

**LEGAL NOTES VOL 11/2009**

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**Discovery and inspection**-Discovery-Documents-Use of discovered documents in other proceedings-Applicants in contempt proceedings seeking to rely on documents disclosed by respondent in arbitration proceedings between parties-Whether *naturalia* of arbitration agreement including English law 'implied undertaking' of confidentiality by party to whom discovery has been made not to use documents disclosed in other proceedings-Semle: Even if 'implied undertaking' forming part of South African law, facts falling within two of recognised exceptions to rule-Accordingly, documents disclosed in arbitration proceedings being admissible in contempt proceedings.

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### **Sex Worker Education and Advocacy Task Force v Minister of Safety and Security and Others 2009 (2) SACR 417 (WCC)**

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### **S v Mabuza and Others 2009 (2) SACR 435 (SCA)**

**Trial**-The accused-Rights of-Requirement that accused be informed of his/her rights-Trial might be unfair if accused not informed of rights-Failure to record fact that accused was so informed, verbatim or otherwise, not by itself rendering trial unfair.

**Sentence**-Prescribed sentence-Minimum sentences-Imposition of in terms of Criminal Law Amendment Act 105 of 1997-'Substantial and compelling circumstances'-Youthfulness-Legislature intending that, in respect of juveniles who have attained age of 18, youthfulness no longer per se a mitigating factor-Although no longer per se a substantial and compelling factor, it often might well be so, particularly when other factors present-Must be taken into account when discharging sentencing function, especially when considering life imprisonment-Youthful offenders not to be denied human dignity of being considered capable of redemption.

### **S v Mngoma 2009 (2) SACR 447 (E)**

**Appeal**-Leave to appeal-From High Court-Prosecution appealing against sentence in terms of s 316B of Criminal Procedure Act 51 of 1977-Leave to appeal to full bench granted-Full bench upholding appeal-This irregular, since s 316B stipulating such appeal lying only to Supreme Court of Appeal-Full bench remitting matter to trial court for disposal of appeal application afresh.

### **S v Rowand and Another 2009 (2) SACR 450 (W)**

**Trial**-Pre-trial disclosure to be made at time when accused acquainted with charge, or immediately thereafter-Certainly before beginning of trial-Depending on circumstances of each case, accused entitled to all documents in State's possession-Question of relevance not a consideration at this stage of proceedings-State not to deny accused person access to information in its possession simply by leaving it out of docket-These principles relating as much to other documents as to actual witness statements.

**Trial**-The prosecution-Position of in respect of the information in the possession of the State-State not to redefine itself and differentiate between 'the State' and 'the prosecution'-'The State' a wide concept comprising all its organs, including prosecuting authority-Important documents in possession of State ought to form part of docket, and to be disclosed, particularly when directly called for-These principles relating as much to other documents as to actual witness statements

Fundamental rights-Right to fair trial-Right of access to contents of police docket prior to trial-Right not applicable only to that which prosecution electing to make part of docket-Not up to State to decide what was, and was not, relevant to defence case-State not to deny accused person access to information in its possession simply by leaving it out of docket-State not to redefine itself and differentiate between 'the State' and 'the

prosecution'- 'The State' a wide concept comprising all its organs, including prosecuting authority-Important documents in possession of State ought to form part of docket, and to be disclosed, particularly when directly called for-These principles relating as much to other documents as to actual witness statements.

### **S v Schoeman 2009 (2) SACR 459 (W)**

**Appeal**-Record-Voluminous record-Steps to be taken by parties and legal practitioners to limit record to those portions relevant to the appeal.

**Appeal**-Leave to appeal-Reasonable prospect of success on conviction but not on sentence-Effect on sentence if appeal against conviction successful or partially successful-Suggested form of order set out when leave to appeal granted.

