

## **LEGAL NOTES VOL 9/2010**

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### **EDITORIAL**

There are many cases that one wants to talk about this month, McBride who won the case about his good name, the prostitute who could not go to the CCMA because of an illegal job, the city council who wants to grab a street, the state who do not pay and get execution orders, the person who commits suicide and leaves a note for his lover that she can inherit, the farmer who was engaged and broke it off and the murderer who does a plea bargain and then wants to appeal, The port authorities who rescues somebody and then wants payment for it. And the doctor for negligence, the liquidator for negligence, the advocates in private practise who do prosecution work on brief.

A very interesting bunch!

The only thing that makes me cross is when you have professional people who mess up. A very professional brain surgeon performed a brain operation on my 20 year old son seven years ago, my son passed away. He got R100 000 for the op. I could not say he was negligent; the op just did not work. And so did 3 other ops by the same neuro- surgeon. Makes one wonder what the hell he was doing and why did the idiot operate in the first place.

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## **SA LAW REPORTS AUGUST 2010**

### **Koyabe v Minister for Home Affairs (lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 CC**

Administrative action-domestic remedies-Residence permits- withdrawal of residence permits that had been granted to non-South Africans.

The case involves the rights to just administrative action guaranteed in section 33 and to access to courts protected under section 34 of the Constitution. In particular, it deals with the interpretation of section 7(2) of the Promotion of Administrative Justice Act 2000 (PAJA) which prescribes that available internal remedies must be exhausted before a judicial review of an administrative action.

The first and second applicants, Mr and Mrs Koyabe, are both Kenyan nationals. They were granted permanent residence in 2006. In 2007, their permits were withdrawn in a letter addressed to them by the Director-General of the Department of Home Affairs, the second respondent (DG). The letter indicated that an investigation by the Department had revealed that their previously obtained South African identity documents had been obtained by fraudulent means. The letter also informed the applicants that they had failed to submit a request for review within the required three days and therefore their right to a review by the Minister had lapsed. The

applicants were therefore prohibited persons and did not qualify for the permanent residence permits. The letter also informed them that they were to be deported but were entitled to request the Minister for Home Affairs, the first respondent, to review the decision to withdraw their permits. The Immigration Act 2002 (the Act) therefore provides an internal remedy which in terms of PAJA must be exhausted before a court is approached to review the Department's decision. The applicants failed to submit an application for review arguing that in order to do so meaningfully, it would first be necessary to obtain the reasons for the withdrawal of their permits. While Mr Koyabe's attorney persistently pursued the Department for reasons on which the withdrawal of the applicants' permits was based, the Department insisted that the reasons stated in the letter which informed them of the withdrawal, were sufficient.

The applicants subsequently approached the North Gauteng High Court for a review of and to set aside the DG's decision. The High Court held that section 7(2)(a) of PAJA requires the exhaustion of internal remedies prior to approaching a court for judicial review. The Court found that the applicants had not exhausted their internal remedy and that there were no exceptional circumstances that would allow it to exempt them from doing so. In dismissing the application with costs, the High Court ordered the applicants to seek a ministerial review.

The applicants sought leave to appeal to the Constitutional Court against the judgment of the High Court. They urged the Court to accept that a lapsing of the time-period for them to seek a ministerial review means that the internal remedy as required under PAJA had been exhausted. To hold otherwise, they argued, would be contrary to their right of access to Court under the Constitution. They contended that they were entitled to be given adequate reasons before seeking a ministerial review.

The respondents argued that the Act does not entitle anyone affected by an administrative decision to reasons before the appeal to the Minister and that the DG's letter contained sufficient reasons for the applicants to have lodged their application for review.

Lawyers for Human Rights (LHR), admitted as *amicus curiae*, provided the Court with information about the difficulties experienced by immigrant detainees who, it said, are, in practice unable to exhaust internal remedies as required by the Act due to a lack of access to legal counsel and writing materials and an inability to understand the relevant prescribed forms which are available in English only.

Writing for a unanimous Court, Mokgoro J held that the submissions raised by the LHR are not applicable to the applicants as they are not in detention. Questions of that nature, she held, may be considered in a different case on another day. Regarding the proper interpretation of section 7(2) of PAJA she held that the mere lapsing of the time-period for exercising an internal remedy does not mean that the internal remedy has been exhausted. Nor does it constitute exceptional circumstances under section 7(2)(c) of PAJA.

Mokgoro J found that section 5 of PAJA read with section 33(2) of the Constitution does entitle the applicants to be provided with reasons for the DG's decision to withdraw their residence permits. She however held that the letter informing the

applicants of the decision to withdraw their permits contained sufficient reasons for them to have requested a meaningful review by the Minister. The Court agreed with the High Court that the applicants were required to exhaust the available internal remedy before they resorted to a judicial review. Accordingly, the appeal was dismissed.

In dismissing the appeal, the Court directed the applicants to request the Minister to review the decision withdrawing their residence permits within seven days of this judgment. The Court also confirmed the High Court's costs order against the applicants, but made no order as to costs in that Court.

### **Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd 2010 (4) SA 359 SCA**

Tender award – setting aside – award of contract by court to unsuccessful tenderer – inappropriate in the circumstances.

This appeal concerns the award of a government tender. These awards often give rise to public concern – and they are a fruitful source of litigation. Courts (including this court) are swamped with unsuccessful tenderers that seek to have the award of contracts set aside and for the contracts to be awarded to them. The grounds on which these applications are based are many. Sometimes the award has been tainted with fraud or corruption, but more often it is the result of negligence or incompetence or the failure to comply with one of the myriad rules and regulations that apply to tenders. Sometimes the successful tenderer is to be blamed for the problem but then there are cases where he is innocent. Many cases are bedevilled by delay, whether in launching the application (and also because the facts were not readily available or easily ascertainable) or because of delays and suspensions inherent in the appeal procedure. If the applicant succeeds the contract may have to be stopped in its tracks with possibly devastating consequences for government or the successful tenderer or both. Conversely, if the works are allowed to be completed, the tenderer that should have been awarded the tender would unjustly be deprived of the benefits of the contract. There are also cases where the final judgment issues only after completion of the contract. It is not necessary to adumbrate further. Tendering has become a risky business and courts are often placed in an invidious position in exercising their administrative law discretion – a discretion that may be academic in a particular case, leaving a wronged tenderer without any effective remedy.

The appeal is upheld with costs.

### **MV Bavarian Trader: Pancoast Trading SA v Orient Shipping Rotterdam BV 2010 (4) SA 369 KZD**

Shipping-admiralty law-when can a ship be arrested as an associated ship.

### **Smith v Parsons 2010 (4) SA 378 SCA**

Wills Act 7 of 1953 – suicide note-written by the deceased - intended to be an amendment of his will as contemplated by section 2(3) of Wills Act? Wording of note

and the surrounding circumstances indicate that the deceased intended it to be his will. Master of high court directed to accept note as amendment to will for purpose of the Administration of Estates Act 66 of 1965.

Ms. Heather Wendy Smith was staying together with the late Mr. Walter Percival Smith (no relationship). They were lovers. Mr. Smith committed suicide. Prior to committing suicide he wrote a 'suicide note' in which he stated that Ms. Smith (his girlfriend) can have a house situated at 688 Kingsway, Athlone Park, Amanzimtoti, Kwa-Zulu Natal and about R 579,000 00 which was in a Plus Plan savings account. Mr. Jeremy Allan Smith, son of the deceased, challenged the validity of the suicide note. The Supreme Court of Appeal found that the 'suicide note' amends the formal will of the deceased. In terms of the formal will, the deceased left his entire estate to the son, Mr. Jeremy Allan Smith.

