

LEGAL NOTES VOL 1/2011

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EDITORIAL

A few remarks:

The Law can be “strange” for example the case where the state is ordered to built more toilets! The number of lavatories available for use by persons attending at the office is to be increased! (See 410 Voortekker Road Property Holdings CC v Minister of Home Affairs [2010] 4 All SA 414 WCC)

In a defamation case where a photo was published of a young woman in a bikini with the word “filth” written next to it, the magazine argued that surfers would know the slang term "filth" meant excellence. (See W v Atoll Media (Pty) Ltd [2010] 4 ALL SA 548 WCC)

The problem is that we cannot give comment on the judgment as we did not see the photo. (I looked at the magazine’s web but it was not there anymore!)

Excellent, filthy magazine!

New Legislation

The Consumer Protection Act

The implementation of the Act has been postponed until the end of March 2011. The Act regulates the activities of suppliers and creates rights for consumers.

Here are some thoughts to stimulate you to attend a course or whatever:

Fixed term agreements are going to be limited.

All agreements with consumers must be in **plain and understandable language**. The general theme of the Act is to protect the **poor and the vulnerable** and is in a way the Bill of Rights for the consumer.

The Act alters the **common law** to be more favourable to consumers. By default, you give the consumer various **warranties and indemnities**. The warranties that you give in your agreements are no longer the only warranties that apply.

The Act also applies to legal services provided so it impacts on attorneys and possibly advocates directly too. The **ambit of the Act is very wide**. Depending on what is contained in the regulations, a lessee may be viewed as a consumer and therefore lease agreements may need to comply with the Act. The Act does not apply to employment contracts. A franchisee will be a consumer and therefore

franchise agreements will have to comply. The regulations have been published end November 2010, I will comment on this in the next issue.

The court will be given the **power to redraft** (well order you to change them actually) your contracts, terms of business, terms of sale and other consumer related terms. Courts must **interpret** standard form contracts in favour of consumers.

Promotional competitions will be governed by this Act, rather than the Lotteries Act. If you are currently ABC (Pty) Ltd, trading as XYZ, you will have to **register** the business name XYZ.

Revisit your **refund** policy.

Your **marketing** campaigns are going to be affected and conducted in accordance with the Act.

Mechanisms are put in place to **enable** consumers to enforce their rights.

SMALL CLAIMS COURT

The monetary value is now R12 000.00

IAASA NAME CHANGE

Shakespeare said (in Romeo and Juliet)"what is in a name, that by which we call a rose by any other name would smell as sweet". In the play the surname of Romeo counted against him when he wanted Juliet. In that context a name is a token of discrimination.

But sometimes a name could be to one's disadvantage if people abuse it. I got a phone call from an advocate who said he is an independent advocate and he wants to join the independent bar. In court, before Satchwell, J an advocate said he is independent and the judge replied"O you are from the independent Bar", he did not correct her. I am going to propose a name-change at our AGM and hope it will be accepted. I also hope that those who oppose it will not, as last year, come with technical excuses.

Perhaps the new name, Faculty of Advocates of South Africa, will be accepted or we can adopt it as a parallel name for IAASA. If you want to vote on this make sure you come to the AGM, proxy votes are only allowed, according to our Constitution, for voting on membership.

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FIRSTRAND BANK LTD v COLLETT 2010 (6) SA 351 (ECG)

Credit agreement - Consumer credit agreement - Debt review - Termination - When competent - Whether competent for credit provider to give notice terminating debt review after debt counsellor's proposal referred to magistrates' court and pending declaration of reckless credit, or order of rearrangement - Such competent - National Credit Act 34 of 2005, ss 86(7) (c) and 86(10).

PIENAAR AND OTHERS v BROWN AND OTHERS 2010 (6) SA 365 (SCA)

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**DUNCAN v MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM AND
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taken - Doctrine extended in English law so as to afford claim to compel substantive compliance with expectation - South African courts will eventually have to decide whether they can compel such substantive compliance.

Legitimate expectation - Legitimacy - Requirements set out - Representation inducing expectation to be clear, unambiguous and devoid of relevant qualification - Expectation to have been induced by decision-maker - Expectation to be reasonable - Representation to be one which is competent and lawful for decision-maker to make.

Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualifies as legitimate. The requirements for the legitimacy of such expectation have been formulated thus:

(a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant qualifications.

(b) The expectation must have been induced by the decision-maker.

(c) The expectation must be reasonable.

(d) The representation must be one which is competent and lawful for the decision-maker to make.

MARGO AND ANOTHER v GARDNER AND ANOTHER ; GARDNER AND ANOTHER v MARGO AND ANOTHER 2010 (6) SA 385 (SCA)

Interest - *In duplum* rule - Interest to stop running when equal to unpaid capital - Application of rule - Whether interest accumulating *pendente lite* - Unfair to penalise creditor by applying *in duplum* rule while proceedings pending - *In duplum* rule suspended *pendente lite* , during which time interest runs.

Although it is axiomatic that the *in duplum* rule prevents unpaid interest from accruing further once it reaches the unpaid capital amount, it has to be borne in mind that a creditor is not prevented by the rule from collecting more than the unpaid capital amount in interest, provided that he at no time allows the unpaid arrear interest to reach the unpaid capital amount. The purpose of the rule is not only to protect borrowers from exploitation by lenders who permit interest to accumulate, but also to encourage plaintiffs to speedily issue summons and claim payment of the debt. Since delays inherent in litigation cannot be laid at the door of litigants, it would be unfair to penalise a creditor with the application of the *in duplum* rule while proceedings are pending. The rule is accordingly suspended *pendente lite* .

MILLER AND OTHERS v NAFCO INVESTMENT HOLDING CO LTD AND OTHERS 2010 (6) SA 390 (SCA)

Company - Winding-up - Enquiry into affairs of company - Statute not envisaging application for such enquiry, much less application from limited class of persons - If application required, Master would be unable to act unless C given information from specified person - Companies Act 61 of 1973, s 417.

Company - Winding-up - Enquiry into affairs of company - Master appointing commissioner to conduct enquiry - Competent, and sensible, for Master to delegate to commissioner power of deciding who might be allowed to attend enquiry and have access to record - Companies Act 61 of 1973, ss 417 and 418.

Company - Winding-up - Enquiry into affairs of company - Liquidators of company can delegate some acts to a third party but not matters of discretion - All acts relative to enquiry not having to be performed by liquidators themselves - Companies Act 61 of 1973, s 417.

CLAASSEN v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2010 (6) SA 399 (WCC)

Court - Independence of judiciary - Doctrine of judicial immunity from civil liability for damages arising from performance of judicial duties - Doctrines consonant with Constitution - Only exception where conduct malicious or in bad faith - Magistrate having acted negligently, but not maliciously, in cancelling appellant's release on warning - Appellant deprived of liberty - Albeit magistrate's acts misdirected, nevertheless judicial acts and immunity applying to it - Constitution, s 165. Constitutional law - Human rights - Right to freedom and security of person - Magistrate negligently cancelling appellant's release on warning - Appellant bringing action for damages for unlawful detention - Doctrine of judicial immunity from civil liability - Section 12 of Constitution entrenching right to personal liberty, but not by itself affording right of compensation to person whose right infringed - Accordingly, dismissing appellant's claim for damages against magistrate not entailing limitation of his right to liberty - Considerations underpinning doctrine of judicial immunity from civil liability making it inappropriate as matter of legal policy to characterise magistrate's conduct as wrongful in sense required for appellant's claim to have succeeded - Constitution, s 12.

The appellant appealed against the dismissal of his action for damages for unlawful detention, brought against a criminal court magistrate in his personal capacity and against the first defendant on the basis of the latter's alleged vicarious liability for the wrongdoings of the magistrate. The trial court found that the criminal court magistrate had not been properly joined in the action, and the appellant's initial appeal against this finding was abandoned during the course of the appeal. The appellant, who had been released on warning, had failed to attend court for a provisional appearance on certain criminal charges, due to unforeseen difficulties in the transport arrangements he had made. He was subsequently arrested and brought before the court, where he was summarily remanded in custody until the E next scheduled hearing of the matter. He had taken the precaution of deposing to an affidavit explaining his difficulties, but was given no opportunity of presenting it or of otherwise explaining the reasons for his failure to appear.

Held, that the importance of punctilious compliance with the procedural requirements bearing on any sanctioned deprivation of liberty could not be overemphasised. The criminal court magistrate had not held an enquiry [into the appellant's failure to attend] in terms of s 72(4) of the Criminal Procedure Act 51 of 1977, and neither had he cancelled the appellant's release on warning in the manner provided for in terms of s 72A, read with s 68(1) and (2) of the Act. The magistrate had thus acted in disregard of both the substantive and the procedural requirements for the exercise of any G power he had to curtail the appellant's right to personal freedom. The magistrate's explanation for his failure to enquire into the reasons for the appellant's absence - that s 72(4) employed the word 'may' rather than 'must', and was therefore permissive and not peremptory - was inherently implausible in the context of the magistrate's conduct. Without such an enquiry there could have been no basis for committing the appellant to prison

Held, further, that, despite the magistrate's actions and his demeanour at the hearing, it could not be found that he had acted mala fide or maliciously. There was no doubt, however, that he had acted negligently: his conduct had fallen short of

what might be expected from a reasonable person in his position; he should have been aware that it might cause the appellant I damage; and he had unreasonably failed to avoid such harm occurring. As to whether or not a remedy in damages should be extended, where a person was unlawfully detained in consequence of a negligently made order by a magistrate acting outside the authority of the law, judges and others exercising adjudicative functions had been held immune against actions for damages arising out of the discharge of their judicial functions. This was a matter of legal policy and the only exception was in cases where the judge's conduct was malicious or in bad faith. Given the finding that the magistrate *in casu* had not acted maliciously, three questions had to be considered: firstly, whether judicial immunity applied in a situation where a magistrate exercised powers that he did not have; secondly, whether the fact that the appellant had been unlawfully committed to prison, in breach of his fundamental rights under s 12 of the Constitution should affect the judicial immunity that would otherwise have protected the magistrate from delictual liability; and, thirdly, whether the fact that South Africa had adopted the International Covenant on Civil and Political Rights (ICCPR) - s 9(5) of which provided that any victim of unlawful detention had an enforceable right to compensation - likewise affected the magistrate's judicial immunity.

Held, further, that, although the matter had been properly before the magistrate, he had dealt with it ineptly and without proper regard to the statutory constraints on his powers, thereby exceeding his jurisdiction. However, albeit his acts in connection with the matter may have been fundamentally misdirected, they were nevertheless judicial acts; accordingly, immunity applied to them.

Held, further, that the doctrine of judicial immunity was consonant with the provisions of the Constitution, notably s 165, which entrenched the principle of judicial independence with the attendant promotion of the ability of the judiciary to administer the law without fear, favour or prejudice. Section 12 of the Constitution entrenched a right to personal liberty, but did not by itself afford a right of compensation to a person whose right had been infringed. Accordingly, denying the appellant a claim for damages against the magistrate did not entail a limitation of his right to liberty; nor did it denote that judicial immunity offended against the spirit, purport and objects of the Bill of Rights. The considerations underpinning the doctrine of judicial immunity compelled the conclusion that it would be inappropriate as a matter of legal policy to characterise the magistrate's conduct as wrongful, in the sense required for the appellant's claim to have succeeded.