### **Snyders v Louw 2009 (2) SACR 463 (C)**

**General principles of liability**-Defences-Private defence-What constitutes-Deceased tampering with respondent's wife's vehicle-Scuffle ensuing between deceased, on one hand, and respondent, and respondent's visitor, on other-Respondent fetching firearm to frighten deceased from property-Deceased approaching respondent aggressively-Respondent warning deceased verbally and firing warning shot into grass-Deceased continuing to approach aggressively-When respondent seeing what appeared to be knife in deceased's raised left hand, deceased all while approaching respondent aggressively, respondent shooting and killing him-Respondent's actions reasonable in circumstances-Action dismissed.

## ALL SA Law Reports October (1) 2009

### Manong v Department of Roads & Transport, Eastern Cape Province [2009] 4 ALL SA 1 SCA

Jurisdiction – High Court sitting as an equality court not a High Court – extent of jurisdiction of equality court to grant relief in respect of administrative action allegedly invalid on the grounds that it amounted to unfair discrimination.

Company-representation by director-need leave from court

The SCA dismissed an appeal by Manong and Associates (Pty) Ltd (the Company). The matter had commenced in the words of the SCA 'as a somewhat ambitious application in terms of The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) to the Equality Court (Transvaal Provincial Division)'. In it, the Company, a national company specialising in civil, structural and development engineering, sought against the Minister of Public Works and the Director General, Department of Public Works an interim interdict preventing them from implementing their Professional Services Supplier Register (the register) including its key principles. The application was dismissed with costs in the court below by Botha J.

The National Department of Public Works (the DPW), which has been described as the largest employer of consultants in the built environment, operated a roster system for the procurement of professional service providers for its projects. The aim of that policy, which was introduced in May 2001, was to ensure a fairer distribution of work by targeting historically disadvantaged firms and individuals and affording them preferential treatment through accelerated appointments to departmental tenders. During March 2008, the DPW sought to replace that policy with a new Professional Services Supplier Register (the register). Disgruntled at the DPW's decision to discard the roster system in favour of the new register, the Company launched an application for an interdict in the Equality Court.

In the view of the SCA, the Company had to fail at the first hurdle for the grant of an interdict – namely a *prima facie* right. According to the SCA, in order to succeed the Company had to establish *prima facie* that the mere implementation of the new policy by the DPW would in and of itself have resulted in a discriminatory practice to the Company and other similarly placed historically disadvantaged firms and individuals. That proposition, according to the SCA, was wholly untenable, because the DPW's explanation that the roster system had to be discarded in favour of the new register to ensure compliance with the relevant statutory framework was not and could not have been gainsaid by the Company. It followed therefore that the appeal had to fail and it was dismissed with costs.

In the course of doing so, the SCA was also called upon to first consider whether Mr Manong, the managing director of the company, who had signed the heads of argument on behalf of the company and who had purported to represent it before the SCA, had what is described as a right of audience on behalf of the Company before it. After

considering the historical rationale for the rule that a company cannot conduct a case before it except by the appearance of counsel on its behalf, the SCA concluded that cases will arise where the administration of justice may require some relaxation of that general rule. It accordingly held that superior courts have a residual discretion in a matter such as that, arising from their inherent power to regulate their own proceedings. Such a discretionary power was in the opinion of the SCA consistent with the Constitution. The SCA emphasised that discretionary audience should be regarded as a reserve or occasional expedient, for, given the increasing complexity of litigation, the rule may well be required as strongly today as it ever was and furthermore there may well be circumstances when an unqualified and inexperienced person may do more harm than good to the corporate litigant that he purports to assist. The SCA refrained from formulating a test for the exercise of the Court's inherent power as it believed that such cases could confidently be left to the good sense of the judges concerned. It did however hold that it would be necessary in each such instance that leave first be sought by way of a properly motivated, timeously lodged formal application showing good cause why in that particular case the rule prohibiting non-professional representation should be relaxed.

**Mathenjwa N O & others v Magudu Game Company (Pty) Ltd [2009] 4 ALL SA 15  
SCA**

Property-ownership-transfer-wild animals

The Supreme Court of Appeal dismissed an appeal against a finding of the Pietermaritzburg High Court that animals on a game reserve, enclosed by electrified game fencing, belonged to the respondent game company.