### **Kylie v CCMA 2010 (4) SA 383 LAC**

Human rights-illegal employment-prostitution-not allowed to protection contractual relationship was invalid.

### **Coetzee v Nassimov 2010 (4) SA 400 WCC**

Practice-judgments-summary judgment –error in papers that caused no prejudice allowed.

### **Standard Bank of South Africa v Master of the High Court 2010 (4) SA 405 SCA**

Insolvency-Duty to examine claims by Trustees/Liquidators.

[see below for further discussion, it was also reported in All SA ]

Jafta, JA can be quoted: "Liquidators are required to act in the best interests of creditors. A liquidator should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice." In this case the Court was not happy with the admission by the liquidators of a R325m claim. The learned judge remarked:

"Whereas accountants are not required to have legal knowledge in general they ought to know the importance of substantiating documents. So too, must liquidators. The latter must at the very least have knowledge of the relevant legal principles relating to their duties and functions. But, even if they did not in this particular instance, their conduct was lacking in simple common sense and devoid of logic to the extent that it is difficult to resist the conclusion that they were improperly motivated."

The liquidators were ordered to pay the costs *de bonis propriis* and were removed !!!

### **Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk h/a/ Pha Phama Security 2010 (4) SA 455 SCA**

Delict-unlawfulness

Wrongfulness of conduct of security guard in allowing unauthorized removal of truck from site where security provider had contract with owner of site to protect it, but where contract excluded liability for provider's services – held security provider not liable – owed no duty to owner to prevent theft of its truck.

### **Bredenkamp v Standard Bank of SA Ltd 2010 (4) SA 468 SCA**

Banker and client – closing of account by bank – when justified – exercise of a contractual right, which does not involve any public policy considerations or constitutional values, does not have to be 'fair'.

The Supreme Court of Appeal dismissed an appeal by Mr Bredenkamp and two companies and a trust in which he has interests against a judgment of the high court. The appellants had sought an order preventing the Standard bank of closing their accounts with the Bank. The high court had dismissed the application. It was accepted that the Bank had, in terms of its contract with the appellants and in terms of the common law the right to close the accounts with reasonable notice. However, the appellants contended that the closing was unfair because it was unlikely that they would be able to obtain other banking facilities. They relied on a Constitutional Court judgment for the proposition that a party is not entitled to use its contractual rights if it would be unfair to the other party. The court held that the appellants had misconstrued the CC judgment and, in any event, the closing of the accounts was not unfair under the circumstances of the case.

### **Registrar of Pension Funds v ICS Pension Fund 2010 (4) SA 488 SCA**

Pension Funds Act 24 of 1956 – actuarial surplus – section 15F – approval by registrar for transfer of credit in reserve account to employer surplus account – considerations to be taken into account.

Depending upon their structure some pension funds are capable of accumulating an actuarial surplus, which, in broad terms, is the excess of its actuarially valued assets over the actuarial value of its accrued liability towards members and former members. In recent years there have been disputes as to whether such surpluses accrue to the benefit of members or whether they accrue to the benefit of contributing employers. With effect from 7 December 2001 ss 15A to 15K were introduced into the Act to deal with such surpluses. Together those sections are commonly referred to as the 'surplus legislation'.

In broad terms s 15B requires the board of every pension fund that commenced prior to 7 March 2002 to submit to the Registrar of Pension Funds, within a specified time, a scheme for the apportionment of any actuarial surplus that it might have. The board is required to determine who may participate in the apportionment, which must include existing members and former members, and must then apportion the surplus as between all the participants, in accordance with various principles that are reflected in the section.

The appeal was dismissed with costs.

### **Duet and Magnum Financial Services CC (in liquidation) v Koster 2010 (4) SA 499 SCA**

Insolvency – dispositions –prescription- liquidator's right to apply for setting aside under ss 26, 29 and 30 of Insolvency Act 24 of 1936 – when extinctive prescription begins to run.

Duet and Magnum Financial Services CC carried on business as a micro-lender. An order for its winding up was made on 17 May 2001 and the liquidators, the present appellants, were appointed on 18 July 2001.

On 12 July 2005 the liquidators caused a summons to be served on Mr Koster, the respondent, in which they alleged that certain dispositions had been made by the close corporation that fell within the ambit of either s 26(1)(b) or s 30(1) or s 29(1) of the Insolvency Act. They claimed an order setting aside the dispositions, and an order declaring Mr Koster obliged to pay to them certain moneys that were alleged to have been alienated under the dispositions from September 2000 until the date of the winding-up order. (Different amounts were claimed in the alternative but that is not material for present purposes.)

### **Mkhize v Umvoti Municipality 2010 (4) SA 509 KZP**

Sale in execution-legal oversight-Plaintiff not owner.

This is a dispute about the ownership of a property in Greytown. The fourth and fifth defendants, Mr and Mrs Dlamini, live in the house on the property. Originally Mr Stephen Mkhize, the plaintiff, owned the property but it was sold in execution of a judgment in favour of the first defendant, the Umvoti Municipality, and Mr and Mrs Dlamini bought it from the purchaser at the sale in execution. Mr Mkhize contends that the sale in execution was void and seeks a declaratory order to that effect. In addition he seeks an order setting aside the subsequent sale to Mr and Mrs Dlamini and an order that the property be re-transferred to him. Amendment not granted.

### **First Rand Bank v Dhlamini 2010 (4) SA 531 GNP**

Credit agreement-consumer credit agreement-debt enforcement –proceedings-notice of default-personal service for notice of default.

### **Samancor Group Pension Fund v Samancor Chrome 540 SCA**

Pension Funds Act 24 of 1956 – Application to set aside determination by the pension funds adjudicator – six weeks period provided for in section 30 P(1) of the Act – Long delay and part implementation of the adjudicator's determination by Samancor Chrome. Doctrine of peremption - Samancor Chrome not allowed to challenge adjudicator's determination.

The Supreme Court of Appeal upheld an appeal against an order of Swart AJ (South Gauteng High Court) wherein he ordered that the fourth respondent (Mr Swanepoel) was entitled to compensation by the appellant for payment of his early retirement benefits due to illness and setting aside the determination made by the adjudicator.

Mr Swanepoel has been employed by the first respondent (Samncor) as a security officer since August 1991. After a blackout while at work during 1996 Mr Swanepoel was sent to various doctors for examination and evaluation. One test conducted by one doctor, Dr Kriel & others concluded that he was permanently ill. Consequently to these findings Samancor tried to find an alternative employment for him of whom he later refused and preferred to be paid his medical benefits and thereafter he resigned.

As a result of his resignation Mr Swanepoel became entitled to his pension benefits which were later paid to him. He later lodged a claim to Sanlam which was the underwriter of the fund for payment of his ill health benefits.

After he found out that there was no claim lodged on his behalf by Samancor he lodged a complaint with the pension adjudicator and the adjudicator ordered that his claim be considered and he be paid what is due to him. Samancor later forwarded all the relevant documents necessary for the consideration of Mr Swanepoel's application to the Pension Fund. Samancor thereafter received a response from the fund advising them that the trustees have agreed that they will only consider Mr Swanepoel's claim if it was submitted at the time of Mr Swanepoel's illness.

After failed attempts to settle the matter Mr Swanepoel approached some certain attorneys to institute legal proceedings against Samancor. Subsequent to that Samancor launched an application to the high court seeking an order condoning its failure to launch such application within the time prescribed by the Act and setting aside the adjudicator's determination.