Held, further, that the ICCPR was not a self-executing legal instrument - the Republic's formal adoption of its provisions did not, without more, amend established domestic law. If unqualified effect were to be given to art 9(5) G of the ICCPR, South Africa would have to enact legislation to do so. Finally, given that the magistrate was immune from liability, the issue of the vicarious liability of the minister for the former's acts did not arise for determination.

Appeal dismissed. No order as to costs.

MEC FOR SOCIAL DEVELOPMENT v MDODISA 2010 (6) SA 415 (SCA)

Social welfare - Social assistance grants - Disability grant - Summary termination of by State - Termination procedurally unfair - High Court ordering reinstatement of grant and payment of all arrears plus interest - Such order no bar to future

termination of grant on legally sustainable basis - Conduct of State both in dealing with grant and in subsequent litigation criticised as being peculiar and wasteful.

LA LUCIA SANDS SHARE BLOCK LTD AND OTHERS v BARKHAN AND OTHERS 2010 (6) SA 421 (SCA)

Company - Shares and shareholders - Shares - Register of members - Disclosure - Refusal of access to register - Power of court - Court having statutory power to compel company to send register of members' names to person whose request for such copy refused by company - Provision serving important public purpose - Conferring discretion upon court - Court should be slow to decline to make order in favour of person requesting access - May do so when access sought for unlawful purpose - Companies Act 61 of 1973, s 113(4).

In the present case the first and second respondents sought and obtained High Court orders directing the first appellant, a share-block company, to provide them with photocopies of its register of members. It appeared that the respondents required the information to enable them to make offers to purchase the members' shareholding in the first appellant, and that the first appellant was accusing the respondents of attempting to engineer an unlawful takeover of the share block and refused to divulge the requested information to the respondents. In an appeal the SCA found that the request did not infringe the statutory rules regulating takeovers and mergers, and, citing the principles outlined above, dismissed the appeal.

FIRSTRAND BANK LTD T/A FIRST NATIONAL BANK v SEYFFERT AND ANOTHER AND THREE SIMILAR CASES 2010 (6) SA 429 (GSJ)

Credit agreement - Consumer credit agreement - Debt review - Termination - When competent - Notice to terminate review is competent once review referred by debt counsellor to magistrates' court - National Credit I Act 34 of 2005, s 86(10).

ROSSOUW AND ANOTHER v FIRSTRAND BANK LTD 2010 (6) SA 439 (SCA)

Credit agreement - Consumer credit agreement - Debt enforcement - Proceedings in anticipation of judicial proceedings - Notice of default - Delivery - Requirements - Sending, not receipt, of notice by credit provider in manner chosen by consumer from alternatives specified in Act, amounting to delivery - Risk of non-receipt of notice on consumer - Consumer, not credit provider, to choose manner of delivery - Sending by registered mail proper delivery despite not being specified in Act - Credit agreements to reflect delivery alternatives specified in Act - National Credit Act 34 of 2005, s 3 (e) , s 65(2) and s 129(1)(a) .

Credit agreement - Consumer credit agreement - Debt enforcement - Debt procedures in court - Enforcement of remaining obligations of consumer after sale in execution - Mortgagee entitled to claim.

LUPACCHINI NO AND ANOTHER v MINISTER OF SAFETY AND SECURITY 2010 (6) SA 457 (SCA)

Trust and trustee - Trustee - Authorisation - Unauthorised trustee commencing legal proceedings on behalf of trust - Effect - Such proceedings a nullity - Trust Property Control Act 57 of 1988, s 6(1).

(This case is old news)

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA AND ANOTHER v EMERGENCY MEDICAL SUPPLIES AND TRAINING CC t/a EMS 2010 (6) SA 469 (SCA)

Appeal - In what cases - Against interlocutory order - Court should be careful not to grant leave where issue is one that will be dealt with in isolation and where balance of issues have yet to be determined - Position different where litigant may suffer prejudice or injustice if order left to stand.

A court, when requested to grant leave to appeal against orders or judgments made during the course of proceedings, should be careful not to grant leave where the issue is one that will be dealt with in isolation, and where the balance of the issues in the matter have yet to be determined. Of course, where a litigant may suffer prejudice or even injustice if an order or judgment is left to stand, then the position will be different.

KWIKSPACE MODULAR BUILDINGS LTD v SABODALA MINING CO SARL AND ANOTHER 2010 (6) SA 477 (SCA)

Evidence - Foreign law - Proof - Presumption that South African law and law of foreign country the same - Law of foreign country (*in casu* Australia) on points in issue readily ascertainable with sufficient certainty - Law of foreign state applied in determining points in issue, namely interpretation of building contract - Law of Evidence Amendment Act 45 of 1988, s 1(1).

Engineering and construction law - Building contract - Performance guarantee - Interpretation - Contract providing that law applicable to it was law of Western Australia - In Australia building contract may contain provisions enforceable by contractor that limit right of beneficiary of unqualified performance guarantee to present guarantee to issuer; but clause in question did not - In any event, on facts, held that principal had enforceable right under contract which it was entitled to assert - No tacit term in contract obliging principal, in its notice to contractor in terms of relevant clause, to set out grounds on which demand under performance guarantee would be made.

MV IRAN DASTGHAYB ISLAMIC REPUBLIC OF IRAN SHIPPING LINES v TERRA-MARINE SA 2010 (6) SA 493 (SCA)

Shipping - Admiralty law - Enforcement of maritime claim - Arrest - Associated ship arrest - Whether ship 'associated ship' - Question of fact to be proved on balance of probabilities by applicant - Admiralty Jurisdiction Regulation Act 105 of 1983, ss 3(6) and 3(7).

CROTS v PRETORIUS 2010 (6) SA 512 (SCA)

Delict - *Condictio furtiva* - *Dolus eventualis* satisfying requirements of theft for purposes of *condictio furtiva* .

When a livestock speculator buys cattle that he has no details of from a person he knows nothing about and deliberately fails to comply with the provisions of the Stock Theft Act 57 of 1959, his actions amount to theft of the livestock. The instincts of Mr

Crots, the victim of the theft, about right and wrong caused him to pursue this matter since 2004 despite successive losses in the magistrate's court and the high court. He has now been shown by the Supreme Court of Appeal to have been right all along.

During August 2004 nine of Crots' gravid heifers disappeared from his farm. He noticed tyre tracks at the likely place where the heifers were loaded and recognised it as belonging to a vehicle of a local transporter. The local transporter confirmed that nine heifers were collected by his truck on the instruction of a livestock speculator from the area, Mr Pretorius. Pretorius admitted that he instructed a vehicle to collect nine heifers and deliver them to the abattoir where they were promptly slaughtered. Crots sued Pretorius for the value of the heifers. He denied any knowledge of the theft, saying that he bought the heifers from a man that was unknown to him, called Petrus, suggesting that if the cattle were stolen, Petrus stole them and not him. He counterclaimed against Crots for saying that he stole the heifers.

The Supreme Court of Appeal found that Pretorius, who knows the livestock trade and the provisions of the Stock Theft Act, was part of the theft of the Crots' heifers. It found that Pretorius, by making sure that he knew nothing about Petrus and the nine heifers and by deliberately not complying with the Stock Theft Act, facilitated and was part of the theft of the heifers. Pretorius was ordered to pay R45 000 with interest to Crots.

The decision of the magistrate's court that Crots was to pay R20 000 in damages for defamation to Pretorius was also set aside. The Supreme Court of Appeal found that there was not sufficient evidence that Crots told anybody that Pretorius stole his heifers.

CURATORS, EMMA SMITH EDUCATIONAL FUND v UNIVERSITY OF KWAZULU-NATAL AND OTHERS 2010 (6) SA 518 (SCA)

Trust - Trust instrument - Variation - Testamentary trust - Power of court to vary trust instrument when provisions against public interest and hampering achievement of founder's objectives - Will creating educational fund, to be administered by university, restricting beneficiaries to white bursars - Racially restrictive provisions in conflict with public interest - Universities, having obligation to apply public policy, cannot administer fund with racially restrictive provisions, thus hampering achievement of founder's objectives - Constitutional imperative of removing racially restrictive provisions taking precedence over freedom of testation and not amounting to unlawful deprivation of property as constitutionally defined - High Court order deleting racially restrictive clause upheld - Trust Property Control Act 57 of 1988, s 13 and the Constitution ss 25(1) and (2).

ANIRUDH v GUNASE 2010 (6) SA 531 (KZD)

Prescription - Extinctive prescription - Debt - What constitutes - Obligation to deliver service - Instruction by client to attorney to perform service - Attorney's obligation to

client to deliver such service in accordance with instruction constituting debt for purposes of prescription.

Prescription - Extinctive prescription - Period of prescription - When it commences - Claim against attorney for failure to institute RAF claim timeously - Client's cause of action against attorney arising when attorney through his negligence allowed RAF claim to prescribe - Prescription commencing to run when client becoming, or reasonably ought to have become, aware that RAF claim having prescribed - Prescription Act 68 of 1969, ss 11 (d) , 12(2) and 12(3).

When an attorney accepts instructions to perform a certain service for a client there arises an implied term in the agreement between attorney and client, that the attorney will perform the service required in a professional, non-negligent manner. This duty constitutes a 'debt', in the sense of an obligation to do something, for the purposes of s 12(1) of the Prescription Act 68 of 1969. The client's cause of action against an attorney who fails to comply with such duty arises when the client acquires or ought to acquire knowledge of such failure, and the onus of proving when the client could have acquired such knowledge rests with the attorney. Where the attorney wilfully prevents the client from obtaining such knowledge, prescription will under s 12(2) begin to run when the client actually acquires the knowledge. The plaintiff was involved in a motor-vehicle accident and had instructed his attorney, the defendant, to lodge a third-party claim with the RAF. The attorney negligently failed to lodge the claim and it prescribed in July 1995. In October 2008 the plaintiff issued summons against the attorney for the sum that would have been paid out by the RAF. The summons was served on the attorney on 11 November 2008. The attorney contended that this claim had in turn prescribed. After referring to the applicable legal principles set out above, the court pointed out that, since the evidence showed that the attorney had wilfully withheld from the plaintiff the fact that he had not lodged the RAF claim, prescription could only have begun running against the plaintiff when he had become aware that his RAF claim was never lodged. This was only in January 2006, which meant that the plaintiff's claim had not prescribed when summons was served on the attorney.

SMYTH AND ANOTHER v MEW 2010 (6) SA 537 (SCA)

Close corporation - Members - Cessation of membership - Application for order for cessation of membership - Court retaining discretion whether to grant order for cessation of member's interest and of terms and conditions under which such disposition should occur - Member making application for such order to place sufficient information before court to enable it to make 'such further orders as it deems fit' in regard to acquisition of member's interest and financial adjustment to be made - Close Corporations Act 69 of 1984, s 36(1) and (2).

VAN DER MERWE v THE MASTER AND ANOTHER 2010 (6) SA 544 (SCA)

Will - Validity - Acceptance of document as will - Requirements - Deceased drafting but not signing document - Absence of signature not barring acceptance of

document as deceased's will where evident document intended as such - Wills Act 7 of 1953, s 2(3).

