on 2 May 2018.

*National Union of Metal Workers of South Africa v Wilro Supplies CC and Another* (34446/2015) [2015] ZAGPPHC 1146 (24 June 2015)

Business rescue – only the draft order available on Saflii.

*Ndlovu v Minister of Police and Another* (30007/2013) [2015] ZAGPPHC 143 (4 March 2015)

Delict – unlawful arrest and detention – last day of trial 30 October 2014 and judgment delivered on 4 March 2015 (recess in Dec) thus about 3 months later - correctly applied the relevant legal principles.

*Nombiba v S* (A82/2014) [2014] ZAGPPHC 601 (23 July 2014)

Criminal appeal – conviction and sentence – rape - heard 21 July 2014 judgment delivered promptly on 23 July 2014 - succinct and to the point judgment – law correctly applied and well-reasoned judgment.

*Patel N.O. obo K.M. v Road Accident Fund* (74647/2010) [2014] ZAGPPHC 188 (3 April 2014)

RAF- loss of earning capacity – contingencies – last day of hearing 26 February 2014 and judgment delivered on 3 April 2014.

*Premier Foods (Pty) Ltd v Manoim NO and Others* (38235/2012) [2013] ZAGPPHC 236 (2 August 2013)

Kollapen J's judgment in this matter was overturned by the SCA in 2016 (1) SA 445 (SCA). He also refused leave to appeal which was subsequently granted by the SCA.

Competition Law – leniency under Corporate Leniency Policy – appellant participated as a self-confessed member of a cartel in complaint proceedings before the Competition Tribunal – order by the Tribunal finding that the appellant was involved in a prohibited practice – appellant excluded from the complaint referrals – whether such order competent – Tribunal having no power to make any order against appellant – order relating to appellant a nullity – no need to set aside order – the Tribunal or its Chairperson cannot issue a certificate under s 65(6)(b) of the Competition Act since order on which that certificate based a nullity.

*Road Accident Fund v Mashala* (A474/2012) [2014] ZAGPPHC 554 (25 July 2014)

RAF- Appeal – costs order – rule 34 offer to settle – impact on costs order where merits and quantum separated - well researched judgment – heard on 23 April 2014 and judgment on 25 July 2014.

*Robert Bosch Retirement Benefit Fund v Kooverjie N.O. and Others* (59231/2012) [2013] ZAGPPHC 455 (3 December 2013)

Review application – PAJA – pension fund – review of Appeal Board’s ruling – heard on 12 November 2013 and judgment on 3 December 2013.

*S and Another v Road Accident Fund* (19993/2013) [2014] ZAGPPHC 1028 (12 December 2014)

RAF – loss of support - remarriage contingency violates the guarantee of equality in Section 9 of the Constitution - the principle of a re-partnering contingency continues to have relevance and applicability, one must be careful in how it is to be applied. If there is evidence that supports its inclusion then a Court would be justified in favourably considering it, but if there is no such evidence, then it may offend the principles of fairness and

justice simply to include it on the broad assertion that the possibility of re-partnering must always exist.

Heard on 19 November 2014 – judgment on 12 December 2014.

*S v Bhiya* (A820/15) [2015] ZAGPPHC 889 (5 November 2015)

Criminal law – Special Review – failing to add condition to the suspended sentence – corrected on review.

*S v Kganyago* (A124/2012) [2012] ZAGPPHC 28 (2 March 2012)

Criminal law – Special Review – judgment penned by Makgoka J – sentence not specifying whether counts taken together for sentencing purposes. corrected on review.

*S v Mokgotlane* (A718/14) [2014] ZAGPPHC 729 (30 September 2014)

Criminal Law – Review – Magistrate presided in bail application and when the accused previous conviction was disclosed and same magistrate thereafter presided at the trial – conviction set aside and referred back to NDPP

*S v S* (A74/14, A395/15, 06/2014) [2015] ZAGPPHC 520 (11 June 2015)

Criminal law – Review – juvenile – sentencing – theft and robbery - Child Justice Act – Kollapen J went out of his way to request an update on the accused's placement at Swartfontein Centre (rehab) as part of the review process to ensure justice was done.

*Absa Bank Limited v Adam; Absa Bank v Adam and Others* (42823/2013; 42824/2013) [2016] ZAGPPHC 1000 (24 November 2016) Heard on 20 October 2016

Strike out application of the defendant's plea and/or dismissing the defence; and judgment entered in favour of plaintiff.

Breach of Rule 21 and Rule 35 orders: compliance, but out of time therefore sought condonation. There has been substantial compliance therefore to grant relief would be far-reaching and disproportionate to the mischief.