The high court granted a rule nisi calling upon the pension fund to give reasons why it should not be ordered to pay Mr Swanepoel the ill health benefits. The application was later opposed by the pension fund.

The high court granted the condonation as prayed by Samncor and set aside the adjudicator's determination.

The SCA found that the high court erred in granting the condonation because of the prejudice to the Pension fund and because the appeal was perempted. The SCA further found that Samancor should not have been allowed to challenge the determination of the adjudicator and the high court should have dismissed the application. For the above reasons the SCA allowed the appeal by the Samancor group pension fund.

### **Bayly v Knowles 2010 (4) SA 548 SCA**

Company – Shareholders – oppression – shareholder in majority bloc making fair offer for minority's shares before litigation – effect on application under s 252 of the Companies Act 61 of 1973 – offer by minority to purchase a majority shareholding – interests of company and remaining shareholders to be considered.

### **Van Jaarsveld v Bridges 2010 (4) SA 569 SCA**

Breach of promise to marry – causes of action – compatibility with present-day public policy discussed – wrongfulness – damages

The Supreme Court of Appeal upheld an appeal against a judgment of the high court in this matter. The high court had awarded Ms Bridges damages in the sum of R282 413 on the ground of breach of promise to marry. The award was set aside with costs.

The court questioned whether the cause of action is, in all its respects, consonant with prevailing customs and public policy.

In relation to her claim for sentimental damages the court found that the way in which the appellant, Mr Van Jaarsveld, had put an end to the engagement was not in the circumstances wrongful or contumacious, and that the award could not stand in the light of this.

As far as her claim for actual loss is concerned, the court found that she had failed to prove that she had suffered any loss. The court below erred because it had omitted to have regard to income she had earned, and to all the amounts paid by Van Jaarsveld.

### **Minister for Justice and Constitutional Development v Nyathi 2010 (4) SA 657 CC**

Section 3 of the State Liability Act 20 of 1957-invalid

This case concerns an application made by the Minister for Justice and Constitutional Development for this Court to extend the suspension order of invalidity made in the case of *Nyathi v MEC for Health, Gauteng and Another* 2005 (5) SA 94 (CC) handed down on 2 June 2008. That order declared constitutionally invalid section 3 of the State Liability Act 20 of 1957, a provision which prohibits parties to whom debts are owed by the state from executing against or attaching state assets for the satisfaction of judgment debts. The order of invalidity was, however, suspended until 2 June 2009 so as to allow Parliament to enact legislation for the effective enforcement of judgment debts against the state.

After considering written and oral argument this Court made an order on 31 August 2009 further suspending the declaration of invalidity until 31 August 2011. In that order the Court invited the parties to the matter as well as the Minister for Finance to submit written submissions on why the Court should not order an interim solution pending the enactment of remedial legislation which allows for a tailored attachment and execution procedure against state movable assets or an alternative interim order. The order also indicated that a judgment with reasons would follow in due course. The judgment handed down provided these reasons. It also provided for an interim order that will regulate the satisfaction of judgment debts against the state until 31 August 2011 or until remedial legislation is enacted, whichever occurs first.

The Minister for Finance made submissions to the effect that judgment creditors should approach the national or provincial treasury for the satisfaction of their judgment debts, in the event that the relevant state department fails to do so. The amount paid by treasury would then be set off against the budget allocation of the relevant department for the current or future financial year against the relevant vote. These submissions together with aspects of the submissions of the amici curiae and

the intervening party were incorporated into the Court's proposed interim order of 31 August 2009.

Writing for a unanimous Court, Mokgoro J held that in view of the fact that the State Liability Bill together with the 18<sup>th</sup> Constitutional Amendment Bill had already been published for public comment and that the public participation process had already begun, an order of extension should be granted to allow for this process to be completed. A suspension period of two years was granted in view of the complexity of the issues and the extensive public debates anticipated. The effect of this order is that the attachment and execution of movable state assets would be permitted in the event that the relevant treasury failed to satisfy the judgment debt within the period prescribed in this Court's order.

### **Ethekwini Municipality v Brooks 2010 (4) SA 586 SCA**

Servitude of right of way – whether such a 'public street', as contemplated in s 1 of Ordinance 25 of 1974 (Natal).

The Supreme Court of Appeal dismissed an appeal by the Ethekwini Municipality against a judgment of the KwaZulu-Natal High Court, Durban, relating to the status of a road in the Drummond area, known as Nyala Drive.

The respondent, Mrs Rosalind Brooks, applied to the high court for an order declaring that the road is not a public road, as defined in s 1 of the Local Authorities (Natal) Ordinance 25 of 1974. It appeared from the evidence that the road was created during the 1960s within the area of a servitude of right of way that runs over the property of Mrs Brooks. The road, which is a cul-de-sac, links her property as well as certain adjoining subdivisions in the area to Thousand Hills Drive.

The municipality argued that the public had acquired a right to use the road; alternatively, that the municipality had taken over the road in question, as contemplated by the Ordinance. In the further alternative, the municipality relied on the provision in the definition to the effect that it is a street 'which is shown on a general plan or diagram of any private township situate in the area of a local authority filed in the Deeds Registry or the Surveyor-General's Office and to which the owners of erven or lots in such township have a common right of use'. The high court rejected the municipality's arguments. It accordingly granted a declaratory order in favour of Mrs Brooks, holding that Nyala Drive is a private road.

On appeal, the SCA confirmed the judgment of the high court and dismissed the appeal with costs.

### **Naidoo v Absa Bank Ltd 2010 (4) SA 597 SCA**

Insolvency-National Credit Act-proceedings –not bound by NCA.

A credit provider need not comply with the procedure provided for in s 129(1)(a) of the National Credit Act 34 of 2005 before instituting sequestration proceedings against a debtor because such proceedings are not proceedings to enforce a credit agreement.

The Supreme Court of Appeal dismissed an appeal against an order of sequestration granted by Gyanda J in the KwaZulu-Natal High Court, Durban. It held that a credit provider need not comply with the procedure provided for in s 129(1)(a) of the National Credit Act 34 of 2005 ('the Act') before instituting sequestration proceedings against a debtor because such proceedings are not proceedings to enforce a credit agreement.

The appellant, Mr Selvan Laban Naidoo, contended that it was not competent for the respondent, Absa Bank Ltd, to have instituted proceedings for his sequestration before complying with the procedure provided for in s 129(1)(a) of the Act. (Section 129 deals with required procedures before debt enforcement.) It was submitted on behalf of the appellant that section 129(1)(a) read with s 130(3) of the Act should be interpreted to cover circumstances relating not only to the enforcement of a credit agreement but also to sequestration proceedings as the unpaid claims which are the subject of the sequestration application arise from credit agreements to which the Act applies. (Section 130(3)(a) provides that in 'any proceeding' concerning credit agreement the procedure provided for in s 129 must, where appropriate, be followed.)

The SCA reasoned that from the language employed in s 130(3)(a), the proceedings referred to there do not extend the reach of s 129 to proceedings that do not involve the enforcement of a credit agreement, it simply provides that where a credit provider decides to institute proceedings to enforce the agreement, he may do so after having complied with the procedure in s 129(1)(a).

### **Aviation Union of South Africa v South African Airways (Pty) Ltd 2010 (4) SA 604 LAC**

Labour Law-section 197 LRA-transfer of business – outsourcing – how effected.