In 1995 the owners of a number of farms in the Magudu area, Vryheid, in KwaZulu Natal had formed a reserve on their farms and constituted the respondent company to manage the reserve and the game. In 2001 they had been joined by a neighbouring landowner, Mr Bouwer, who had entered into various contracts in terms of which he gave control of the game on his farms to the game company. The fences between the farms were all taken down and the game roamed freely on the land forming the reserve. The game company, the high court held, had acquired ownership of the game through a number of ways: barter, sale, the birth of progeny and capture.

Some of the Bouwer land subsequently formed the subject of a claim for the restitution of land, and was purchased from Bouwer by the Regional Land Claims Commissioner and transferred to a community trust. The appellants were all trustees of the trust. They attempted to prevent employees of the game company from gaining access to their land and from hunting or in any way dealing with the game on the trust land. The game company accordingly sought an order that it was the owner of all game on the trust property, and that it was entitled to enter the property to recover its game. (The trust had conceded that some species which did not occur naturally in the area could be removed.) The high court found that the game company remained owner of the game despite the fact that the trust land was excluded from the reserve.

The principal issue before the high court was whether the game company had acquired the game originally on the Bouwer farms that were transferred to the trust. It was argued by the trust that Bouwer had not transferred ownership of the game on his property to the game company, but merely handed the control and management of the animals to it. It was also argued that since the game company did not have actual control of the game because the reserve was very large, the animals had reverted to a state where they were free – unowned by anyone. The common law principle is that wild animals belong to no one unless captured and kept under the owner's control.

The SCA confirmed the high court's finding that the game company had acquired ownership and kept control of the game within the reserve. Although the game roamed freely it could not escape the reserve and was in effect controlled by the game company. The trust was not therefore entitled to prevent access by the game company to its land to capture the game, and was obliged to allow the game company to recover it. Accordingly, the appeal was dismissed.

### **MIA v THE STATE [2009] 4 ALL SA 33 SCA**

Fraud-sentence-appeal against

The SCA set aside the effective sentence of 20 years' imprisonment imposed upon Mr. Mia and replaced it with a sentence of 15 years' imprisonment. Mr Mia was convicted by the Pretoria Regional Court during May 2004 on two charges of fraud. The facts giving rise to the conviction were, broadly stated, the following: During 2001, a complete cheque book for the account of Vodacom Service Providers Company (Pty) Ltd – Creditors was stolen. Two cheques from that cheque book to the total value of R 5,72million were deposited into a bank account operated by Mr Mia. He admitted that he had unlawfully, falsely and with the intention to defraud, held out that the cheques were good and valid cheques and that he had thereby induced the bank to act to its prejudice by crediting his bank account with the value of those cheques.

The trial court concluded that there were no substantial and compelling circumstances present. It accordingly found itself unable to depart from the minimum sentencing legislation that prescribed 15 years' imprisonment for an offence of that kind. He was thus sentenced to 15 years' imprisonment on each charge – 10 years of which on the second charge was ordered to run concurrently with the first. An appeal to the Pretoria High Court against sentence proved unsuccessful. According to the SCA, given the paucity of information adduced by Mr Mia as to the circumstances surrounding the criminal enterprise and his own role in it, as also the staggering amounts involved, neither the trial court nor the High Court could be faulted in finding that there were no substantial and compelling circumstances present. The SCA held that the two offences although distinctly separate were closely related and were in reality the execution of the same broad criminal transaction. It followed, that the second term of imprisonment of 15 years should have been ordered to run concurrently in its entirety with the first. The SCA concluded that the cumulative effect of the sentence imposed by the trial court was manifestly severe and that interference in the sentence was competent and warranted.

In the result it set aside the effective sentence of 20 years' imprisonment and replaced it with a sentence of 15 years' imprisonment.