KRAWA NO v ROAD ACCIDENT FUND 2010 (6) SA 550 (ECG)

Practice - Pleadings - Plea - Amendment - Defendant, after pleading, filing notice formally conceding merits in favour of plaintiff, and offering to pay whatever damages proved - Minute of pre-trial conference thereafter stating that defendant had formally conceded merits and only aspect of quantum to be determined - Defendant thereafter applying for amendment of plea in order to deny (1) that one of minor children, in respect of whom loss of support claimed, plaintiff's child; and (2) that plaintiff had received support from deceased prior to her death - Proposed amendments relating to merits of claim as conceded by defendant, and not to quantum - Defendant's concession amounting to compromise of merits of plaintiff's action - Amendments, if granted, would result in court reopening issues relevant to merits - Court not having power to do so - Application for amendment dismissed - Uniform Rules of Court, rule 34(1).

Arising out of the death of his wife in a motor vehicle-accident, the plaintiff instituted action, in his personal capacity and in his capacity as father and natural guardian of two children born of the marriage of the plaintiff and the deceased, against the defendant for damages for loss of support. The defendant filed a plea denying that the driver of the vehicle concerned was negligent and averring that the accident was caused by the negligence of the driver of the vehicle in which the deceased was a passenger. However, the defendant subsequently served a notice in terms of rule 34(1) of the Uniform Rules of Court on the plaintiff, wherein 'it formally concedes the merits in favour of the plaintiff and offers to pay the plaintiff whatever damages he has suffered in consequence of his injuries sustained in the collision which occurred on 2 April 2004 to be proved in due course'. The parties later had a pre-trial conference and in para 2 of the minute of that conference it was stated that the 'defendant has formally conceded the merits in favour of the plaintiff and only the aspect of quantum is to be determined'. However, the defendant subsequently delivered a notice of intention to amend its plea. The effect of the proposed amendments would be (1) to deny that one of the minor children was the plaintiff's natural child, and (2) to deny that the plaintiff had received support from the H deceased prior to her death. The plaintiff objected to the proposed amendments, on the grounds that the defendant had formally conceded the merits of the plaintiff's claim, that the plaintiff had accepted the defendant's tender to concede the merits, and that, through the proposed amendments, the defendant purported to withdraw its concession of the merits of the claim. The application for the amendment of the plea was heard on the first day of the trial in the action.

**SA TAXI SECURITISATION (PTY) LTD v CHESANE 2010 (6) SA 557 (GSJ)
2010 (6) SA p557**

Credit agreement - Consumer credit agreement - Debt enforcement - Interim relief - A registered credit provider may obtain an order for the interim attachment of goods, pending the outcome of vindicatory or quasi-vindicatory proceedings.

FIRSTRAND BANK LTD v FILLIS AND ANOTHER 2010 (6) SA 565 (ECP)

Practice - Judgments and orders - Summary judgment - Verifying affidavit - Deponent thereof need not be authorised by plaintiff to depose to verifying affidavit - Uniform Rules of Court, rule 32(2).

Credit agreement - Consumer credit agreement - Debt rearrangement - Consumer in default of rearrangement order - When credit provider may proceed against consumer - Once jurisdictional requirement in s 88(3) (a) of NCA co-existing with any one of jurisdictional requirements in s 88(3) (b) , credit provider entitled to enforce by litigation any right or security under credit agreement without further notice - Restraint placed upon credit provider in such case falling away on express authority of s 88(3) of NCA - National Credit Act 34 of 2005, ss 86(7) (c) , 88(3) (a) and 88(3) (b).

RGS PROPERTIES (PTY) LTD v ETHEKWINI MUNICIPALITY 2010 (6) SA 572 (KZD)

Practice - Judgments and orders - Default judgment - Rescission - Court should not scrutinise too closely whether defence well founded - What is required is that, prima facie, there are sufficient reasons for allowing defendant to lay before court facts he thinks necessary to meet plaintiff's claim - Where defendant has never acquiesced in plaintiff's claim, but persisted in disputing it, court should be slow to refuse him opportunity of having defence heard.

Practice - Judgments and orders - Default judgment - Rescission - Default judgment inherently unconstitutional - In weighing up facts in rescission application, court to balance constitutional right of access to courts against facts leading to default judgment being granted in first instance - Court not seized with duty to evaluate merits of defence - But defence should not be such that it is nothing more than delaying tactic.

Local authority - Rates - Valuations - Objections - Local Authorities Ordinance affording aggrieved ratepayer right to file objection - In resolving disputes pertaining to rates, not open to parties to act outside provisions of ordinance - Rating authority and ratepayer to find solution within confines of law - Local Authorities Ordinance 25 of 1974 (KZN).

ARUFORSE v MINISTER OF HOME AFFAIRS AND OTHERS 2010 (6) SA 579 (GSJ)

Immigration - Illegal foreigners - Arrest, detention and deportation - Detention - Without warrant - Foreigner may only be detained without warrant for initial period not exceeding 30 days - Such period may be reduced if foreigner's application for confirmation of detention by magistrate's warrant produces no result within 48 hours, in which case he or she must be immediately released - Initial period of detention

may be extended by magistrates' court for further 90-day period - No further extension of detention permitted once magistrate has extended initial period - Immigration Act 13 of 2002, s 34(1).

NATIONAL PRIDE TRADING 452 v MEDIA 24 2010 (6) SA 587 (ECP)

Practice - Judgments and orders - Rescission - Order erroneously sought or granted in absence of party affected thereby - Respondent serving notice of intention to oppose but failing to serve answering affidavit - Matter set down on unopposed roll as 'uncontested opposed matter' - Eastern Cape rules providing that in such cases duty on respondent to inform applicant of date of hearing - Respondent having failed to do so - Court nevertheless granting order sought - Order erroneously granted and rescinded on that ground - Uniform Rules of Court, rule 42(1) (a).

HERALD INVESTMENTS SHARE BLOCK (PTY) LTD AND OTHERS v MEER AND OTHERS

MEER v BODY CORPORATE OF BELMONT ARCADE AND ANOTHER 2010 (6) SA 599 (KZD)

Sectional title - Common property - Exclusive use area - Liability to maintain - Proviso to s 37(1) (b) providing that body corporate shall require owners of sections with right to exclusive use of parts of common property to make additional contribution to defray costs of maintaining such parts - Exclusive use rights can be created by registration (s 27) or under rules (27A), and s 60(3) recognises such rights created by an agreement in force when 1971 Act applied, or under rules produced in terms of 1971 Act - Only if owner's right to exclusive use has one of these sources, it does owner come within proviso to s 37(1) (b) - Sectional Titles Act 95 of 1986, s 37(1) (b) .

STRUCTURED MEZZANINE INVESTMENTS v DAVIDS AND OTHERS 2010 (6) SA 622 (WCC)

Interest - Money-lending transaction - Lawfulness of interest rate agreed between parties - Requirements - NCA requiring interest below maximum interest rates prescribed by s 105 thereof - Conventional Penalties Act requiring proportionality between interest rate charged and prejudice suffered by creditor advancing loan - Public policy requiring interest charged not being usurious - National Credit Act 34 of 2005, s 105 and Conventional Penalties Act 15 of 1962, s 3.

Principal and surety - Surety - Liability - Interest on debt of principal debtor - Whether maximum interest rates prescribed by NCA availing surety - Where NCA maximum rates not applying to principal debtor, then also not applying to surety - National Credit Act 34 of 2005, s 4(2) (c) .

STRYDOM NO v THE MASTER AND ANOTHER 2010 (6) SA 630 (GNP)

Company - Winding-up - Liquidator - Remuneration - When entitled to draw remuneration - Matter not regulated by statute - Common-law requirement of confirmation of accounts by master before trustee may be paid applying also to

liquidators - No indication in Companies Act that legislature intended departing from common-law position - *Quaere* : Whether regulation purportedly empowering master to authorise payment of liquidator's fees before accounts presented for inspection *ultra vires* Companies Act - If master so empowered, power to be sparingly used - Regulations for the Winding-Up and Judicial Management of Companies, reg 24.

SANAN v ESKOM HOLDINGS LTD 2010 (6) SA 638 (GSJ)

Practice - Pleadings - Exception - Whether exception or special plea appropriate - Statutory bar to delictual claim - Nature of defence more important than procedure - Either defence suitable, provided that properly and timeously raised in intelligible form.

The plaintiff claimed a substantial amount in delict from his previous employer, in respect of damages suffered as a result of cancer allegedly caused by the negligence of the defendant's employees. The defendant took exception to the plaintiff's particulars of claim, in that s 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 barred such claims against an employer. The court, finding that the exception should be upheld, turned to the question of whether the statutory bar should have been raised by special plea, rather than by exception.

Held , that it seemed to be of little moment whether a particular defence was raised by way of exception or by way of special plea, provided that it was properly and timeously raised in an intelligible form.

DIRECTOR-GENERAL v KOVAC INVESTMENTS 2010 (6) SA 646 (GNP)

State - Actions by and against - Actions against - Notice of intention to institute action - Whether required - Claim for payment of arrears - Such constituting claim for specific performance, not damages - Accordingly, not claim for 'debt' as defined - Notice not required - Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3 read with definition of 'debt' in s 1.

Landlord and tenant - Rent - Claim - Claim for rent by joint lessor - In absence of contractual provisions to contrary, joint lessor having claim against lessee for his pro rata share of rent - Not necessary to join other joint lessors as parties to action. In determining whether a claim against an organ of State is a claim for a 'debt' as defined in s 1 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, the enquiry does not stop in para (a) of the definition. Paragraph (b) of the definition lists, in addition to the features mentioned in para (a) , another feature that the contractual, delictual or other claim must possess: it must be a claim for which an organ of State is liable for the payment of damages. There are therefore two legs to the enquiry whether a claim is a debt in terms of the Act. First, it must arise from a contract, a delict 'or any other liability'. Second, it must render the organ of State liable for damages.

Thus, a claim for the payment of arrear rental due in terms of a contract of lease is a claim for specific performance, and is not a claim for damages. The claim is accordingly not one for a 'debt' as defined in the Act, and the plaintiff is not required to give notice to the organ of State as required by s 3 of Act 40 of 2002.

ALL SA LAW REPORTS NOVEMBER 2010 (1)

Lombaard v Droprop CC [2010] 4 All SA 229 SCA

Also reported as **Lombaard v Droprop CC 2010 (5) SA 1 SCA**

Sale of immovable property-description of property

Whether the description of the immovable property was sufficient and adequate in terms of S 2(1) of the Alienation of Land Act 68 of 1981 – Practice – whether this court can exercise its discretion to refer the question of a dispute of fact back for the hearing of evidence when such point was not canvassed or considered by the court a quo, nor was it raised by the legal representatives.

This is an appeal against a judgment of the Durban High Court (Ndlovu J), in terms of which an application by Mr Jan Antonie Lombaard, the appellant, to compel a close corporation, Droprop CC and its members, to transfer immovable property to him, was dismissed with costs. The present appeal is before us with the leave of the court below. In the notice of motion the property sought to be transferred was described as Portion 526 (of 432) of the Farm Melkhoute Kraal No 789, Registration Division FT in the Durban entity, Province of KwaZulu-Natal, in extent 2,0797 hectares as more fully appearing on FT diagram number 782/1998. Mr Lombaard claimed the relief referred to in the preceding paragraph on the basis of an agreement of sale pursuant to the exercise of an option to purchase contained in a lease agreement between him and Droprop.