Defendant brought application to strike in respect of allegations brought by the plaintiff that the defendant repeatedly acted mala fide. No evidence of the defendants acting in such way, therefore upheld striking of certain paragraphs.

No merit in defence: not proper proceedings to deal with this.

*Adegbuyi v Firstrand Bank Limited and Others* (19958/2014) [2016]  
ZAGPPHC 703 (16 August 2016)

Rescission. Service of in respect of declaring immovable property specially executable. Did not receive in spite of it being served on domicilium. The exercise of Rule 46(1)(a)(ii) may include considering whether personal service should be a requirement. Applicant to file a notice of opposition within 10 days of this order.

*Beach v Road Accident Fund* (53528/2009) [2014] ZAGPPHC 128 (20 March 2014)

Found against insured driver based on facts.

*Beaux Lane (S.A.) Properties Limited v The Minister of Public Works*  
(A647/2015) [2016] ZAGPPHC 679 (28 July 2016)

Appeal – judgment written by Kollapen J.

Whether holding over damages in breach of an agreement could have been “reasonably foreseeable” in order to claim damages. Held it wasn’t. Must be realistic possibility, not just a mere possibility.

*Bekker v Janse Van Rensburg* (61332/2012) [2014] ZAGPPHC 709 (23 September 2014)

There was no acceleration clause, therefore could only claim amount which was due as at date of summons and no subsequent debts.

*Board of Healthcare Funders v Discovery Health Medical Scheme and Others* (35769/2010) [2012] ZAGPPHC 65 (15 May 2012)

Copyright. Held that the applicants were the authors and the work was original.

*Bonthuys and Another v Potgieter and Others* (16760/2014) [2014] ZAGPPHC 170 (3 April 2014)

Respondents bought a property which was sold to them as Unit 5, but on plan it was Unit 1. Applicants bought “Unit 1”, and said Respondents must move out. Held that respondents are the owners of the property.

*Brandaline v Minister of Defence and Military Veterans and Others* (25801/2016) [2017] ZAGPPHC 322 (27 June 2017)

Rule 53 Application. Referred to oral evidence because dispute of facts and not everything on papers.

*Brick on Brick Property Investments 23 (Pty) Ltd v Chevron South Africa (Pty) Ltd* (6412/2013) [2013] ZAGPPHC 400 (3 December 2013)

Dealt with cancellation of notarial deed of lease. Whether a suspensive condition was created. There was breach. Notice to remedy was required,

but it was clear that this would have been met with unwillingness. Therefore, notice would have been an exercise in futility. Cancellation valid.

*Business Partners Ltd v Silver Stars Trading 245 CC and Another* (14408/2008) [2012] ZAGPPHC 76 (15 May 2012)

Royalty agreement – simulated transaction, because it was actually an interest agreement. Contract formulated to escape Usury Act. Cannot do this as it is against public policy.

*Cash Crusaders Franchising (Pty) Ltd v Swart and Another* (85149/2017) [2018] ZAGPPHC 756 (27 February 2018)

Urgent. Found exceptional circumstances to exist which would not suspend an order pending appeal, because the duration of restraint would expire before exhaustion of appeal process. Ordered that Kollapen’s order of 17 Jan 18 would continue to operate pending the outcome of the appeal process.

*Cash Paymaster Services (North West) (Pty) Ltd v South African Social Security Agency* (6406/2011) [2011] ZAGPPHC 190 (13 September 2011)

Respondents filed notice of appeal against arbitrator decision to dismiss an exception. Based on wording of agreement – parties could elect whether to proceed by means of arbitration or litigation. Distinguished between “award” and “ruling”. Appeals are envisaged against awards. This was a ruling. Whilst HC jurisdiction is not ousted, the parties should have first brought matter before appeal tribunal as per the pre-arbitration agreement.

*Chiura and Another v Absa Bank Limited and Others* (20740/2013, 7580/2007, 1730/2013) [2014] ZAGPPHC 973 (12 November 2014)

Application for security to be furnished, exercised discretion allowing parties to amend irregularities to accord with Rules of Court.

*Citiconnect Business Solutions v City Manager of the City of Tshwane Metropolitan Municipality N.O. and Others* (82542/2014) [2015] ZAGPPHC 115 (4 March 2015)

Urgent. Applicants were awarded a tender, which was cancelled. The applicants contend that the cancellation was invalid, because of a tacit term extending contract. Tacit term denied by respondents and very vague and no facts supporting its conclusion, therefore no reliance placed on it. (Analysed tacit terms).