### **MEC for Safety and Security, Eastern Cape v Mtokwana 2010 (4) SA 628 SCA**

Magistrate's court-civil proceedings-joinder

Joinder or substitution by way of notice of amendment not served on the intended defendant – inappropriate procedure – high court overlooking fundamental principle that an intended defendant or respondent be informed of an action or any other court proceedings against him or her.

### **Standard Bank of South Africa Ltd v Kruger/Pretorius 2010 (4) SA 635 GSJ**

Credit agreement-Debt review proceedings-termination of debt review where already referred to Magistrate-section 87 applicable.

## **All SA LAW REPORTS JULY (1)**

### **SAMSA v McKenzie [2010] 3 All SA 1 (SCA)**

Civil procedure – Jurisdiction – Employee-Whether High Court has jurisdiction to consider claim in action for damages for alleged breach of employment contract – High Court and other civil courts retain their common law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment.

Upon being dismissed from his employment with the appellant, the respondent pursued his remedies under the Labour Relations Act. A settlement agreement was reached, in terms of which he was paid an amount equivalent to one year's salary. The respondent then instituted action in the present case, claiming that his contract of employment was subject to an explicit or implied term that the contract would not be terminated without just cause. He alleged that this term had been breached by his having been unfairly dismissed, and that he was therefore entitled to claim damages calculated on the basis that he would otherwise have continued working for the appellant until his retirement.

The appellant filed four special pleas, all of which were dismissed. Leave to appeal was refused, but on petition to the present court, the application for leave to appeal was set down for hearing and the parties were directed to be prepared to argue the merits of the appeal. Only two of the special pleas were relevant on appeal.

**Held** – One of the special pleas was a challenge to the High Court's jurisdiction to consider the claim. It was argued that the respondent's remedies for unfair dismissal were those provided for in the Labour Relations Act, and that the High Courts have no jurisdiction to grant such remedies. The Court pointed out that the question in such cases is whether the court has jurisdiction over the claim actually pleaded, and not whether it has jurisdiction over some other claim that has not been pleaded but could possibly arise from the same facts. In the present case, the respondent's pleaded case was clearly a claim for damages for breach of contract. The Court pointed to case authority which stated that the High Court and other civil courts retain their common law jurisdiction to entertain claims for damages arising from alleged breaches of contracts of employment. Properly construed, the appellant's plea did not raise a jurisdictional challenge at all.

The second special plea attacked the respondent's argument to the effect that his contract of employment was subject to an explicit or implied term that the contract would not be terminated without just cause. It was easily ascertained that the term in question was not an express term as no mention thereof could be found in the contract. In the alternative it was alleged that the term arose either by way of an implied term or as a tacit term. When it is argued that a statutory provision not only creates statutory rights and remedies but also impliedly introduces terms into certain types of contract, the enquiry commences by examining the statutory provision in order to determine whether it was intended that its provisions or some part of them should be incorporated in contracts of that class.

Where the Labour Relations Act adequately gives effect to that constitutional right, there is no need for the common law to be developed so as to duplicate those rights.

The question of whether the respondent's contract contained a term implied by law as pleaded by him was answered in the negative. While there was nothing wrong with the respondent pursuing his claim in the High Court, it was not a good claim and the only viable claim he could have brought based on those allegations had to be pursued, as it was, before the CCMA.

The appeal was upheld, the second special plea upheld and the respondent's claim dismissed.

### **Stratgro Capital (SA) Ltd v Theodorus NO and others [2010] 3 All SA 27 (SCA)**

Civil procedure – Attachment of incorporeal property – Attachment of the appellant's claim against the first to third respondents, in their representative capacities as trustees – Rule 45(8) – Uniform Rules of Court – Court held that a litigant's right, title and interest in a claim constitutes incorporeal property which may be attached at the instance of a judgment creditor and sold in execution – In attaching the appellant's claim against the trust, the respondent was obliged to comply with the provisions of rule 45(8).

Civil procedure – Attachment of incorporeal property – Uniform Rules of Court – Rule 45(8)(c)(i)(a) – In terms of rule, an attachment of the right, title and interest of a litigant in an action will only be complete once the sheriff has given notice of the attachment in writing to all interested parties – Failure to give it notice resulting in the attachment being incomplete and the subsequent sale in execution being null and void.

The first three respondents were trustees in a family trust which owned certain immovable property. In 2001, the appellant concluded a written agreement with the trust for the purchase of the property from the trust. The agreement was conditional upon the appellant's ability to raise finance for the full purchase price. The condition was not fulfilled and the agreement ultimately lapsed.

The appellant's representative in the transactions then entered into an oral agreement with the trust in the following terms: The appellant would introduce to the trust a third party who would purchase the property, and the appellant and the trust would share the profits from that transaction. The sale of the property was effected, but the trustees refused to pay the amount owing to the appellant in terms of the agreement. They contended that the appellant's claim constituted commission and that the appellant, not being a registered estate agent, was precluded from claiming payment of the sum still outstanding.

Consequently, the appellant sued the respondents in the High Court, for the balance owing to it. Prior to the matter being heard, the trust obtained an order in terms of which the appellant was ordered to provide security for the trust's costs in the action, and a bill of costs was taxed in that regard. The appellant's failure to comply with that order led to the trust's proceeding with execution. It began that process by determining the assets held by the appellant. Discovering that there were no assets,

the trust found that the only asset of the appellant was the appellant's cause of action against the trust in the main proceedings!!!

It, accordingly, instructed its attorney to cause the sheriff to attach such right of action and have it sold in execution of the taxed bill of costs. Despite the sheriff's return of non-service and its prior knowledge that the appellant was unknown at its registered address, the trust instructed the sheriff to attach the appellant's right of action by service of the warrant of execution at its registered office. A sale in execution was then held, and the fourth respondent was the successful bidder for the appellant's claim.

The appellant then instituted motion proceedings seeking, against the trustees of the trust and the fourth respondent, an order setting aside the attachment and sale in execution of its right, title and interest in its claim against the trust. The court *a quo* dismissed the application with costs. The present appeal flowed from the above.

**Held** – The appellant's case on appeal was that the attachment and subsequent sale in execution of its right, title and interest in its claim against the trust were invalid for want of compliance with the provisions of rule 45(8) of the Uniform Rules of Court. It also contended that the execution process had not been invoked for the purpose for which it was intended, which is to obtain satisfaction of a judgment debt, but for the purpose of quelling the litigation. The appellant argued that that constituted an abuse of the court process which should not be countenanced.

Rule 45(8) deals with the attachment of incorporeal property. The Court held that a litigant's right, title and interest in a claim constitute incorporeal property which may be attached at the instance of a judgment creditor and sold in execution. Consequently, in attaching the appellant's claim against the trust the respondent was obliged to comply with the provisions of rule 45(8).

In terms of rule 45(8)(c)(i)(a), an attachment of the right, title and interest of a litigant in an action will only be complete once the sheriff has given notice of the attachment in writing to all interested parties. The court confirmed that the appellant was clearly an interested party as envisaged by rule 45(8)(c)(i)(a) in regard to its claim against the trust which was purportedly attached, and the failure to give it notice resulted in the attachment being incomplete. Thus, the subsequent sale in execution was null and void.

The appeal was allowed!!!

WOW!!!

### **Tecmed (Pty) Ltd and others v Nissho Iwai Corporation and another [2010] 3 All SA 36 (SCA)**

Civil procedure – Substitution of party to proceedings – Rule 15 – Uniform Rules of Court – Purpose of rule 15 is merely to provide a simplified form of substitution, subject to the right to any affected party to apply to court for relief in terms of rule 15(4).