Held: that the agreement of sale resulting from the exercise of the option was invalid because the third respondent, notwithstanding that he was a member of Droprop, had signed the lease on its behalf without written authority. Second, the court below found that the description of the property sold did not comply with the requirements of s 2(1) of the Alienation of Land Act 68 of 1981 (the ALA), in that the land in question was not identified with reasonable certainty and that the purported sale was therefore invalid.

Appeal dismissed with costs.

Matlou v S [2010] 4 All SA 244 SCA

Criminal law –pointing out- appeal against conviction on charges of murder and robbery with aggravating circumstances – whether incriminating statements were admissible – whether evidence of the pointing-out of the deceased's body and a firearm was admissible.

Molotlegi v Mokwalase [2010] 4 All SA 258 SCA

Defamation – action for damages for defamation based on an innuendo – separation of issues in terms of rule 33(4) – trial court decided that the words are defamatory per se without reference to the innuendo – misdirection justifying the setting aside of its order – matter referred back to the court below for trial.

The Supreme Court of Appeal upheld the appeal by the appellants Kgosi Leruo Molotlegi of the Royal Bafokeng Nation and the Royal Bafokeng Administration from a judgment of the Mmabatho High Court (Mogoeng JP), which had granted judgment

in favour of the respondent, Mr Mosoko Mokwalase. Mr Mokwalase, was a team leader of the VIP Protection Team of the Royal Bafokeng Nation. At a protocol and security meeting attended, inter alia, by Kgosi Molotlegi, Mr Mokwalase and members of the protocol and security, Kgosi Molotlegi said to Mr Mokwalase: 'Mokwalase, you are fired. I don't want to see you again on my premises. You can excuse yourself.'

Mr Mokwalase issued summons against Kgosi Molotlegi and the Royal Bafokeng Administration alleging that he was defamed by the utterances. The court below ordered separation of issues in terms of rule 33(4). When the trial resumed before Mogoeng JP, the learned Judge President found that the words uttered were defamatory per se without any evidence of the special circumstances surrounding the utterances referred to above to prove the innuendo relied upon by Mr Mokwalase being led.

The Supreme Court of Appeal found that the learned Judge President erred in finding that the words per se, without any evidence of the special circumstances, were defamatory. The SCA set aside the judgment of the court below and referred the matter back to the court below for trial. Given the peculiar circumstances of this matter and the role played by the appellants in having the wrong issue decided by the court below, there, being no blame to attribute to Mr Mokwalase, the SCA found that it would be unfair and unjust to mult him with any costs.

Accordingly the appeal was granted but the appellants were ordered to pay the costs.

Opperman v S [2010] 4 All SA 267 SCA

Criminal procedure – sentence – rape and indecent assault – young children – influence on sentence of low intelligence and lack of insight of accused.

The appellants, twin brothers, were convicted in a regional court of two counts of indecent assault and rape. The two victims are the appellants' nephew and niece, ie their sister's son and daughter. The children were six and three years old respectively at the time of the commencement of the commission of the offences and the appellants were in their late twenties. The indecent assault charges were in respect of both the boy and the girl and the rape charge relates to the girl.

The first appellant was sentenced to six years' imprisonment for each indecent assault count and to 25 years' imprisonment for rape; and the second appellant was sentenced to six years' imprisonment on each count of indecent assault and 20 years' imprisonment on the rape count.

In both instances the sentences were ordered to run concurrently so that the first appellant was effectively sentenced to 25 years' imprisonment and the second appellant effectively to 20 years' imprisonment. The present appeal, with leave of the court below, was directed against sentence only. The appeal was dismissed.

Oribel Properties 13 (Pty) Ltd v Blue Dot properties 271 (Pty) Ltd [2010] 4 All SA 282 SCA

Section 25(13) Sectional Titles Act 95 of 1986 – changed circumstances – content of real right of extension reserved – standing of owner of section to apply for demolition of wall on common property.

The Supreme Court of Appeal upheld an appeal by the owner and the occupier of a section in the Theba Hoskens Sectional Title Scheme in Cape Town against the developer of that scheme. The appellants appealed against an order of the Cape high court dismissing their application for an order inter alia restraining the developer from transferring or ceding its right to extend the scheme by making the exclusive use of an area on the common property available to the owner of a different section in the scheme. The scheme was registered on 28 November 2007. It concerns an existing three story building in Cape Town. On the date of registration of the scheme two sections were transferred into the names of the first appellant and another person. By virtue of these transfers the body corporate was also established. As part of the application for the opening of the register and registration of the scheme, an eight page sectional title plan, approved by the Surveyor General, was lodged with the registrar of deeds. The scheme comprises five levels of which the third to fifth levels correspond with the first to third floors of the building. The section owned and occupied by the appellants is situated on the second floor of the building and consists of the whole of that floor less certain common areas like staircases and landings. The section on the first floor was later subdivided into three sections. On the extension plans relating to the second floor of the building it is indicated that a right is reserved for the developer to extend the plant area, ie the area that housed the defunct air-conditioning unit, adjacent to the appellants' section into the scheme by 'incorporating' it into that section so as to confer the right to the exclusive use of that area on the appellants. The appellants and the developer could not agree on a price to be paid for this right of extension and the developer resolved to sell and transfer this right to the purchaser of the section below. In terms of the Sectional Titles Act 95 of 1986 a developer is obliged to exercise the rights reserved strictly in accordance with the plans reflecting the extension. The Supreme Court of Appeal held that the developer was not entitled to transfer or cede the right reserved to any person other than the appellants. Any transfer or cession to the purchaser of the section below would not be in accordance with the right reserved. An order restraining the developer from transferring or ceding the right to any person other than the owner of the section owned and occupied by the appellants should therefore have been made by the Cape High Court.

Samancor Group Pensions Fund v Samancor Chrome [2010] 4 All SA 297 SCA

Pension-adjudicator-award

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.

Nunes v Crawford [2010] 4 All SA 304 WCC

Professiopnal body-Board of Architects-appeal-notice of appeal-applicant should get notice and should be afforded opportunity to give his view. PAJA also applicable.

Thabo Mogudi Security Services CC v Randfontein Local Municipality [2010] 4 All SA 314 GSJ

Tenders-audi alteram partem-not necessary when considering legality where councillor prohibited from taking part in tender process by Local Government Municipal Finance Management Act.

Quinella Trading (Pty) Ltd v Minister of Rural Dev and Land Reform [2010] 4 All SA 331 LCC

Restitution of rights in land-valid agreement-must be valid, Alienation of Land Act applicable.

Also reported as Quinella Trading (Pry) Ltd and Others v Minister of Rural Development and Others 2010 (4) SA 308 (LCC)

AII SA LAW REPORTS NOVEMBER 2010 (2)

AMI Forwarding (Pty) Ltd v Government of the RSA (Dept Customs and Excise) [2010] 4 All SA 347 SCA

Liability under ss 18 and 18A of the Customs and Excise Act 91 of 1964: whether clearing and forwarding agent had proved that it was not liable for payment of duties.

In my view, once AMI had proved that it had removed the goods in bond or in transit under s 18(3), it discharged the onus that it bore – it disproved the assumption created by s 102(4). When SARS alleged fraud, which it did in the plea, it had to prove that the bills of entry had been falsely acquitted. I can see no reason why the onus of proving fraud should shift from SARS to AMI simply because s 102(4) creates an assumption of liability that AMI must disprove. Once AMI has proved acquittal the usual rule must apply: the fraud must be proved by the party making the allegation – SARS. That it did not do. There was no acceptable evidence adduced, either documentary or through the witnesses Burger and Vorster, that the stamps on the four bills of entry had been falsified. SARS could not claim duties in respect of those bills.

Pitelli v Everton [2010] 4 All SA 357 SCA

Also reported as Pitelli v Everton Gardens Projects CC 2010(5) SA 171 SCA

Appeal-against order taken by default-not appealable

The North Gauteng High Court at Pretoria (Van der Merwe J) made a declaration and ordered Mr Pitelli, the appellant, to pay to Everton Gardens Projects CC, the respondent, the amounts of R382 500 and R607 611, together with related relief. Those orders were made on 22 June 2007 in proceedings from which Mr Pitelli pertinently absented himself. Mr Pitelli appealed against the orders with the leave of this court. The business of the respondent was the development of housing estates, mainly for the purpose of the government's Reconstruction and Development Programme. One of its projects was a massive development in an area known as Everton Gardens. It employed the services of Eldima Construction (Pty) Ltd to install the water reticulation and sewerage infrastructure. At the time that is now relevant Mr Pitelli was the sole shareholder and director of the company.

The basis of the claim, as it was stated in the founding affidavit, was that the retention of the moneys by Mr Pitelli when he knew full well that the company had been overpaid constituted conduct that occurred with intent to defraud the respondent. To that was added in argument that his conduct in protracting the proceedings that were brought for recovery of the money, not least by perjuring himself in resisting summary judgment, when those proceedings were bound to end in favour of the respondent, and by resolving to wind up the company so as to avoid the consequences of a judgment, constituted a course of deceitful conduct directed at preventing the respondent from recovering what Mr Pitelli knew to be due, which fell within the provisions of section 424.

The appeal was struck from the roll with costs.

Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd [2010] 4 All SA 366 SCA

Also reported as Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd 2010(5) SA 90 SCA

Marine Insurance: parties cannot exclude mandatory provisions of South African statute by choice of other legal system: validity of policy affected by non-disclosure, misrepresentation or illegality determined by reference to ss 53 and 54 of Short-Term Insurance Act 53 of 1998: vessel sinking as a result of latent defect in hull: Lloyds held liable. Second and third appellants, joined as defendants, not liable: entitled to full costs of trial.

Van Jaarsveld v Bridges [2010] 4 All SA 389 SCA

Van Jaarsveld v Bridges 2010 (4) SA 569 SCA

Marriage- breach of promise to marry

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.

Van Rensburg NO v Naidoo NO [2010] 4 All SA 398 SCA

Zoning rights— nature of rights derived from restrictive conditions in title deed stated to be subject to alteration discussed — zoning regulations and town planning schemes not overriding restrictive conditions — the Removal of Restrictions Act 84 of 1967 not applicable — power of Member of the Executive Council of the Eastern Cape Province to alter or amend restrictive conditions — delegation not properly proved — decision made without reference to written objections in any event liable to be set aside — power of court of the same division and of equal jurisdiction to set aside or otherwise interfere with order intended to be final in effect discussed — held that in the prevailing circumstances the court had no such power either by way of

inherent jurisdiction or in terms of the Uniform rules of court – held that justice required the prior order to be executed.

The Supreme Court of Appeal handed down judgment in two related appeals. First, it upheld an appeal against an order of Van der Byl AJ (Eastern Cape High Court), in terms of which he purported to declare parts of a judgment of Froneman J, in the same division of the high court, to be of no force and effect and made certain allied orders. Second, the SCA dismissed an appeal against an order of Dambuza J, in terms of which she reviewed and set aside a decision of the Member of the Executive Council of Local Government and Traditional Affairs, Eastern Cape Province (MEC) granting consent for the amendment of certain title conditions in respect of Erf 105, Summerstrand, Port Elizabeth, the property of the Shan Trust.