### **Minister of Safety and Security v Tyulu [2009] 4 ALL SA 38 SCA**

Unlawful arrest and detention – s 40(1)(a) and (f) – Criminal Procedure Act 51 of 1977 – whether the appellant had adduced sufficient evidence to justify the respondent's arrest and detention – The appropriate quantum of damages in respect of respondent's arrest and detention – Award reduced on appeal.

The respondent (Mr Tyulu) instituted an action against the appellant in the Cape of Good Hope Provincial Division, claiming damages in the sum of R400 000 for unlawful arrest and detention. The High Court awarded him damages in the total amount of R280 000. On appeal, the Full Bench overturned the court a quo's finding on the merits regarding the second arrest and detention. Concerning the first arrest, the Full Bench confirmed the judgment on the merits but reduced the amount of damages to R50 000. This appeal, which is by special leave of this Court, is against the judgment of the Full Bench. On appeal the amount was again reduced to R15 000.00!! And....The appellant was ordered to pay the costs of appeal, including the costs occasioned by the employment of two counsel.

### **ST PAUL INSURANCE CO SA LTD v EAGLE INK SYSTEMS (CAPE) (PTY) LTD [2009] 4 ALL SA 46 SCA**

Insurance law-indemnity

The respondent, Eagle Ink, supplied ink to Nampak Polyfoil for printing on plastic bags destined for WalMart in the USA. It was a term of the contract that the ink should be free from heavy metals, including lead. An employee of Eagle Ink negligently mixed ink containing lead with the lead-free ink supplied for the plastic bags, and the plastic bags were rejected. Eagle Ink claimed against the appellant, St Paul Insurance Company, under the insurance policy issued to it by the appellant. The claim succeeded in the Cape High Court. But the Supreme Court of Appeal upheld the insurance company's appeal and found that the ink was 'contaminated' as contemplated in a clause of the policy which excluded liability in such an event.

### **Van der Westhuizen v S [2009] 4 ALL SA 51 SCA**

Civil/criminal procedure-condonation-appeal against refusal of condonation

The Supreme Court of Appeal refused an appellant the opportunity to pursue an appeal from the magistrate's court in the high court. The appellant was convicted of fraud in the magistrate's court. It was found that he defrauded his employer, Dunlop Tyres (Pty) Ltd. He allowed individuals and private businesses to make purchases on an unauthorised account with Dunlop at a 45% discount usually allowed government departments whilst they were not entitled to purchase directly from Dunlop at all. He was sentenced to five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, which implies that he has to serve a minimum of 10 months' imprisonment whereafter the

Commissioner of Correctional Services may, in his discretion, place him under correctional supervision. Early in December 2002, just after his conviction and sentence, the appellant instructed his attorney to lodge an appeal on his behalf and undertook to contact his attorney in regard to the appeal after the holiday season. However, he did not do so.

His attorney did file a notice of appeal on his behalf but thereafter received no further instructions and lost contact with the appellant. Because of the notice of appeal that was filed the appellant's appeal was placed on the roll of the high court for hearing during January 2006. Because of the appellant's failure to give his attorney instructions nothing was done to pursue the appeal and his appeal was struck off the roll. The appellant was then contacted during March 2006 to hand himself over in order to start serving his sentence. This jolted him to contact his attorney but he still took until June 2006 to bring an application to the high court to condone his earlier failures in relation to his appeal and to re-instate his appeal.

The high court found that the appellant's appeal was not to be re-instated primarily because of two reasons: his explanations for his failure to properly pursue his appeal and for the delay in bringing the application for condonation was very poor; and his prospects of success on appeal in relation to his conviction and sentence were equally poor. In his appeal to the Supreme Court of Appeal it was found that the high court was not wrong in its conclusion. Hence the appellant was refused the opportunity to pursue his appeal.