Civil procedure – Substitution of party to proceedings – Whether affected by Prescription Act – In terms of Japanese law, which applied in casu, the merger leading to substitution of parties meant that the merged entity stepped into shoes of original plaintiff by operation of law – Therefore, section 15(2) of Prescription Act was not set in motion by the substitution.

**Held** – On appeal, that the High Court has the inherent power to grant a substitution of a party to proceedings.

The Court confirmed the correctness of the lower court's findings in respect of the substitution application, and found no reason to interfere with the judgment of the court *a quo* in any respect. The appeal was dismissed with costs.

### **The Citizen 1978 (Pty) Ltd and others v McBride [2010] 3 All SA 46 (SCA)**

Defamation – Defences to action – Expression of opinion – Where offending publication contains no mention of an opinion being expressed, the defence cannot succeed.

Words and phrases – “Amnesty” – Promotion of National Unity and Reconciliation Act Definition of “amnesty” in Shorter Oxford Dictionary is “forgetfulness; an intentional overlooking” or “an act of oblivion, a general overlooking or pardon of past offences by the ruling authority”.

The first two appellants were respectively the publisher and editor of a newspaper. The remaining two appellants were journalists at the newspaper.

Between September and October 2003, two editorials and five articles were published in the newspaper regarding the respondent's candidacy for the post of Metro Police Chief. The articles addressed the respondent's suitability for the post in light of his history. It spoke critically of his conviction in respect of the bombing of a bar, and of his association with alleged gun dealers in Mozambique.

That led to the respondent's instituting action, claiming damages for the injury to his reputation and dignity. He alleged that the publications were wrongful and unlawful in that they were understood by readers and intended to convey the notions, *inter alia*, that the respondent was not suited for the position of Police Chief; that he was a criminal and a murderer. In essence, the respondent contended that the publications were defamatory of him.

Defending the claim, the appellants raised a plea of fair comment and alleged that the statements in the editorials and articles were not statements of fact, but comments concerning matters of public interest. They argued that the comments were fair and that the facts on which the comments were based were true.

The trial court held that the allegations of fact commented upon in the editorials and articles were essentially untrue and not accurately stated and that the defence of fair comment could for that reason not be sustained.

**Held** – The issues of impairment of dignity and of defamation involved the same defences, and were therefore in dealing with the defences raised, referred to solely under the heading of defamation.

The trial court's reasoning on the issue of the respondent's alleged involvement with gun dealers in Mozambique was criticised on appeal, in that it appeared to blur the distinction between the writer's referring to a crime actually committed and one which the writer suspected might have been committed.

The court therefore focused on the defamatory statements that the respondent was not suited for the position of Police Chief and that he was a murderer.

The publication of a defamatory statement gives rise to a presumption that its publication was wrongful and with the intention to inflict injury. The onus is on a defendant to rebut one or other of these presumptions on a preponderance of probabilities. The lawfulness of a defamatory publication is determined by the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the court's perception of the legal convictions of the community. Among the various defences to an allegation of unlawfulness are those of fair comment and truth for the public benefit. For the defence of fair comment to prevail, the relevant statement must constitute comment (or opinion); the comment must be fair; the facts commented upon must be true; and the comment must be about a matter of public interest.

In objecting to being labelled a murderer for his bombing of the bar referred to above, the respondent relied on the fact that he had been granted amnesty for the act in the truth and Reconciliation process established in terms of the Promotion of National Unity and Reconciliation Act. The respondent was convicted of murder but as a result of amnesty having been granted to him, the conviction was in terms of the Act to be deemed not to have taken place and he could not be held criminally or civilly liable for the offences he had committed.

The appellants' insistence that despite the granting of amnesty to the respondent, he was still guilty of having committed murder led the court to consider the meaning of the word "amnesty" for the purposes of the Promotion of National Unity and Reconciliation Act. The court was satisfied that the intention was not only that people to whom amnesty had been granted should not be held criminally and civilly liable for offences committed by them in the course of the conflicts of the past and with the political object of liberation, but also that they should be considered not to have committed the offences and that those offences should not be held against them, so that they could be reintegrated into society. Therefore, once amnesty had been granted to the respondent he could no longer be branded a criminal and murderer in respect of the offences in respect of which such amnesty had been granted to him. The statement in the editorials and articles that the respondent was a murderer was therefore false.

Accordingly, the appellant's defence of fair comment on a matter of public interest should have been dismissed by the trial court on the ground that the facts on which the comment was based were not true.

The appellants also attempted to argue that they were merely expressing an opinion on whether the respondent was a murderer, regardless of the issue of amnesty.

Whether the effect of amnesty is that a person who had been convicted of murder is no longer a murderer is a matter on which opinions may differ and such opinion if genuinely held and relevant may constitute fair comment. The question was however whether the statement was an expression of opinion as contended for by the appellants. A statement that the respondent is a murderer may be intended as a statement of fact or may be intended as a comment based on certain facts. Whether the ordinary reasonable reader would understand it as the one or the other depends on all the circumstances. If made without reference, express or implied, to the facts upon which the statement is based, more particularly the fact that amnesty had been granted to the respondent, it will be understood as a statement of fact and not as comment. In none of the appellants' editorials or articles was any mention made of the fact that amnesty had been granted to the respondent and in none of them was any express or implied indication to be found that a comment or opinion in respect of the effect of amnesty on the offences committed by the respondent was being expressed. In the absence of any such indication it was not possible to construe the statement that the respondent was a murderer simply as an expression of an opinion on the effect of amnesty.

Turning to the issue of damages, the court held that the damages awarded against the first, second and third appellants had to be adjusted as the court below should not have found that they had made the defamatory allegation that the respondent had been involved in illegal activities with gun dealers in Mozambique. The award against the first, second and third appellants was reduced by an amount of R50 000.

### **Deyzel v Fastpulse Trading 461 (Pty) Ltd and another [2010] 3 All SA 80 (WCC)**

Civil procedure – Provisional sentence – Cheques – Bills of Exchange Act – The liability of the second defendant was in solidum with the first defendant, his liability was not illiquid, and that provisional sentence could be taken against him.

Provisional sentence was sought against the second defendant, based on a cash cheque drawn by the first defendant and signed by the second defendant. He later again appended his signature to the face of the cheque accompanied by the words "as surety". However, he denied that those words appeared on the cheque when he appended his second signature thereto.

**Held** – Section 62(1) of the Bills of Exchange Act provides that if a bill or an acceptance is materially altered, the liability of all parties who were parties to the bill at the date of alteration and who did not assent to it, must be regarded as if the alteration had not been made, but any party who has himself made, authorised or assented to the alteration, and all subsequent endorsers are liable on the bill as altered. The Court found that the plaintiff had discharged the onus of proving the signature of the second defendant.

### **Malachi v Cape Dance Academy Int (Pty) Ltd and others [2010] 3 All SA 86 (WCC)**

Civil procedure – Arrest *tamquam suspectus de fuga* – Magistrates' Courts Act – Section 30 – Constitutionality of – Section 30 infringes the constitutional right to equality because a defendant in a civil matter is treated unfairly in relation to a defendant who is able to furnish adequate security for his or her release from detention.

The applicant was a citizen of Moldova, employed in South Africa as an exotic dancer by the first two respondents. Upon her arrival in South Africa, the applicant was required to leave her passport in the care of the owner of second respondent. She was then informed that the passport would not be returned unless she paid the owner the cost of her air-ticket plus a R20 000 levy. She was unable to do that, and wished to return to Russia. However, before that could happen, she was arrested and taken into custody pursuant to a court order issued by the third respondent *ex parte* and a warrant of *arrest tamquam suspectus de fuga*. She would only be released from custody if she could furnish security for the first two respondents' claim – which she was, again, unable to do.