The opposing litigating parties are trustees of the Hobie Trust and the Shan Trust respectively. The Hobie Trust and Shan Trust are abutting neighbours in Summerstrand Township, Port Elizabeth. The Hobie Trust acquired erf 104 in 1989, whilst the Shan Trust acquired erf 105 in 1996. Both properties were subject to the restrictive conditions which in turn were subject to alteration and amendment by the then Administrator of the Cape Province. The restrictive conditions were to the effect that the properties were to be used only for private residential purposes.

At the time of acquisition of Erf 105, the only improvements were a main building and a double garage. The Shan Trust thereafter started effecting a number of improvements and erecting additional buildings on the property in three phases in furtherance of its guest house business. The municipality had granted the Shan Trust special consent to operate a guest house – initially four rooms for hire – later 11 rooms, subject to certain conditions. The Shan Trust did not adhere to the conditions imposed and the municipality withdrew the special use consent in 2007. The improvements, referred to above, were more often than not effected without the necessary approvals of the municipality.

The Hobie Trust subsequently launched an application against the municipality and the Shan Trust for an order to demolish the offending buildings and for the Shan Trust to cease operating business unlawfully. The application was heard by Froneman J, who, on 30 March 2007, after considering restrictive conditions and repeated transgressions by the Shan Trust ordered it to demolish the offending structures within 60 days of the order. The Shan Trust applied for leave to appeal the decision. The application was dismissed by the SCA and the Constitutional Court. This rendered Froneman J's judgment final. The Shan Trust however failed to comply with the order.

On 27 June 2007 the Shan Trust applied to the Premier of the Eastern Cape Province, for the removal of the restrictive conditions. On 16 October 2007, the MEC purported to grant the said application.

The Shan Trust subsequently applied for an order to declare certain parts of Froneman J's orders to be of no force or effect and to suspend the remaining orders. In the meantime, the Hobie Trust instituted review proceedings to have the MEC's decision set aside.

Van der Byl AJ, who heard that application, sitting as a court of first instance, suspended and nullified the orders granted by Froneman J. The review application referred to above in terms of which the decision by the Administrator to remove the

restrictive conditions was sought to be reviewed, was subsequently heard and the MEC's decision was set aside by Dambuza J. The decision was reviewed and set aside.

In regard to that decision, the SCA held that the decision by the MEC constituted administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that the MEC was obliged to consider the objections of the Hobie Trust and other affected residents before making the decision in that regard – the MEC had made the decision without reference to the written objections of the Hobie Trust. This court held further that the MEC lacked the statutory authority to make the decision as there had been no proper delegation from the Premier of the Province, the successor to the Administrator. The SCA thus held that the MEC's decision was rightly reviewed and set aside. It dismissed the appeal by the Shan Trust.

In regard to the decision of Van der Byl AJ the SCA found that the learned judge had failed to appreciate the full import of Froneman J's judgment and re-engaged on issues already decided by the latter. It held that Van der Byl AJ did what he was not empowered to do when he declared an order of equal jurisdiction to be of no force and effect. The court held that although a court has inherent jurisdiction to order a stay of execution or to suspend an order, such discretion must be exercised judicially and that in this case Van der Byl AJ erred in suspending the order. The SCA thus upheld the appeal by the Hobie Trust and set aside the order by Van der Byl AJ.

410 Voortekker Road Property Holdings CC v Minister of Home Affairs [2010] 4 All SA 414 WCC

Refugees Act-legality

Held:it is declared that the operation by the Department of Home Affairs of its Cape Town refugee reception office at the premises situate at erven 24125, 24129, 24150, 24151 and 24165, Cape Town, is unlawful by reason of the resultant infringement of the land use restrictions applicable to erven 24150, 24151 and 24165 in terms of the City of Cape Town zoning scheme regulations, read with s 13 of the Legal Succession to the South African Transport Services Act 9 of 1989;The first and second respondents are interdicted from continuing with the operation of the refugee reception office at the said premises until and unless the land use restrictions applicable to erven 24150, 24151 and 24165, Cape Town, are amended so as to permit of the lawful operation of the office at the premises.The operation of the interdict granted in terms of paragraph 2 is suspended- for a period of six months on condition that the Department procures the submission within two months of the date of this order of an application to the competent authority in terms of the Land Use Planning Ordinance 15 of 1985 by the owner of erven 24150, 24151 and 24165 for an appropriate amendment of the applicable land use restrictions to enable the lawful use of the said erven for the purposes of the operation of a refugee reception office at the said premises, and serves a copy of any such application on the applicant at the address of its attorneys of record within three days of the lodgement of any such application with the competent authority;alternatively,for a period of four months in the event that an application for an amendment of the land use restrictions is not submitted within the period stipulated in sub-paragraph .Without derogation from the foregoing, it is further declared that the current operation by the Department of Home Affairs of a refugee reception office at the said premises has

given rise to an actionable nuisance of the nature described in the reasons for judgment. The first and second respondents are interdicted from continuing with the operation of the refugee reception office at the said premises until the following measures are taken to abate the said nuisance: The onsite staff complement dedicated to the administrative work of the office at the said premises is to be increased from the current number of 44 (excluding interns) to not less than 90 (excluding interns); **The number of lavatories available for use by persons attending at the office is to be increased to a number determined in writing by the Medical Officer of Health of the City of Cape Town as being appropriate to address the demands of up to 1 500 daily visitors and as being compliant with the requirements of the National Building Regulations**, and in particular Part Q thereof pertaining to non-waterborne means of sanitary disposal. The operation of the interdict granted in terms of paragraph is suspended on condition that- the abatement measure described in sub-paragraph is effected within four months of the date of this order; an affidavit by the second respondent confirming compliance with the abatement measure described in sub-paragraph is filed with the Registrar of this Court and a copy thereof served on the applicant at the address of its attorneys of record within three days of the expiry of the period of four months provided for in terms of sub-paragraph of this order; the abatement measure described in sub-paragraph is effected within two months of the date of this order; an affidavit by the second respondent confirming compliance with the abatement measure described in sub-paragraph is filed with the Registrar of this Court and a copy thereof served on the applicant at the address of its attorneys of record within three days of the expiry of the period of two months provided for in terms of sub-paragraph of this order. The first and second respondents shall be liable, jointly and severally, the one paying the other being absolved, to pay the applicant's costs of suit, including the costs of two counsel.

Mantra Consulting (Pty) Ltd v Valor IT CC (Companies and Intellectual Registration Office Intervening) [2010] 4 All SA 449 GSJ

Contract-fees-payment in full and final settlement.

Due to the respondent's breach of contract, the applicant, addressed a letter of demand to it enclosing Invoice No. C1003 dated the 6 April 2009, and requesting payment of the globular amount of R10.494.682.78

On 17 April 2009 the respondent's attorneys addressed a letter to the applicant accompanied by a cheque, which reads:

"Our instructions are to place the following facts on record in relation to your claim invoice C003 dated 6 April 2009;

- 1. Our client admits that it is liable for the claim in terms of Clause 3.1.1.1 of the SAL;*
- 2. Our client is not privy to the claim purported to be under Clause 1.2 and records that none exist;*
- 3. No work has been performed and none has been required in terms of Clause 3.1.2.1 and therefore no liability accrues;*
- 4. Our client is making an offer of compromise to your claim in full and final settlement of his (sic) obligations and liability on Invoice C1003.*

This offer is made by the enclosed cheque in the sum of R2,5 million which has special clearance and can be liquidated today. Acceptance of this cheque shall be appreciated as acceptance of our offer. We reiterate that our client denied any further liability to your above-mentioned claim.....”

A cheque dated the 17 April 2009, payable to the applicant bearing the words “*in full and final settlement INV C1003*”, written at the foot of the cheque across its face, was attached to the letter.

In the premises the following order is made:

- (a) The respondent is ordered to make payment to the applicant the sum of R2.500.000.00 (inclusive of VAT) being the second payment in terms of *Clause 6.1.2 of SAL*, and interest thereon at the rate of 15% per annum a *tempora morae*; and
- (b) The aspects relating to Prayers 7, 8 and 9 are referred to trial for adjudication;
- (c) The applicant’s founding affidavit shall stand as the particulars of claim, respondent’s answering affidavit as the plea, and the applicant’s replying affidavit as the applicant’s replication;
- (d) The respondent is ordered to pay 50% of the applicant’s taxed legal costs.

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De Aguiar v Real People Housing (Pty) Ltd [2010] 4 ALL SA 459 SCA

Appeal-Application for leave to adduce further evidence – requirements restated – Enrichment-whether lessee entitled to rely on enrichment lien for expenses in respect of necessary and useful improvements.

The Supreme Court of Appeal dismissed an appeal by Mr Anselmo De Aguiar (the appellant) against an eviction order granted by the South Gauteng High Court, Johannesburg.

The appellant applied to the SCA for leave to lead new evidence so as to establish a lien over the property in question as a defence to a claim for his eviction from a smallholding in Meyerton, Gauteng. He alleged that he had spent 'considerable amounts of money' in respect of necessary and useful improvements to the property.

The SCA referred to previous authorities, where it was held that, in the interests of finality, the court's powers to allow further evidence 'should be exercised sparingly and further evidence on appeal should only be admitted in exceptional circumstances'. With reference to the facts on which the appellant relied, the SCA held that the appellant's application did not comply with any of the requirements laid down in the authorities. The appeal was accordingly dismissed with costs. The appellant and all other persons occupying the premises with him will now have to vacate the premises within 60 days from the date of the SCA's order.

Fedbond Participation Mortgage Bond Managers (Pty) Ltd v Investec Employee Benefits Ltd and Others [2010] 4 ALL SA 467 SCA

Contract – extrinsic evidence inadmissible to contradict written terms – evidence of terms of alleged common understanding inconsistent with written terms.

Collective Investment Schemes Control Act – withholding of consent by manager of a collective investment scheme – to be accompanied by reasons – failure to respond to notice of withdrawal amounts to withholding of consent without reason – does not relieve manager of obligations arising from agreement – relationship between participant and manager does not exclude manager's obligation to make payment to a participant who has complied with the agreement.

The Supreme Court of Appeal dismissed an appeal brought by Fedbond Participation Mortgage Bond Managers against an order of the South Gauteng High Court ordering it to make payment to Investec Employee Benefits Limited (IEB) of certain monies invested in Fedbond in terms of the Collective Investment Schemes Control Act 45 of 2002 (the CIS act).

Fedbond had resisted the IEB's efforts to withdraw its investments upon their maturity. Fedbond's primary contention was that IEB, who had under its initial name of Fedsure Life Assurance Limited, made the investments was not entitled to withdraw the investments because there was a common understanding underlying the investment agreement that the investments were for longer than the five year period stated in the agreement.

This argument was rejected by the high court on the basis that the terms of the disputed common understanding were inconsistent with the written terms of the written agreement and as extrinsic evidence was inadmissible to contradict terms of a contract reduced to writing; this argument could not be accepted. The SCA upheld this conclusion.