### **Walker v Santam Ltd a.o. [2009] 4 ALL SA 60 SCA**

Insurance-indemnity insurance-nature

On 7 August 2002 the appellant's motor vehicle, a 1996 BMW 323i, was hijacked in East London and damaged beyond repair. The appellant was insured against events of this nature with a 'co-insurance panel' comprising the three respondents herein jointly and severally, namely Santam Limited, Mutual & Federal Insurance Company Limited and Alexander Forbes Insurance Company Limited. (The policy in question was issued and administered on behalf of the panel by Alexander Forbes). The appellant duly lodged a claim for compensation in terms of the policy, but the respondents repudiated liability. After selling the wreck of the vehicle to a local scrap dealer for an amount of R21 000, the appellant instituted action against the respondents in the magistrate's court in East London, claiming the difference between the insured value of the car in its undamaged condition (R98 100) and the value of the wreck, less the compulsory excess, being five percent of the difference. The respondents defended the action, but the magistrate granted judgment in favour of the appellant for payment of R73 245 together with interest at the prescribed rate and costs.

On appeal to the Eastern Cape High Court in Grahamstown, the court below (per Leach J; Nduna AJ concurring) reversed the judgment of the magistrate, holding that 'the evidence that was placed before the court was insufficient to enable the court to determine the value of the motor vehicle in its damaged condition'. In the result, so it

was held, the plaintiff had failed to prove the quantum of his damages. The judgment of the magistrate was accordingly set aside and substituted with one of absolution from the instance with costs. Leave to appeal against this judgment was refused by the court below, but was subsequently granted by this court on petition. The SCA dismissed the appeal.

**Hlophe v The Judicial Services Commission [2009] 4 ALL SA 67 GSJ**

Judge-Laying of complaint by other judges before Judicial Service Commission-refusal of postponement held to be unreasonable

**Zuko v S [2009] 4 ALL SA 89 E**

Criminal law-constitutional rights-evidence obtained unlawfully-members of public taking law into own hands-conviction and sentence set aside.

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### **African Products (Pty) Ltd v AIG South Africa Ltd [2009] 4 ALL SA 99 SCA**

Insurance law-insurance policy-meaning of “sudden”

In terms of the contract of insurance the respondent agreed to indemnify or compensate the appellant ‘by payment or, at [the respondent’s] option, by replacement, reinstatement or repair, in respect of the Insured Events occurring during the period of insurance . . .’. The insured event in this case is defined in section 3 of the insurance policy, headed ‘Business Interruption’, as:

The Engineering section then defines the insured event as ‘unforeseen and sudden physical damage to the machinery described in the schedule from any cause . . . whilst it is at work or at rest . . .’ and goes on to provide that:

‘Machinery shall mean all plant and machinery and/or electronic equipment including that equipment being an integral part of controlling machinery, property held in trust or on commission and foundations supporting machinery . . .’

In order to succeed in its claim, therefore, the appellant would not only have had to prove that the electrical cables that failed constituted machinery as defined, but also that the damage it relied on, was ‘unforeseen and sudden’.

At the commencement of the trial before the court below (Joffe J), an order was made, by agreement between the parties, in terms of which the issues of the merits and quantum were separated. The trial accordingly proceeded on the issue of the merits of the case only, which the court a quo decided in favour of the respondent. It consequently dismissed the appellant’s claim with costs. This appeal is with its leave.

The SCA agreed that “sudden” means “taking place all at once” and the appeal was dismissed with costs, which were to include the costs of two counsel.

### **Gibbs v Minister of Justice [2009] 4 ALL SA 109 SCA**

Magistrates-merit awards-abandonment

On 1 June 2009 the Supreme Court of Appeal handed down judgment in *W W Gibbs and 23 others v Minister of Finance and Constitutional Development and 5 others* and dismissed, with costs, an appeal by magistrates against a judgment of the Pretoria High Court, in terms of which it was held that a system of merit awards which held monetary value was no longer legally valid.

In the past magistrates had been regarded as part of the civil service. Civil servants and magistrates received merit awards as special recognition for above average performance. In the past magistrates were responsible for various administrative duties including the collection of revenue, the processing and payment of social benefits, the processing and administration of labour contracts.