*City of Tshwane Metropolitan Municipality v Nndwa* (A762/2013) [2014] ZAGPPHC 737 (12 September 2014)

Appeal against rule nisi directing electricity to be restored. Pre-termination notice not properly proved. Even if the City were unaware of the identity of the occupant, it would at least have to be aware that electricity was being used at the property.

*D v D* (55507/2012) [2016] ZAGPPHC 368 (16 May 2016)

Contempt of maintenance order. Seeking imprisonment. Claimed to be financially not able to pay. On his version, he could have afforded it for at least some months. Committed to Jail.

*Democratic Alliance v Municipal Demarcation Board and Others* (70915/2015) [2015] ZAGPPHC 1090 (6 November 2015)

Shifting municipal boundaries. Seek to review these decisions. The notices contained sufficient information (not required to go into details as to rationale, reasons and explanation as to why those municipalities were

chosen). The radio advert provided sufficient information, even though the means to access the information was somewhat onerous. Independent investigations commissioned by first respondent does not mean that it must be open to a process of sharing and exchanging submissions – need efficient administration. It is not required for the duty of the provinces to assist ailing municipalities to be exhausted prior to demarcation. Affections that people feel to the places where they live cannot always be decisive in decision-making.

*Derby-Lewis v Minister of Veiligheid en Sekuriteit* (20193/2004) [2014] ZAGPPHC 587 (14 August 2014)

Unlawful arrest.

*Djuma and Others v S* (A423/2015) [2017] ZAGPPHC 309 (12 April 2017)

Appeal against convictions & sentences. Based it on bias of Judge, because he refused to recuse himself. There was a separation of trials of the co-accused and the Judge was asked to recuse himself given that some of the co-accused pleaded guilty and the Judge who convicted them should not have presided over the appellants case. Confessions of co-accused do not constitute evidence other co-accused. Judge wanted to finalise quickly. No reason for Judge to recuse self.

*Dhudlu v S* (A858/2013) [2013] ZAGPPHC 7 (17 January 2013)

Criminal appeal - sentencing. Reduced sentence to 20 years.

*Law Society of the Northern Provinces v Van Der Merwe* (40666/2006) [2012] ZAGPPHC 119 (19 June 2012)

Suspension of an attorney.

Full court: Webster writing judgment. Kollapen J Concurring.

The applicant applied for an order that the respondent, an admitted attorney be suspended from practice.

The respondent had a drug addiction which affected his duties as an officer of the court. He underwent rehabilitation and at the time of hearing the application for his suspension he underwent a drug test which showed that he did not have any trace of drugs in his body.

In the end the court exercised some measure of mercy and suspended the respondent for six months.

*Letsoalo and another v Letsoalo and another; In Re: Letsoalo v Letsoalo and Others* (A116/2014) [2014] ZAGPPHC 738

Transfer of immovable property in terms of Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988.

Magistrate failing to enquire about a report of the Director-General of the provincial administration as prescribed by section 2 which provides that the Director-General of the provincial administration shall conduct an enquiry in respect of all affected sites within the province in order to determine who shall be declared to have been granted a right of leasehold or ownership. Order of magistrate set aside.

*Ley v Xstrata Coal South Africa (Pty) Limited and Others* (38012/2013) [2015] ZAGPPHC 428 (19 MAY 2015)

Malicious prosecution.

The plaintiff issued summons against the defendant seeking damages in the amount of R7 million in respect of what the plaintiff alleges is the instigation of a malicious prosecution against him by the second defendant, who the

plaintiff alleges was at all relevant times, acting in the course and scope of his employment with the first defendant(Xstrata Coal).

Requirements for malicious prosecution applied. Court finding that the second requirement of “defendants acted without reasonable and probable cause” lacking.

Claim dismissed.

*Lisbon Estates (Pty) Ltd and Others v Mokoena N.O. and Others*  
(39602/2013) [2015] ZAGPPHC 194 (4 MARCH 2015)

Special plea of prescription.

Issue for determination in the adjudication of the special plea is whether regard being had to Section 12(3) of the Prescription Act 68 of 1969, it could be said that reasonable care had been exercised by the plaintiffs to establish the identity of the defendants.

Court finding that no such reasonable care was exercised. Special plea upheld.

*Lombard and Another v Okhionks* (46878/2012) [2013] ZAGPPHC 486 (18  
DECEMBER 2013)

Declaratory relief that an agreement has been cancelled.