Fedbond had also argued that having withheld its consent to the withdrawal this also forestalled any attempts to the withdrawal. The SCA also rejected this argument holding that in terms of the CIS Act Fedbond, as the manager of the investment scheme, could only withhold consent to pay out moneys to the investor if it gives sufficient reasons for doing so. The SCA held that Fedbond's failure to respond to the notice of withdrawal amounted to withholding of consent without a reason which did not shield Fedbond from its obligation to respect the withdrawal notice.

The SCA also rejected Fedbond's argument that its relationship as manager, to an investor, arising in terms of the CIS Act was not that of debtor and creditor which meant that an investor could not approach a court demanding payment of its investment as was done in this case. The SCA reasoned that upon investments maturing the manager could not refuse to pay out unless it alleged default by a mortgagor who had taken out a loan linked to the investment.

Isaacs v S [2010] 4 ALL SA 481 SCA

Murder charge — State's case built on circumstantial evidence — items on circumstantial evidence to be viewed cumulatively — evidence as a whole must prove accused's guilt beyond reasonable doubt.

On Sunday 6th July 2003, Priscilla and Michael Heneke, the maternal grandparents of eight year-old Sasha Leigh Crook, watched their granddaughter play in and around their house at 47 Adrian Road, Ottery, Cape Town. They could not have imagined that later that day she would disappear and that eight days thereafter, during the early hours of Monday 14 July 2003, her body would be discovered in the vicinity of a rubbish dump in Muizenberg.

The appellant, Moegamat Yusuf Isaacs, was convicted in the Cape High Court of Sasha Leigh's murder. The conviction was based on circumstantial evidence and on statements he had allegedly made to his mother, Mrs Fatima Isaacs, in the presence of police. At material times the appellant, together with his wife and mother, resided right next door to Sasha Leigh's grandparents, at 45 Adrian Road, Ottery. He is the last known person to have seen her alive. It is common cause that some time after lunch on that fateful Sunday, Sasha Leigh had gone over to the front of the appellant's house, after she had spoken to him over the low fence separating the two homes, and that she had then followed him through a gate into the backyard.

According to the appellant, he had been under the influence of dagga and, although he had seen Sasha Leigh enter the yard behind him, he immediately went to sit at a table in the yard where he rested his head and had dozed off. He testified that he had no idea of what had happened to her thereafter. The appellant testified further that his mother's prospective tenant had come to drop off a refrigerator at the flat at the back of their house and that he had interacted with this person at about the time that Sasha Leigh had gone missing and that this had occurred before 14h00. According to the appellant he had departed the scene before 14h00 to be at a friend's house to watch a television movie scheduled to start at 14h00. This part of

his testimony was directed at showing that he could not have murdered Sasha Leigh. From the time that she had entered the yard at house no 45, Sasha Leigh was not seen in public again until the discovery of her body on 14 July 2003 by Mr Daniel Geduld, an employee of a private security firm who was patrolling the veld in an area known as Pelican Heights in Muizenberg. As will be seen in due course, the degree of decomposition of the body is relevant, as is a tiny fragment of a pressed wooden board having the appearance of a marble finish (of the kind found on kitchen surfaces), that the police allege they had found between the clothes that covered Sasha Leigh's body. The assessment of objective evidence is of crucial importance to a determination of the appellant's guilt.

What follows are the material parts of the evidence viewed cumulatively, that compel the conclusion that the court below did not fault:

- the appellant was the last known person to see Sasha Leigh alive.
- it is undisputed that Sasha Leigh had followed the appellant into the backyard.
- when Sasha Leigh's grandmother enquired whether she was there the appellant had not offered to look to see if indeed she was still in the yard.
- the fragment of wood found on Sasha Leigh's clothes and the perfect match with the wooden board found in the shed in the appellant's backyard point an accusing finger at the appellant.
- the items found in the paint container in the garage are similarly damning, particularly when one takes into account that the appellant had not disclaimed any of the items or the container.
- the statements made by the appellant to his mother, that were correctly admitted and accepted by the court below, viewed contextually amount to a confession and are consistent with the evidence of the pathologist and with the evidence of the Jacobs family that Sasha Leigh appeared to have followed the appellant into the yard. The recorded statement by Inspector Cilliers reflecting an invitation by the appellant to Sasha Leigh to enter the yard is consistent with that evidence. The confession is made all the more reliable thereby.
- had Sasha Leigh re-emerged from the appellants backyard, members of the Jacobs family would have been in the best position to see it. None of them saw her re-emerge.
- the suggested conspiracy against the appellant by the police is ludicrous. It would mean that the police, in anticipation of the discovery of the body, would have had to plant the wooden fragment which they would have had to acquire from the shed behind the appellant's house by stealth. In addition, they would have had to plant the items in the container in the garage and plant Sasha Leigh's DNA material on them. The investigating officer, Captain Naidoo, the forensic team and possibly the pathologist would have had to be part of such a conspiracy.
- The unsatisfactory nature of the appellant's evidence completes the mosaic.

The appeal was dismissed.

Naidoo v Absa Bank Ltd [2010] 4 ALL SA 496 SCA

Also reported as Naidoo v Absa Bank Ltd 2010 (4) SA 597 SCA

Insolvency-National Credit Act- sequestration 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).

Olivier v S [2010] 4 ALL SA 503 SCA

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

It has become common practice during the sentencing stage of a criminal trial for an accused's legal representative to make *ex parte* submissions from the Bar on his or her client's behalf. These unattested statements often contain material averments which impact directly on sentence considerations. The appellant, Mr Louis Johann Olivier, was convicted on his plea of guilty of six counts of fraud by the regional court at East London. The six counts were taken together for sentence purposes and a sentence of seven years' imprisonment, of which three years were suspended for a period of four years on condition that the appellant is not convicted of fraud or theft committed during the period of suspension, was imposed.

An appeal to the Eastern Cape High Court at Grahamstown (Jones and Alkema JJ) against sentence was unsuccessful. The present appeal against sentence is with the leave of the court below.

In a comprehensive written plea explanation the appellant admitted having perpetrated fraud in six instances in respect of monies entrusted to him by his clients for secure investment as their financial adviser. The frauds were committed over a period of approximately one year from 18 February 2002 until 5 February 2003. The total sum lost through the appellant's fraudulent conduct amounts to R807 000. The appellant explained that he, contrary to the express instructions of his clients (the complainants) that he should invest their money with either Sanlam or Old Mutual, handed the money to one Shane Richter who deposited same into the account of Mini Stores (owned by Richter) at FNB Kingwilliamstown. Richter was one of the appellant's clients. The complainants' cheques were cashed through a special arrangement that Richter had with a specific teller at FNB. Richter did not pay over the full proceeds of the amounts thus deposited, thereby causing loss to the complainants.

During the sentencing stage, the appellant's counsel did not lead any oral evidence and contented himself with an *ex parte* address on sentence from the Bar. Given the importance of this aspect it is necessary to quote in full counsel's opening remarks:

'Your Worship, in respect of sentence, I am not calling any evidence, I will address the court on sentence. ***However if there's anything that I'm saying that my learned colleague is not in agreement with, if she can just indicate and then we will consider whether it's necessary to call evidence to disprove [prove] our allegations***'.

The prosecutor did not take up this invitation to dispute any of the *ex parte* averments at that time, but instead challenged same in the course of her address on sentence.

Although the Court confirmed the sentence, it was very critical re the way the prosecutor handled the matter.

Body Corporate Croftdene Mall v Ethekwini Municipality 4 ALL SA 513 KZD

Interdict-disconnecting water- Section 102 of the Local Government Municipal Systems Act 32 of 2000

The Applicant sought an interdict prohibiting the Respondent from disconnecting or otherwise interrupting its supply of electricity and water. On or about the 21 June 1995 the first transfer of the 37 units of Croftdene Mall took place. It is common cause that in 1999 the Respondent had allocated two account numbers for Croftdene Mall. These account numbers were 832 6596 4691 and 696 0380 5285 the former was in the name of the Applicant whilst the latter was in the name of Croftas Holdings (Pty) Ltd. During October 2006 the Respondent consolidated these two accounts, together with the rates account for the mall.

Croftas Holdings (Pty) Ltd was liquidated in 1999. During the course of this liquidation, 27 units of their 37 units were sold in liquidation. At this stage the Applicant alleges that they were being controlled by the liquidators and the majority

shareholders of the mall. This is when, according to the applicant, a dispute arose with the Respondent. The dispute centred on the payment of the rates and services, that is, electricity and water for the mall. The Applicant avers that "*it was unclear exactly who was liable and for what in respect of payments due to the Respondent*". The Applicant was of the view that a percentage of those accounts needed to be paid by the liquidators.

The Applicant's case is that the Respondent acted unlawfully when it terminated the supply of electricity and water to the mall. It contends that, in terms of Section 102 of the Local Government Municipal Systems Act 32 of 2000, ('the Act') the Respondent could not have consolidated its accounts since there had been a dispute between them. In October 2006 when this consolidation of the two accounts together with the rates took place, a dispute existed between them, as regards the amounts claimed by the Municipality. The Applicant further alleges that all outstanding amounts due for electricity and water services were paid in full by December 2009.

The Respondent contends that the Applicant, as the body corporation of the mall in 1995, is responsible for payments for services and rates of the mall. It was common cause that various meetings were held between the parties during the period 16 July 2008 to 4 September 2008, an attempt to resolve the issue of the arrear rates and charges. The Respondent contends that these meetings were certainly not for the purpose set out by the Applicant but were used by the Applicant to try and convince them to reduce the amounts owed on the various accounts.

The aforesaid Ordinance allows the establishment of any accounts in order for the Respondent to regulate its finances. These accounts could be of revenue in nature and could expand between department and accounts in terms of Section 64 (1). In addition the Respondent has the power in terms of Section 68 to include in a single account different classes of charges of amounts due to it whether or not these relate to more than one account. In accordance with Section 64(1) the Respondent may establish various accounts such as rates account, water account, electricity account, sewerage account and the like. These charges or amounts are reflected in these different accounts as amounts due to the Respondent and can be consolidated into a single account in terms of Section 68. Section 68(h) empowers the Respondent to cut off the supply of water and electricity *if any amount reflected in the said account is not paid as if the aforesaid amount related to the supply so cut off*.

Respondent had the power to cut off the electricity and water services of the Applicant if the rates amount is not paid in its consolidated account.

The application was dismissed with costs which included those consequent to the employment of two Counsel.

Minister of Safety and Security and Others v Mohamed (1) 4 ALL SA 521 WCC

Criminal procedure-search warrant-section 20,21 of CPA.

Respondent raised several objections against the issuing of a search warrant: the warrant was made *ex parte* and without notice to him; that the issue of the warrant imposed limitations on his rights to dignity (section 10), privacy (section 14) and

freedom to practice trade, occupation and profession (section 22) and such limitations were not reasonable and justifiable in terms of section 36 of the Constitution; the terms of the warrant were too general and over-broad; the Third Appellant did not apply his mind properly to the matter when exercising his discretion to authorise the warrant.

NB: The court *a quo* disposed of the case on another issue, namely that the Third Appellant did not have evidence under oath which was a prerequisite for the granting of a warrant of search and seizure in terms of section 21 read with section 20 of the Criminal Procedure Act, No 51 of 1977 ("the Act").

Minister of Safety and Security and Others v Mohamed (2) 4 ALL SA 538 WCC

Appeal-section 22 (a)—power of hearing further evidence on appeal-requirements.