In the present application, the applicant sought to set aside the order of third respondent and to further order her immediate release from custody. She also sought to declare section 30(3) of the Magistrates' Courts Act and the common law rule of arrest *tamquam suspectus de fuga* unconstitutional and invalid.

**Held** – The common law rule relating to arrest *tamquam suspectus de fuga* allows a judicial officer to issue a writ of arrest and for the procedure to be used prior to and after a judgment.

The Court agreed with the applicant that section 30 infringes the constitutional right to equality as a defendant in a civil matter is treated unfairly in relation to a defendant who is able to furnish adequate security for his or her release from detention. Furthermore, a debtor in a civil matter is treated unequally compared to an accused in a criminal case. Section 30 of the Act does not make provision for any of the constitutional rights contained in section 35 of the Constitution of the Republic of South Africa, 1996.

In considering the constitutionality of section 30 the National Credit Act was also relevant. In terms of this Act, the emphasis has moved to the enforcement of the rights of consumers and is meant to protect consumers through addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness. Execution of a judgment should be preceded by a full enquiry into the reasons why the debtor failed to pay and the amount that he owed.

The Court concluded that the words "*arrest tamquam suspectus de fuga*" as contained in section 30(1) of the Magistrates' Courts Act were unconstitutional and invalid and had to be deleted. The whole of section 30(3) was declared to be inconsistent with the Constitution and invalid. The common law which authorises arrests *tamquam suspectus de fuga* was also declared to be unconstitutional and invalid.

On Tuesday 24 August 2010, the Constitutional Court delivered a judgment confirming an order of constitutionality invalidity made by the Western Cape High Court, Cape Town (High Court). The High Court had declared the procedure of arrest *tanquam suspectus de fuga* in terms of section 30(1) and (3) (the impugned provisions) of the Magistrates' Courts Act, 1944 unconstitutional and invalid.

The procedure empowers a magistrate to make an order for the arrest and detention of an alleged debtor at the instance of a creditor who is owed R40 or more and reasonably suspects that the debtor is about to flee the country to avoid the adjudication of the dispute.

The applicant is Tatiana Malachi, a citizen of the Republic of Moldova. She was recruited by Cape Dance Academy International (Pty) Ltd and Rasputin Properties (Pty) Ltd (the employers) from Moldova to work for them as an exotic dancer.

After a few months of work, the applicant made plans to return to Moldova. Her employers alleged that she owed them money but the applicant lacked the means to pay. They then applied for, and were granted, an order by the Magistrates' Court to have the applicant arrested in terms of the impugned provisions, pending the finalisation of their claim against her. She was arrested and detained at Pollsmoor Correctional Centre for 16 days. In pursuit of her liberty, the applicant approached the High Court for an order declaring the impugned provisions constitutionally invalid. The High Court granted an order declaring these provisions inconsistent with the Constitution, and referred it to this Court for confirmation.

Writing for a unanimous Court, Mogoeng J held that the arrest of a person in terms of the impugned provisions was without "just cause", because, amongst other things: (i) the arrest does not necessarily render the debt any more executable than would have been the case had the debtor left the country; (ii) the impugned provisions severely curtailed the applicant's fundamental right to freedom; (iii) the degrading effect of incarceration could not be undone if it is determined that the money is not owed; (iv) it is inconceivable that imprisonment of a person can ever be justified where liability has not been established, bearing in mind that imprisonment for non-payment of an established debt is unconstitutional; and (v) the amount of R40 was minimal.

Mogoeng J held that these provisions were not reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom. The order of constitutional invalidity made by the High Court was accordingly confirmed insofar as it related to the impugned provisions.

LETS DANCE BUT NOT WITH THE CAPE DANCE ACADEMY!!!

**Transnet Ltd t/a National Ports Authority v MV *Cleopatra Dream* and another [2010] 3 All SA 110 (WCC)**

Maritime law – Salvage reward – Port authority – Entitlement to reward – Salvor's services must be voluntary, whereas a public authority usually acts as a result of a statutory duty – Exception to the rule is in cases where the assistance provided exceeds the bounds of any duty imposed by statute or the common law.

The question raised in the present dispute is whether a public authority is entitled to claim a reward for salvaging a vessel in distress. The plaintiff was a port authority which had rescued the first defendant when it ran into trouble as a result of a power failure on board on 2 April 2004 in the port of Saldanha. The plaintiff now claims a salvage award arising out of services rendered to the vessel and the cargo.

**Held** – The dispute arose because a key element of such a claim is that the salvor's services must be voluntary, whereas public authorities involved in salvage actions often render their services under a common law or statutory duty, the voluntary nature of the services is negated and no award may be claimed. Therefore, the first question was whether the plaintiff's salvage operation was carried out voluntarily and not as a result of a statutory duty.

The Court found that, given the plaintiff's statutory duties within port limits, including its duty to keep the port area safe for shipping traffic, therefore, it could not be said to have assisted the distressed vessel voluntarily. The only exception to the rule is in cases where the assistance provided exceeds the bounds of any duty imposed by statute or the common law.

The plaintiff's claim was dismissed with costs.

SORRY TELKOM, NEXT TIME: STRIKE!

I MEAN STRIKE IT LUCKY!

## **All SA LAW REPORTS JULY (1)**

### **CSARS v Fascination Wigs (Pty) Ltd [2010] 3 All SA 129 (SCA)**

Customs and excise – Imported goods – Tariff classification of wefts imported for use in wigs – Court upholding Commissioner’s classification of goods into tariff heading applicable to items used for making up a wig.

The respondent was an importer of synthetic hair products, including wigs. In December 2005 the appellant, in terms of section 47(9)(a)(i)(aa) of the Customs and Excise Act, determined that certain synthetic hair products imported by the respondent should be classified under tariff heading 6704.19 of Part 1 of Schedule 1 to the Act. The respondent appealed against that determination, and the High Court upheld the appeal. The Commissioner (“the appellant”) appealed against that judgment.

**Held** – that the issue was whether the synthetic hair products imported by the respondent were to be classified as completed products for the purpose of levying customs duty on them, or whether they fell under a tariff heading that attracted no customs duty.

The products in issue fell into two classes: “weaves” or “wefts” for integration into a person’s hair or for gluing on to a scalp, and “braiding fibres” for integration into hair by plaiting it in. The essence of the dispute was whether the wefts in question were to be classified as items used for making up a wig, or as completed or finished products. They would not be dutiable if they fell into the first category, but would attract duty in the second category.

The Court approached the dispute by identifying the key question as being whether, objectively, the wefts in issue – and not wefts in general – were themselves complete and capable of being used without being changed or processed in any way. Having regard to the evidence, including that of an expert, the Court concluded that the products imported by the respondent could not be regarded as a complete article. The appellant’s classification was therefore correct, and the appeal was dismissed.

### **Standard Bank v Master of the High Court [2010] 3 All SA 135 (SCA)**

Insolvency – Liquidators – Duties – Insolvency Act – In terms of this section, duties of the liquidator are peremptory – Duty of the trustee to examine every claim proved against the estate and to satisfy himself that the estate is indebted to the creditor in the amount of the claim.

Insolvency – Liquidators – Duties of – Liquidators are required to act in the best interests of creditors, and should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice – Where liquidators failed to properly assess and verify a claim against the liquidated company, they were found to have failed to comply with their duties as liquidators in accordance with the standards required of them.