The stance of the respondent in these proceedings was that he continued to perform even after the cancellation of the agreement. That performance was accepted by the applicants and under such circumstances it was not open to the applicants to, as it were, approbate and reprobate. The election they made in full knowledge of their rights, to accept the performance, is binding on them and they must accept the consequences that go with it.

Court applying the applicable contractual principles relating to cancellation and revival of agreements.

Application dismissed.

*Long Beach Homeowners Association v Great Kei Municipality, Amotole District, Eastern Cape and Others* (28064/2014) [2016] ZAGPPHC 610 (26 APRIL 2016)

Review-The right to have the environment protected, and the right to ecologically sustainable social and economic development, are to be given effect to and reconciled to the extent that they may come into conflict with each other.

The first decision sought to be impugned was the decision taken by the fifth respondent (THE MEC: ECONOMIC DEVELOPMENT, ENVIRONMENTAL AFFAIRS AND TOURISM) to uphold an appeal against the grant of an application for environmental approval granted by the fourth respondent and by doing so to effectively deny the applicant an environmental authorisation (referred to hereinafter as the 'DEDEAT Application').

The second decision which is the subject of the review was a decision by the sixth and seventh respondents to refuse to grant the applicant two forestry licences that it applied for which were required in order to cut, disturb, damage or destroy indigenous trees in a forest (referred to hereinafter as the 'DAFF Application').

Decisions reviewed and set aside.

*Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho* (CCT54/17) [2018] ZACC 2; 2018 (3) SA 335 (CC)

Unanimous judgment.

Prescription Act 68 of 1969 — section 12(3) — medical negligence claim — knowledge of the facts upon which a claim is based — objective assessment — reasonable person — correctly applied by lower courts

*M v L, D v B* (A379/16, A380/16) [2016] ZAGPPHC 415 (9 JUNE 2016)

Special review in terms of the provisions of section 19(1)(a)(ii) read with section 24(1) of the Supreme Court Act 59 of 1959. The basis upon which the review was sought relates to the provisions of the Protection from Harassment Act 17 of 2011 ('the Act') and in particular what the learned Magistrate had described as the failure of the Act to provide for the rights of children who are respondents in proceedings brought in terms of the Act (Protection from Ha The court concluded that even though the Act may be silent on the manner in which child respondents are to be dealt with, it is evident that the provisions of the Children's Act to which reference has been made provide an overarching and comprehensive protection to all children in all legal proceedings. The proceedings in terms of the Protection from Harassment Act would certainly fall within the proceedings contemplated in the Children's Act and there exists no reason in law or otherwise, why its provisions should not and do not have applicability in dealing with children (whether as applicants or as respondents) in terms of the Act.

*Madise v Maswikeng Transport CC and Others* (22250/2018) [2018] ZAGPPHC 435 (18 MAY 2018)

Cessation of membership by order of Court.

Court concluding while there is little doubt that there is a deadlock between the Applicant and the second Respondent, the Applicant has not made out a

case in terms of Section 36 for the cessation of the membership of the second Respondent.

*Martycel Properties CC v Slip Knot Investments 777 (Pty) Ltd; In Re: Slip Knot Investments 777 (Pty) Ltd v Martycel Properties CC (55004/2012) [2016] ZAGPPHC 1214 (6 DECEMBER 2016)*

Appealability of interim orders.

Principles regarding the appealability of interim orders applied.

*Matabane v S (A157/2013) [2017] ZAGPPHC 269 (12 APRIL 2017)*

Full court Appeal against conviction.

The court lamenting the inordinate delays in the finalisation of prosecution.

Appeal upheld.

*Matlala v Minister of Police (6578/2012) [2015] ZAGPPHC 136 (4 MARCH 2015)*

Unlawful arrest and detention and unlawful assault.

Principles relating to unlawful arrest and detention applied. Claim dismissed.

Claim for unlawful assault upheld.

*Maxime Hotel (Pty) Ltd and Another v Chairperson: National Gambling Board N.O and Others (70868/2012) [2014] ZAGPPHC 121 (20 March 2014)*

Applicants seeking an order declaring ‘declaring regulation 3(2) of the Regulations on Limited Payout Machines published under GN R 1425 in GG 6977 of 21 December 2000 as amended by the National Gambling Act 7 of 2004:

ultra vires the powers, functions and duties of the National Board as outlined by the National Gambling Act 2004; and

as infringing upon the exclusive licensing authority of the Gauteng Gambling Board as contemplated by the National Gambling Act, 2004 and the Gauteng Gambling Act.’

Application dismissed.