In 1994 a new system for the appointment of magistrates was introduced. In terms of the provisions of the Magistrates Act 90 of 1993 read with the provisions of the Magistrates' Courts Act 32 of 1944, magistrates are appointed by the Minister of Justice and Constitutional Development after consultation with the Magistrates Commission. They were no longer required to perform administrative functions. This change was the beginning of a new era in line with the Constitution to ensure and promote an independent judiciary.

Within the civil service itself there were changes. From 1 July 1999 merit awards were done away with and replaced with performance management and development schemes. Transitional arrangements to allow for departments to establish such schemes allowed merit awards in some instances to continue up until December 2000.

Notwithstanding these changes the department continued with the system of merit awards up to and including 2003. In its judgment the SCA stated that since evaluations were required for merit awards, and since administrative tasks had been abolished for magistrates, it was difficult to understand what in fact was being evaluated. From 1997 the department withdrew from the evaluation procedure and left the magistrates to their own devices.

During 2004 the Magistrates Commission resolved that the system of merit awards should be abolished, recording that they were inconsistent with judicial office and impinged on the independence of the judiciary. In February 2005 the second respondent, the Director-General of the Department of Justice and Constitutional Development, decided to terminate the payment of merit awards. It is that decision that led to an application by affected magistrates in the Pretoria High Court for the continuation of the system and payment of the benefits flowing from it.

The SCA held that there was no statutory basis for the system of merit awards and concluded that the Pretoria High Court's decision in this regard was correct. The SCA stated that merit awards detracted from judicial independence and that judicial officers did not require incentives to comply with their oath of office. It commended the Magistrates Commission and the department for putting an end to merit awards.

### **Henriques v Giles NO [2009] 4 ALL SA 116 SCA**

Wills-rectification-signed in error

The Supreme Court of Appeal dismissed an appeal against a judgment of Goliath J in the Cape High Court relating to situation of so-called 'crossed wills', where a husband and wife had each, by mistake, signed the will prepared for the other.

Briefly stated, the facts giving rise to the litigation are as follows: in about August 1999, acting on the instructions of Mr Franco Cammisa, an accountant and partner of PKF (Cape Town) Incorporated (the second respondent) drafted two wills, one for Mr Cammisa and one for his wife, Jackie. On 15 September 1999, when the couple met with the accountant and his colleague to sign their wills, a mistake occurred and each inadvertently signed the will intended for the other. The mistake only came to light after the deaths of both Mr and Mrs Cammisa, which occurred on 19 October 2004 and 5 January 2005, respectively. In the meantime, on 10 November 2004, the Master of the High Court, Cape Town, accepted and registered the will prepared for Mr Cammisa, but signed in error by Jackie, as the former's last will for the purposes of the Administration of Estates Act 66 of 1965.

The Supreme Court of Appeal upheld the conclusion of the court below to the effect that the will signed by Mr Cammisa could be rectified so that his estate could devolve in the manner in which he undoubtedly intended. It thus dismissed the appeal against the High Court judgment ordering this rectification.

## **JOUBERT & OTHERS v MARANDA MINING COMPANY (PTY) LTD [2009] 4 ALL SA 127 SCA**

Mining and minerals-permit holder's rights

The SCA confirmed the decision of the South Gauteng High Court which had ruled in favour of Maranda Mining Company (PTY) LTD (Maranda). The high court had granted Maranda an order, amongst others, interdicting and restraining the appellants from refusing to allow Maranda access to a portion of a farm in Leydsdorp, Limpopo Province in respect of which the latter had purchased certain mineral rights. Maranda had subsequently been granted a mining permit by the Minister of Minerals and Energy in accordance with the Mineral and Petroleum Resources Development Act 28 of 2002. The Minister had also approved an environmental management plan submitted by Maranda regarding the intended mining activities on the affected portion of the farm.