Insolvency – Liquidators – Removal of – While removal of a liquidator is an extreme step, where liquidators failed to properly assess and verify a claim against the liquidated company, they were found to have failed to comply with their duties as liquidators in accordance with the standards required of them.

The second and third respondents (hereinafter referred to as “the respondents”) were joint liquidators of a company (“Intramed”) of whom the appellant, a commercial bank, was a proven creditor. In an application to the High Court, the bank sought the removal of the respondents as joint liquidators of the company.

The present appeal was directed at the refusal of the application.

The company was a wholly-owned subsidiary of a holding company (“Macmed”). Both the company and the holding company were wound-up because they were unable to pay their debts. Their winding-up had enormous financial consequences.

According to the appellant, the respondents, in winding up Intramed, treated the process as part of the winding-up of the larger group and improperly deferred to Macmed and its creditors. It was alleged that they acted in a manner favouring Macmed and prejudicing Intramed. The main basis for that allegation was the admission of a claim by Macmed in Intramed in the amount of R325m. The bank also accused the respondents of misappropriating Intramed’s funds. It accused them of improperly using Intramed’s monies to pay costs which a court in prior litigation, had ordered them to pay personally.

**Held** – The central question on appeal was whether the respondents had discharged their duties as required of liquidators. The Court reminded that in the winding-up of companies, liquidators occupy a position of trust, not only towards creditors but also the companies in liquidation whose assets vests in them. Liquidators are required to act in the best interests of creditors. A liquidator should be wholly independent, should regard equally the interests of all creditors, and should carry out his or her duties without fear, favour or prejudice.

The first aspect considered by the Court in its assessment of the respondents’ conduct, was the admission of Macmed’s R325m claim. The Court was not happy with the admission by the respondents of the R325m claim. The respondents were found not to have properly assessed or interrogated the claim, and their consideration of the issue was perfunctory and dismissive. The conclusion was that they had failed to comply with their duties as liquidators in accordance with the standards required of them.

Next, the Court considered the allegation of misappropriation of money as referred to above. The Court pointed out that money in the estate of the company being wound-up cannot be put to private use by the liquidators. It condemned the respondents’ actions in using Intramed’s monies to pay costs which they were personally ordered to pay.

In considering whether to grant the appellant’s request for the removal of the respondents, the Court’s starting point was section 379(2) of the Companies Act which sets out the circumstances in which a court may order the removal of a

liquidator. Such circumstances include where the liquidator has failed to perform satisfactorily any duty imposed upon him by the Act or to comply with a lawful demand of the Master or a commissioner appointed by the Court under the Act; or is no longer suitable to be the liquidator of the company concerned. The Court was satisfied that in respect of the claim of R325m, the respondents had lost all objectivity and improperly preferred the Macmed claim without properly interrogating and verifying it. Moreover, their behaviour in relation to the cost of the litigation referred to above was highly questionable.

Removal of a liquidator is an extreme step. However, the Court was satisfied that it was not in the best interests of the liquidation that the respondents continue to serve as joint liquidators of Intramed. Their removal was ordered.

### **Klopper NO v Master of the High Court [2010] 3 All SA 182 (WCC)**

Insolvency – Liquidator’s fee – Master’s refusal to allow applicant liquidator’s remuneration – Master’s wilful disregard of court order – Held that the Master’s remedy was to seek leave to appeal – In failing to comply with the order, the Master acted with gross impropriety – Court granted a punitive costs order against the Master.

Insolvency – Liquidator’s fee – Whether the applicant, as liquidator, was entitled to remuneration exceeding that prescribed in the applicable tariff – Supreme Court Act – Appointment of a referee – Enquiry into what would constitute reasonable remuneration for the applicant’s service as liquidator.

Pursuant to an order in which the court had remitted to the case to the Master for reconsideration, the Master responded to the order via a letter. The matter concerned the Master’s refusal to allow the applicant, as liquidator’s remuneration, an amount exceeding that prescribed in the applicable tariff.

**Held** – The master’s response was unsatisfactory, in that once again, the applicant was not allowed remuneration higher than provided for in the tariff. The Court adopted the recommendations of a referee appointed by the Court in respect of the liquidator’s fee.

As far as the master’s conduct was concerned, the Court expressed its disapproval by making an adverse costs order against her.

### **Singh and another v Ebrahim (1) [2010] 3 All SA 187 (D)**

Delict – Claim for damages – Medical negligence – Assessment of damages – Actio legis aquiliae – Compensation should be assessed with a view to place the injured party, as far as it is reasonably possible, in the position he would have been had the injury not occurred.

Delict – Claim for damages – Medical negligence – Assessment of damages – Claim involving a child – Assessment guided by the best interest of the child and defendant’s constitutional rights to property and in particular the right not to be deprived of property by way of any arbitrary deprivation.

The plaintiffs sued the defendant for damages arising from their son’s suffering a hypoxic brain injury at birth, rendering him cerebral palsied and severely permanently disabled. Liability was conceded by the defendant, and only the quantum of the claim was in dispute. After further concessions by the defendant, and abandonment of certain aspects of the claim by the plaintiffs, the issues remaining in dispute were the claim for treatment, therapy services, assistive devices and alterations to the home; the claim for caregivers, relief caregivers and mealtime compensation; the claim for future loss of earnings/ earning capacity; the claim for general damages, personal claims by each of the plaintiffs; and a claim for psychotherapy for the plaintiffs’ other son.

**Held** –The Court agreed that the claims were valid, and ordered the defendant to pay the amounts awarded. Some of the issues required actuarial calculations, and the plaintiffs were requested to submit the Court’s findings in respect of the individual heads of damages to their actuaries for the necessary calculations to be done.

**Singh and another v Ebrahim (2) [2010] 3 All SA 240 (D)**

Medical negligence – Claim for damages – Quantum – Parties submitted individual heads of damages to their actuaries for calculations to be done – Court awarded damages upon receipt of actuaries’ calculations.

**Held** – Upon receipt of the requested clarification, the actuary provided his calculations. The Court proceeded to make the awards remaining in the matter.

**Singh and another v Ebrahim (3) [2010] 3 All SA 249 (D)**

Civil procedure – Costs – Reconsideration of – Rule 34(12) – Uniform Rules of Court – Whether award of costs to plaintiff should remain undisturbed in light of written offer of settlement by defendant – Purpose of offer to settle is to enable a defendant to avoid further litigation – Court found offer made by defendant was adequate and defendant was entitled to a reconsideration on the question of costs.

Unbeknown to the Court at that time, the defendant had made a written offer of settlement. The defendant now served a notice in terms of rule 34(12) in terms whereof he requested a reconsideration of the costs awarded to the plaintiffs as the offer to settle exceeded the amounts awarded. He submitted that his offer of settlement exceeded the total sum eventually awarded to the plaintiffs.

**Held** – The issue was whether the award of costs to the plaintiffs should remain undisturbed. The purpose of a tender or offer to settle in terms of rule 34 is to enable a defendant to avoid further litigation, and failing that to avoid liability for the costs of

such litigation. Under rule 34(12) a trial court retains an overriding discretion on costs.

The court found that the offer made by the defendant was not only adequate, but generous. The defendant was entitled to a reconsideration of the question of costs. The Court, accordingly, substituted its previous order with a new one.

## **SA CRIMINAL LAW REPORTS AUGUST 2010**

### **Albutt v Centre for the Study of Violence 2010 (2) SACR 134 CC**

Also reported as: Albutt v Centre for Reconciliation 2010 (3) SA 293 CC

Constitutional Law-State President-pardons-victims to be heard.