*Mbombela Local Municipality v The Premier, Mpumalanga Province and Others* (47407/2015) [2016] ZAGPPHC 674 (28 July 2016)

The application involved a challenge brought by the applicant to the legality of Proclamation No. 80 of 1983 published in the Provincial Gazette of 16 February 1983.

*Eskom Holdings SOC Limited v National Energy Regulator of South Africa and Others* (74870/2019) [2020] ZAGPPHC 2 (10 February 2020)

Application for urgent relief (Part “A”) by ESKOM pending an application in terms of the Promotion of Administrative Justice Act for judicial review and setting aside of a decision taken by NERSA in relation to an application by ESKOM for electricity tariff increases for the 2019/2020, 2020/2021 and 2021/2022 financial years (Part “B”).

The candidate held that it cannot be said that there exists a well-grounded apprehension of irreparable harm if the interim relief is not granted and further that the balance of convenience also does not favour the granting of interim relief.

The application under Part A was dismissed.

## **Judgments re Covid-19**

*Solidarity obo Members v Minister of Small Business Development And Others; Afriforum v Minister Of Tourism and Others* (21314/20; 21399/2020) [2020] ZAGPPHC 133 (30 APRIL 2020)

Both Applicants sought, on the basis of urgency, orders reviewing and setting aside the decision of the Minister to make applications for emergency assistance in the tourism sector subject to empowerment criteria and / or race based criteria.

Issues for determination – whether the decision of the Minister to establish the fund and prescribe the qualifying criteria for applicants, constitutes administrative action and therefore subject to review in terms of the Promotion of Administrative Justice Act 3 of 2000, or constitutes executive policy making which would render it only subject to legality review.

The candidate held that the Applicants had not succeeded in advancing any review grounds and the applications therefore fall to be dismissed.

*Freedom Front Plus v President of The Republic of South Africa And Others* [2020] 3 All SA 762 (GP) (6 July 2020)

Reportable judgment delivered by Mlambo JP, Kollapen J and Keightley J.

The Court was once again called upon to rule on the legality of the State's response to the Covid-19 crisis, and in particular the national state of disaster Government declared under Disaster Management Act 57 of 2002.

*Helen Suzman Foundation v Speaker of The National Assembly and Others* (32858/2020) [2020] ZAGPPHC 574 (5 October 2020)

Reportable judgment delivered by Mlambo JP, Kollapen J and Baqwa J.

The Applicants sought declaratory relief that the Respondents had failed to fulfil their constitutional obligations to initiate and pass legislation to deal with the Covid-19 pandemic as well as a mandamus directing the Respondents to fulfil these obligations by initiating and passing legislation to deal with the Covid-19 pandemic.

Issues for determination (a) are the Respondents under a constitutional and legal obligation to initiate and pass legislation and in particular is the power to do so permissive or peremptory and if such duty exists; (b) have the Respondents failed to discharge their duty to initiate and pass legislation to deal with Covid-19 and associated therewith is the Disaster Management Act the constitutionally appropriate response both in the short term as well as the long term.

The Court dismissed the application.

**Judgments upheld on appeal:**

*Rahube v Rahube and Others* (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC) (30 October 2018)

*Maxime Hotel (Pty) Ltd and Others v The Chairperson: National Board NO and Others* [2017] ZAGPPHC 648 (2 June 2018)

*Heritage Hills Homeowners Association v Heritage Hill Devco (Pty) Ltd* 2016 (2) SA 387 (GP)

*Du Preez v Tonel Props (Pty) Ltd* 2015 JDR 2079 (SCA)

*Local Municipality of Madibeng v Paphiri Business Enterprise CC* 2014 JDR 1077 (SCA)

*Adriaan W de Meyer Property v Competence Management (Pty) Ltd* [2015] ZAGPPHC 1059

*Friend v Senekal* 2015 (1) SA 395 (GP)

**Judgments overturned on appeal**

*Premier Foods (Pty) Ltd v Manoim NO and Others* 2016 (1) SA 445 (SCA)

*Brouze and Others v Wenneni Investment (Pty) Ltd and Another* 2015 (4) All SA 543 (SCA)

*S v Musiker* 2013 (1) SACR 517 (SCA)

*Business Partners Limited v Silverstar Trading 245 CC* 2015 JDR 0728 (SCA), [2015] ZASCA 62 (17 April 2015)

*De Haas v Fromentin and Others* 2013 (6) SA 621 (SCA)

*First National Bank v Clear Creek Trading 12 (Pty) Ltd and Another* [2015] ZASCA 6 (9 March 2015)