The appellants are trustees of Sanwild Wildlife Trust who is the lawful occupier and part owner of the farm and operates a wildlife sanctuary and an eco-tourism enterprise on the farm. Sanwild The appellants had thwarted several attempts by Maranda to gain access to the farm informing it that under no circumstances would it be allowed access. The impasse persisted even after Maranda had formally consulted the appellants as required by the Act.

The SCA rejected the appellant's argument that Maranda had sought access in contravention of its environmental management plan as well as that the only solution of the impasse was expropriation of the farm in terms of the Act. The SCA found that the unreasonable conduct of the appellants was not countenanced by the Act and ruled

that, having complied with all the requirements of the Act, Maranda had acquired the right to enter the farm for purposes of exploiting its mineral rights.

### **Kimberley Junior School v The Head of the Northern Cape Education Department [2009] 4 ALL SA 135 SCA**

Education-public school-appointment of principal

On 28 May 2009 the SCA upheld an appeal by the Kimberley Junior School and the Governing Body of that school against a judgment of the Kimberley High Court in favour of the Head of the Northern Cape Education Department (HoD).

The matter arose from a decision by the HoD to appoint Mrs Rantho instead of Mr Theunissen as principal of the School. The application by the School and the Governing Body to the High Court for that decision to be reviewed and set aside was dismissed with costs.

The basis for the High Court's decision was essentially that, in terms of the Employment of Educators Act 76 of 1998 the discretion to make the appointment was bestowed upon the head of the department and that he could not be faulted in the exercise of that discretion.

The SCA found, however, that in terms of s 6(3) of the Act, the HoD's discretion to make an appointment is dependent on the prerequisite of a recommendation by the Governing Body of at least three candidates. On a proper analysis of the facts, so the SCA found, there was no proper recommendation by the Governing Body. Consequently the HoD had no discretion to make any appointment at all. In the result the HoD's appointment of Mrs Rantho was set aside. The request by the school and the Governing Body that the court should appoint Mr Theunissen was, however, refused, essentially on the basis that that will be for the HoD to consider in the light of a proper recommendation by the Governing Body.

### **Makhanya v University of Zululand [2009] 4 ALL SA 146 SCA**

Labour law-employment-jurisdiction

Professor Makhanya instituted an action against the University of Zululand in the High Court at Durban. The particulars of claim were straightforward. Makhanya said that he had been employed by the University under a contract of employment. He said that the University had purported to terminate the contract in breach of its terms. That notwithstanding, said Makhanya, he had continued to render his services, or at least he had tendered to do so. But the University had not paid him his remuneration and other moneys to which the contract entitled him, and he claimed orders compelling it to do so. (Two separate claims were made but they were in truth a single claim and I will refer to

them together in the singular. An additional claim was made that does not feature in this appeal.)

In a special plea the University challenged the jurisdiction of the high court to consider the claim. The jurisdictional challenge is curious because claims for the enforcement of contracts are commonplace in the high courts. Some eight years ago it was argued before this court – in *Fedlife Assurance Ltd v Wolfaardt* – that claims for the enforcement of contracts of employment had been excluded from the jurisdiction of the high courts by the Labour Relations Act 66 of 1995 (LRA) but that argument was rejected, and is not sought in this case to be revived. And if there is any residual doubt as to whether a high court has the power to consider such a claim it is put to rest by s 77(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA), which was enacted after the LRA, and which makes it perfectly clear that the high courts have not been divested of their ordinary jurisdiction to enforce contracts of employment (the section confers equivalent jurisdiction on the Labour Court also to consider such claims).

The judges remarked: "One asks in those circumstances on what basis the jurisdictional objection could possibly have been taken? Because the objection was upheld by the court below, and it dismissed the claim on that ground. This appeal is against that order and it is before us with the leave of that court." The result: The appeal is upheld with costs. The order of the court below is set aside and the following orders are substituted: Both special pleas are dismissed with costs.

### **SABC Ltd v Mpofu a.o. [2009] 4 ALL SA 169 GSJ**

Company law-board of directors-meeting of-exclusion of respondent-invalid-must be properly convened-one minute notice insufficient!