### **Bonugli v Deputy National Director of Public Prosecutions 2010 (2) SACR 134 TPD**

Prosecuting authority-advocates in private practice appointed as prosecutors-cannot be done

The two applicants had been charged with fraud. The NPA appointed 2<sup>nd</sup> and 3<sup>rd</sup> respondents as prosecutors in the case. The Complainant's company paid their fees into their attorney's trust account as was agreed upon by the NPA and the 2 advocates. The Court removed them as the basis of the independence of the prosecution was compromised.

(I wonder what would have happened if they followed the route of a private prosecution? Perhaps the court would not have granted permission because the NPA would not have had valid reasons not to prosecute?)

### **National Director of Public Prosecutions v King 2010(2) SACR SCA**

Criminal procedure – right to a fair trial – right to a motivated index of police docket – litigation privilege

Police dockets, forming a prosecutor's brief, consist normally of three sections. Section A contains statements of witnesses, expert reports and documentary evidence. Section B contains internal reports and memoranda, and section C the investigation diary. In our law, following English precedent, the general rule is that one is not entitled to see his adversary's brief. This is referred to as litigation privilege, something different from attorney and client privilege. However, as the Constitutional Court has held in *Shabalala*, a 'blanket' docket privilege in criminal cases conflicts with the fair trial guarantee contained in the Bill of Rights. Accordingly, litigation privilege no longer applies to documents in the police docket that are incriminating, exculpatory or prima facie likely to be helpful to the defence. This means that an accused is entitled to the content in the docket 'relevant' for the exercise or protection of that right. The entitlement is not restricted to statements of witnesses or exhibits but extends to all documents that might be 'important for an accused to properly 'adduce and challenge evidence' to ensure a fair trial'.

The blanket privilege has not been replaced by a blanket right to every bit of information in the hands of the prosecution. Litigation privilege does still exist, also in criminal cases, albeit in an attenuated form as a result of these limitations. Litigation privilege is in essence concerned with what is sometimes called work product and consists of documents that are by their very nature irrelevant because they do not comprise evidence or information relevant to the prosecution or defence.

This much is hardly contentious. What is in contention in this appeal is whether an accused is entitled as of right to a full description of each and every document to which he is denied access – all being documents falling in parts B and C of the docket – with a statement of the precise basis upon which access is denied to any document in order to have a fair trial. In other words, is the accused entitled to a ‘motivated index’ to satisfy him in advance that the trial will be fair? The court below held in the affirmative and hence this appeal by the National Director of Public Prosecutions (the NDPP).

The respondent, Mr DC King, has been indicted on 322 counts including fraud, tax evasion and evasion of the Exchange Control Regulations, as well as money-laundering and racketeering. The counts relate inter alia to a failure to submit tax returns, fraudulent misrepresentations in his tax returns, and devising and implementing an allegedly fraudulent scheme to ‘externalize’ his assets to evade income tax and obligations under the regulations, involving amounts in excess of R1 billion. The main complainant, as one could expect, is the SA Revenue Services (SARS). It apparently has a claim of some R3 billion against King flowing from some of the allegations.

Whether a trial is fair is an objective fact. To receive a fair trial Mr King is entitled to the material that is contemplated by *Shabalala*. If he has received all that material, and is then tried, it could hardly be said that his trial was unfair on account of not having had the list that he requires. And if he is tried without having been given that material the proceedings might be set aside if that has denied him a fair trial, even if he has been given the list. No doubt he is not obliged to wait until his trial has been concluded before complaining, and might rightly object if he is faced with the prospect of a trial that is destined to be unfair because he has not been furnished with documents to which he is entitled. But I have pointed out that that is not what the case is about.

### **S v Mbezi 2010(2) SACR 169 WCC**

Fundamental rights-right to be tried in language that accused understands [and hears]-accused unable to hear!

Two (2) accused persons faced attempted murder charge before the Regional Court. They are John Mbezi and Lendy Wagner (respectively referred to as Accused 1 and 2). The accused persons were both legally represented. The charge was put to the accused persons and they both pleaded not guilty. On their behalf certain plea explanations were made in terms of Section 115 (2) of the Criminal Procedure Act. The State proceeded to prove its case by calling one James Meni as the only witness. The witness testified in chief and was duly cross-examined by the legal

representatives of accused 1 and 2. After certain admissions in terms of Section 220 of the Criminal Procedure Act were made, the State rose to close its case.

Mr. Bezuidenhout who represented accused 1 called the accused to the witness stand to testify in his defence. Mr. Bezuidenhout noticeably had difficulty in leading the accused in that it did appear that he and accused 1 did not properly understand each other. This the Magistrate noted, but Mr. Bezuidenhout struggled on until he came to the end of the evidence in chief. The resultant cross-examination by the prosecution put it beyond anybody's doubt that accused 1 either did not hear the questions or he did not understand them at all. All this happened despite the fact that services of a Court interpreter were employed. The prosecution was having his "feed" on this accused person when the Magistrate *mero moto* indicated that he was of the view that accused 1 did not understand or even hear the prosecution. Mr. Bezuidenhout then brought it to the notice of the Court that he himself struggled to communicate with accused 1 even during consultation prior to the trial.

In the instant matter there was most certainly a failure of justice. The proceedings were "poisoned" by the fact that they were never heard and understood by accused 1. These proceedings fall to be set aside. In the circumstances the matter is hereby reviewed and the proceedings are set aside. It is ordered that the proceedings may be started *de novo* at the discretion of the Director of Public Prosecutions provided that the apparent disability of accused 1 is taken care of. Should the proceedings be instituted anew, it is not desirable and advisable that they be presided over by the same Magistrate.

### **S v Msomi 2010(2) SACR 173 KZP**

Accomplice-to rape-appellant was aware of intentions-appeal dismissed.

### **S v Olivier 2010(2) SACR5 178 SCA**

Sentence – evidentiary weight of *ex parte* submissions from the Bar – six counts of fraud – sentence of seven year's imprisonment, of which three years conditionally suspended, confirmed.

The Supreme Court of Appeal dismissed an appeal by the appellant, Ms Mavis Pemella Steyn, against the sentence imposed by the Regional Court. The appellant had been convicted of forgery, uttering and fraud. She was sentenced to two years imprisonment, conditionally suspended for five years on the forgery and uttering charges and to five years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977, on the fraud charge.

The SCA held that, despite the procedural irregularity and shortcomings in respect of the provisions contained in section 309B(5)(c)(ii) and section 309B(6) of the Criminal Procedure Act, the Court was competent to finalise the matter. It held further that, since the appellant had a similar previous conviction, had not complied with the conditions of suspension in respect of the previous conviction and, having regard to the fact that the appellant had again, as before, abused a position of trust in her employment situation to commit the offence, the appeal had to fail.

The SCA consequently confirmed the sentence imposed by the Regional Court.

**S v PN 2010(2)SACR 187 ECG**

Sentence-prescribed sentence-rape of 3 year old –appeal against life sentence dismissed.

**S v De Koker 2010(2) SACR 196 WCC**

Appeal- against sentence-where plea bargain entered into-Appeal pre-empted.

Plea “bargain”, was not such a “bargain” after all, appellant pleaded guilty to robbery, rape and murder. Agreed to life but in jail he found the sentence to be shocking, I suppose that’s when he found the circumstances in jail shocking and “choking”.

Yes you must be joking.

Held: By following the process in section 105A of the CPA he had settled the lis between himself and the state once and for all!