The appeal was upheld in part and dismissed in part. See the summary above.

W v Atoll Media (Pty) Ltd [2010] 4 ALL SA 548 WCC

Delict-invasion of privacy and defamation-minor

The guardian of a minor sued for R500 000.00 for damages against the editor and publisher of a magazine. The minor, T, was 12 years old. The photo was published in the Zigzag magazine of April 2006 without consent.

Judge Dennis Davis found it was "properly proved" that the publication was negligent in using the "pin-up" picture without the girl's knowledge or her and her parents' consent.

This finding was "fortified" by Section 28 of the constitution which found that the child's best interests were always paramount. He also found the appropriation of her image for the publication's commercial advantage infringed her dignity and privacy.

The Eastern Cape girl's mother first sued the publisher Atoll Media and Zigzag editor Will Bendix for R500 000, but later said the claim was not about money but about her daughter's shattered dignity.

The mother said they would have been happy with an apology, but none was forthcoming.

Although photographed from the back, the girl said people in her community, and especially the surfing community, recognised her because she spent the summer on the beach in that bikini, tied in her way.

The picture appeared in a 16-page spread, "Dishing up the photo feast", with the slang term "Pure Filth" stamped across it. Her caption read "all-natural Eastern Cape honey".

The picture was pinned up in a boys' high school and in a shop. A man her mother knew commented on its appeal, and it was briefly flighted on SuperSport. She was incessantly teased that she was a "slut" and "porn star".

The girl said the words "pure filth" had "destroyed" her, while her mother said she was robbed of her innocence.

The magazine, which is over 30 years old and has more than 30 000 readers, argued that surfers would know the slang term "filth" meant excellence.

It also said the picture was submitted by freelancer Al Nicoll who did not tell them the girl was 12, and they did not need her name because she was not identifiable.

The magazine argued she would only have been recognisable to close family and friends who would not have associated her with "filth" in the traditional sense. The publisher also could not have foreseen its further dissemination.

Editor Will Bendix conceded he probably would not have used the picture had he known she was 12.

Judge Davis said: "In my view it was certainly foreseeable that taking so provocative a photograph of a young girl who is a member of a small community would result in her being the subject of both speculation and identification; particularly a photograph which was described as 'a pin-up photo'."

To reasonable readers with ordinary intelligence, "filth" had negative connotations, he found.

The court was referred to websites on surf slang but heard no expert evidence that established "a secondary meaning ... within the context of a South African readership".

Held:1. The picture of Taryn together with the words contained in the Zigzag magazine of April 2006 are wrongful and defamatory of Taryn as a result of which she was defamed which caused damage to her good name and reputation.

2. Defendants, jointly and severally the one paying the other to be absolved are ordered to pay the amount of R10 000. 00,with costs.

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S v NZIMANDE 2010 (2) SACR 517 (SCA)

Appeal - By Director of Public Prosecutions or other prosecutor, in terms of B s 310 of Criminal Procedure Act 51 of 1977, on question of law - What constitutes 'question of law' - Appellant convicted on basis of inferences drawn from primary facts - State's complaint not that trial court having committed error of law, but that it having drawn incorrect inference from facts - Such error one of fact, not of law - Not conferring upon State right to appeal - Accordingly, High Court not having had jurisdiction to entertain appeal.

The appellant, an attorney, was acquitted in a regional court on 197 charges of fraud, all relating to claims submitted by him to the Legal Aid Board for professional services rendered by his firm. The trial court found that, while there had clearly been irregularities in numerous of the appellant's claims, these might have arisen from gross negligence on his part; it could not be inferred beyond reasonable doubt that he had had the intention to defraud.

The State appealed to the High Court against the acquittal, contending that the acquittal had been based on a question of law. The High Court upheld the appeal, set aside some of the acquittals, and convicted the appellant on certain counts; it then remitted the matter to the trial court for the imposition of sentence. The view of the High Court was that the question of the appellant's guilt or innocence had to be determined by inference drawn from common-cause facts. Such an inference was a matter of legal, rather than factual, reasoning, and it had therefore been open to the State to lodge an appeal in the matter. The appellant then appealed against the decision of the High Court, contending that the appeal to the High Court had in fact been on a question of fact, and should accordingly not have been entertained by it.

Appeal upheld.

S v EB 2010 (2) SACR 524 (SCA)

Appeal - Application for hearing of further evidence - Evidence not available at time of sentencing - Requirements to be satisfied - Reasonable explanation of why such evidence not led at trial - Prima facie likelihood of truth of evidence - Evidence materially relevant to outcome of trial - Appellant failing all three requirements - New evidence not materially relevant since direct imprisonment only legitimate sentencing option and evidence sought to be introduced not resulting in non-custodial sentence - New evidence not prima facie likely to be true: discrepancies between evidence of probation officer and psychologist, and what appellant claiming in her affidavit - No exceptional or peculiar circumstances present justifying reception of evidence - Application dismissed.

The appellant was convicted in a regional court on 67 counts of fraud involving a total amount of R330 000. The frauds were all committed against her employer, a close corporation. After a correctional supervision report had been submitted, and after hearing evidence from a probation officer, the trial court sentenced the

appellant to five years' imprisonment, of which two were conditionally suspended. Four months later the appellant applied for leave to appeal against the sentence and to lead further evidence which had allegedly not been available at the time sentence was imposed. The evidence in question was to the effect that the appellant's mother had died and that, consequently, the appellant's two minor children were being deprived of the necessary care and love that they needed while their mother was imprisoned. The appellant submitted that it was in the interests of the children that a non-custodial sentence be imposed. Her appeal to the High Court was dismissed, along with her application to lead further evidence, but she was granted leave to appeal to the Supreme Court of Appeal.

Held, that the court had laid down requirements that were to be complied with before it would be prepared to hear evidence on appeal: there should be a reasonable explanation of why the evidence sought to be led had not been led at the trial; there should be a prima facie likelihood of the truth of the evidence; and the evidence should be materially relevant to the outcome of the trial. Furthermore, while the general rule was that an appeal court would decide on the correctness of a judgment on the basis of facts in existence at the time it was given, this rule was not invariable, and had recently been relaxed to allow evidence that had arisen subsequent to the imposition of sentence where exceptional or peculiar circumstances were present. However, the court's more liberal approach was not to be seen as an opening of the floodgates; applications were to be carefully scrutinised to ascertain whether or not they disclosed exceptional or peculiar circumstances.

Held, further, regarding the likelihood of the truth of the evidence, that it was not the usual practice of the court to refer a matter back to a trial court for re-imposition of sentence where a misdirection was discovered; in the interests of saving unnecessary delay and expense, this approach should apply equally where evidence which was admitted by the State was allowed on appeal. As to the requirement of material relevance, an appeal court should allow evidence only if it was satisfied that there was at least a probability, not merely a possibility, that the evidence, if accepted, would affect the outcome. However, the evidence would not have to be decisive.

Held, further, that the appellant's application failed to satisfy all three of the requirements. Firstly, the new evidence was not materially relevant: she had been sentenced on the basis that her mother, who was already seriously ill at that stage, would not have been able to assist in caring for the children. In any event, direct imprisonment was the only legitimate sentencing option, and the evidence the appellant sought to introduce would not result in a non-custodial sentence. Secondly, the application did not satisfy the requirement that there should be a prima facie likelihood of the truth of the evidence. There were discrepancies between the evidence of the probation officer and what the appellant claimed in her affidavit; there were also discrepancies between her allegations and the psychologist's report concerning the availability of other people who could assist in caring for the appellant's children. Thirdly, there were no exceptional or peculiar circumstances present to justify reception of the evidence. The fact that the children's grandmother could not act as a physical caregiver for them was an existing fact when sentence had been passed, not a consequence of her later death. No doubt, the children had been left in an emotional void once their mother, and thereafter their grandmother, were no longer part of the household. However, their emotional needs could not

trump the duty properly to punish criminal misconduct where the appropriate sentence was one of imprisonment.

HOCO v MTEKWANA AND ANOTHER 2010 (2) SACR 536 (ECP)

Arrest - Detention in terms of s 50 of Criminal Procedure Act 51 of 1977 - Whether lawful - Plaintiff not brought before court within 48 hours or released on expiry thereof - Defendants claiming such period extended in terms of s 50(1) (d) (iii) as plaintiff outside jurisdiction of court authorising warrant - Incumbent on police to make arrangements to bring plaintiff C before court within prescribed period - Reliance on s 50(1)(d)(iii) misplaced, as plaintiff not in transit at time of expiry of 48 hour period - Once plaintiff's detention becoming unlawful on Friday, not becoming lawful again on Monday without fresh warrant issuing - Plaintiff unlawfully detained for four days.

Damages - Measure of - For unlawful detention - Plaintiff detained for four days without being brought before court - Suffering embarrassment by being transported as criminal in presence of his minor child - Loss of esteem - Exposed to squalor of prison cells - Taken away from home and business - Released from custody hundreds of kilometres away from home, and left to pay for own transport back - Award of R80 000 and costs appropriate.

The plaintiff was arrested, in terms of a warrant, at around 12 noon on Wednesday 13 February 2008 in Port Elizabeth and held until 18 February. He was then transported to Gugulethu in Cape Town, held overnight, and released on 19 February. It was common cause that the plaintiff's arrest and his detention from 13 to 15 February, having been authorised by a warrant, was lawful; the plaintiff contended, however, that his further detention up to 19 February was unlawful, and he sued for damages in that regard. His uncontested evidence was that he had been arrested in connection with a dispute regarding one of his minor children. After 48 hours had expired he was informed that he was to appear in court in Cape Town, but that, as the police from that city had not arrived to fetch him, he would be held over the weekend of 16 - 17 February in Port Elizabeth. He was then fetched on Monday 18 February, driven to Cape Town, together with his child, held overnight and released the following day. The defendants chose not to lead evidence, but in argument on their behalf it was submitted that it was impossible for the police to have caused the plaintiff to appear before a court on 16 or 17 February, as that was a weekend; that he could in any event not appear in a Port Elizabeth court, as the warrant specified that he was to appear in Cape Town; and that, in terms of s 50(1) (d) (iii) of the Criminal Procedure Act 51 of 1977, when a person was outside the court's area of jurisdiction and was in transit to such court, the period of 48 hours after arrest was deemed to expire only at the end of the court day next succeeding the day on which the person was brought into the court's area of jurisdiction.

Held, that there was no evidence to support the submissions made on behalf of the defendants. It was incumbent on the police, having arrested the plaintiff, to make arrangements to bring him before court within the prescribed period. In any event, the defendants could not rely on s 50(1) (d) (iii), as the plaintiff had not been in transit at the time of expiry of the 48 hour period - he was still in detention in Port Elizabeth. Furthermore, if the plaintiff's detention during 16 and 17 February was unlawful, it could not have become lawful again on Monday 18 February A without a

fresh warrant having been issued. Accordingly, the plaintiff's detention from 12 noon on Friday 15 February until his release on 19 February was unlawful.

Held, further, concerning the quantum of damages, that the police's conduct gave the impression that they had failed to appreciate the seriousness of depriving the plaintiff of his liberty. They had also failed to take reasonable and necessary steps to protect his interests and to comply with the law relating to arrest and detention. The plaintiff had suffered embarrassment by being transported as a criminal, and the continued detention must have lowered the esteem in which he was held by his minor child. He had been exposed to the squalor of prison cells, taken away from his home and business, released from custody hundreds of kilometres away from home, and left to pay for his own transport back. An award of R80 000 was appropriate in the circumstances. As to costs, even though the amendment of the plaintiff's particulars of claim (to exclude the first two days of detention) had placed the probable quantum of damages within the jurisdiction of a magistrates' court, it had been agreed between the parties that the matter would remain in the High Court. It would accordingly not be just, as urged by the defendants, to award costs on the magistrates' court scale. Judgment in favour of plaintiff in the amount of R80 000 with costs.

S v MM 2010 (2) SACR 543 (GNP)

Sentence - Prescribed sentences - Minimum sentences - Imposition of in terms of s 51 of Criminal Law Amendment Act 105 of 1997 - 'Substantial and compelling circumstances' - Inappropriateness of prescribed sentence itself can amount to such compelling circumstance justifying lesser sentence.

S v MAPHUMULO AND ANOTHER 2010 (2) SACR 550 (KZP)

Evidence - Of identification - Assessment of - Evidence of identification always to be evaluated with caution - Treatment of evidence must demonstrate that caution applied - Such demonstration missing in judgment of trial court - Where reasons given for accepting identification evidence unsatisfactory, court of appeal at large to come to own conclusion on matter.

Evidence - Assessment of - Identification - Whether evidence sufficient to convict - Crime committed in broad daylight - Witnesses close by - Single witness identifying second appellant having clear view - However, witnesses having short time to observe appellants - Regarding first appellant, three witnesses testifying that he was well known to them - This, together with mutual corroboration, sufficient to remove all danger that first appellant wrongly identified - Position different concerning identification of second appellant - Only one witness identifying him as having been present - His opportunity reliably to observe second appellant not tested - Although this appellant well known to other two eyewitnesses, they had not identified him - Reliance on such uncorroborated single witness I evidence risking grave injustice - Second appellant's conviction set aside.

The two appellants were each convicted on one count of murder and four counts of attempted murder. The first appellant was also convicted of unlawful possession of a firearm and unlawful possession of ammunition. They appealed against their convictions only, arguing that the court a quo had erred in finding that they had been

reliably identified as the perpetrators of J these offences. It was further argued that, since bad blood existed between the family of the first appellant and that of the deceased and some of the other complainants, the court a quo should have found that the witnesses had a motive falsely to implicate the appellants. In addition, the second appellant had been identified only by a single witness, and the court a quo had failed to approach this evidence with the necessary caution.

S v ABADER 2010 (2) SACR 558 (WCC)

Evidence - Circumstantial evidence - Assessment of - Inferential reasoning - Ballistics evidence proving that appellant's firearm murder weapon - Only appellant and one other having had access to firearm, but no suggestion that other person anywhere other than at home on night of murder - Witnesses present at social function and supposedly able to confirm appellant's alibi not called to testify - Possible for appellant to have absented himself from function, commit murder, and return - No reasonable inference to be drawn other than that it was appellant who had committed murder.

The appellant was convicted of murder, arising from a shooting incident, and sentenced to 18 years' imprisonment. At trial the appellant put forward an alibi defence, alleging that he had been at a social function in another suburb on the evening in question, and that he had, in any event, not had his firearm with him - he had left it in the safekeeping of a relative, A. On appeal against conviction it was argued that the forensic evidence, proving that the appellant's firearm had been used to commit the murder, ought to have been rejected; that his alibi evidence was reasonably possibly true; and that he could not have absented himself unnoticed from the function for the time necessary to commit the murder.

Appeal dismissed.

S v SENYOLO 2010 (2) SACR 571 (GSJ)

Fundamental rights - Right to a fair trial - Right to benefit of least severe of prescribed punishment where prescribed punishment changing between time of commission of offence and time of sentencing - Section 35(3)(n) of Constitution of Republic of South Africa, 1996 - Court a quo erring in sentencing appellant in terms of amended provisions of s 51(3)(aA) of Criminal Law Amendment Act 105 of 1997, since these provisions not in force at time of commission of offence - Sentence to be imposed afresh, taking into account relevant factors since excluded by s 51(3)(aA).

The appellant was convicted in a regional court on two counts of raping a 10-year-old girl, and sentenced to life imprisonment. The incidents occurred on 10 and 25 November 2007. He was sentenced in accordance with the provisions of s 51 of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, which came into operation on 31 December 2007; in terms of these amendments, the regional court was given jurisdiction to impose life sentences for certain offences, including rape where the complainant had been raped more than once by the accused. Act 38 of 2007 also

introduced s 51(3)(a A) into Act 105 of 1997, which provided that four specified factors would not constitute substantial and compelling circumstances, justifying the imposition of lesser sentences than those prescribed. These were the complainant's previous sexual history; lack of physical injury to the complainant; the accused's cultural or religious beliefs about rape; and any prior relationship between the accused and the complainant. In effect, therefore, the appellant was sentenced in terms of provisions which had come into force after the commission of the offences. He appealed both conviction and sentence.

The crime was an inherently serious one, and it had been aggravated by the youth of the complainant, the recurrence of the rape after a period of two weeks, and the fact that she had been lured with the promise of a cell phone, thus creating the impression of consent on her part. However, this was not a case in which a sentence of imprisonment for life would be a proportional and constitutional sentence.

Appeal against conviction dismissed. Appeal against sentence upheld. Sentence of life imprisonment set aside, and appellant sentenced to ten years' imprisonment on each count.

S v MQIKELA 2010 (2) SACR 589 (ECG)

Rape - Sentence - Life imprisonment - Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 - 'Substantial and compelling circumstances' justifying lesser sentence than prescribed sentence - Seriousness of rape in eyes of legislature reflected in sentences laid down in Act - Categories of rape for which life imprisonment prescribed not to be blindly implemented, automatically resulting in life sentence - That case falling within particular category might aggravate what is already inherently serious crime, so that it can properly be regarded as among most serious of rape cases, but that not necessarily so - Court to conduct balancing exercise of all relevant factors.

DE KOKER v MINISTER OF SAFETY AND SECURITY 2010 (2) SACR 595 (KZD)

Arrest - Legality of - Arrest without warrant - Police arresting and detaining plaintiff on suspicion of drunken driving - Suspicion proving to be groundless - Embellishing evidence to suggest other driving offences by plaintiff - Police not in uniform and driving unmarked vehicles - Failing to identify themselves clearly to plaintiff - Police unreasonably rejecting plaintiff's explanation for failure to stop - Police's conduct unreasonable and disproportional - Arrest, detention and charging of plaintiff unlawful.

Damages - For unlawful arrest and detention - Defendant liable to pay damages to plaintiff's person and property.

The plaintiff sued the defendant for damages for unlawful arrest and detention, and for damages caused to his vehicle and that of a third party, with which he had collided. The suit arose from an incident in which the plaintiff, believing himself to be the victim of a hijacking, drove away from a group of police officers before coming to a halt after colliding with another car in an intersection. He was arrested on suspicion of driving under the influence of alcohol, released the same night on bail, and

appeared the following day I in court, whereupon all charges were withdrawn. A number of issues arose for determination: had the plaintiff proceeded through a red traffic light and almost collided with the defendant's vehicle; had the police officers identified themselves to the plaintiff when they initially stopped him; had the plaintiff then driven through several red traffic lights before colliding with the third party's vehicle; was the police officers' suspicion, that the plaintiff was under the influence of alcohol, reasonable; was their rejection of his explanation, that he had believed that he was being hijacked, reasonable; and was the police's conduct at all times reasonable and justifiable?

Plaintiff's claim upheld with costs.

S v MARAIS 2010 (2) SACR 606 (CC)

Appeal - Leave to appeal - To Constitutional Court - Whether constitutional issue raised - If so, whether in interests of justice to grant leave - Whether court able to order hearing of further evidence - Applicant contending that trial court misapplying legal rules applicable to criminal trials and leading of evidence, particularly regarding 'battered woman syndrome' - Fairness of trial therefore compromised - Pith of applicant's complaint no more than that trial court wrong on the facts - Dissatisfaction with court's factual findings not itself raising constitutional issue and thus application for leave to appeal must fail - Both High Court and Supreme Court of Appeal, having refused leave to appeal conviction, functus officio - *Since no* constitutional issue raised, Constitutional Court having no power either to reopen case for further evidence or to remit matter to SCA or High Court.

Appeal - Parties - Amicus curiae - Application for admission as - Where main application failing to be dismissed as not raising constitutional issue, and since application to be admitted as amicus curiae always ancillary and subservient to main application, request to become amicus also failing.

Court - Constitutional Court - Powers of - Neither Supreme Court Act 59 of 1959 nor Criminal Procedure Act 51 of 1977 giving Constitutional Court express power, when refusing leave to appeal in criminal case, to undo prior refusal of leave to appeal to another court and to remit matter to A another court - In absence of constitutional issue, court not empowered to set aside Supreme Court of Appeal's refusal of leave to appeal, and grant leave to either full bench of High Court or to SCA.

The applicant was convicted in the High Court of murdering her husband, and sentenced to life imprisonment. Both the High Court and the Supreme Court of Appeal (SCA) refused her leave to appeal against the conviction, but the former granted her leave to appeal the sentence, which appeal was pending at the time of the Constitutional Court application. The applicant's approach to the Constitutional Court was grounded on the argument that the trial court had breached her right to a fair trial under s 35 of the Constitution of the Republic of South Africa, 1996, in that it had dismissed her defence of having been a battered woman, and instead found that she had hired people to carry out her husband's murder for financial gain. She contended that the trial court had misapplied certain legal rules applicable to criminal trials and the leading of evidence, particularly regarding 'battered woman syndrome', and that this had compromised the fairness of her trial. The court had therefore to decide, firstly, whether the application raised a constitutional issue; and, if so, whether it was in the interests of justice to hear the appeal; secondly, whether it

should hear further evidence on 'battered woman syndrome'; and thirdly, whether it should admit a prospective amicus curiae to the proceedings.

Held, that the 'legal rules' allegedly breached by the trial court appeared to relate to the caution that a court should observe when making factual findings.

Held, further, however, that a question remained: whether it was open to the court to receive further evidence that might upset the trial court's conviction, or to remit the matter to either of the courts a quo to receive such evidence. Both the applicant and the prospective amicus curiae sought to introduce new matter that had not been tendered before the trial court, and which was directed at contesting the correctness of that court's findings on the battered woman syndrome. Once an application for leave to appeal had been disposed of, the High Court that had finally determined the matter was rendered *functus officio* and ceased to have the power to entertain an application to lead further evidence, unless the matter was remitted to it by the SCA.

S v BARENDSE 2010 (2) SACR 616 (ECG)

Sentence - Imposition of - Factors to be taken into account - Advanced age of offender - Must be taken into account - Twenty years' imprisonment imposed on 72-year-old man for indecent assault and rape of young girl in his foster care - Such sentence, in effect, one of life imprisonment - Sentence reduced on appeal to one of ten years' imprisonment.

Just as youthfulness is a factor to be taken into account in the imposition of sentence, so is the advanced age of the offender also such a factor, but for different reasons.