

LEGAL NOTES VOL 12/2010

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EDITORIAL

Lets' end the year by starting with a nice X-Mass case!! SEE WINGAARDT AND OTHERS v GROBLER AND ANOTHER 2010 (6) SA 148 (ECG)

This case reminded me of the attorney who helped his father to come with motion proceedings against the autistic house, of which I was chairman, and where my late son was. The basis was nuisance. These people, so they averred, were making too much noise, yet 50% could not talk! But the house is still going on strong, eight years later. (The attorney made as if he was my friend yet he did not want my son to live next door to his father, *esse quam videre*.¹)

OTHER MATTERS:

Adv Quim De Freitas presided as magistrate in the first human tissue case IN THE WORLD! Netcare was fined R7.8 million. The state will now prosecute surgeons and doctors who were involved. Watch out for the green eyed monster who is worse than lust, greed is its alias. It is a pity that this monster abuses minors as well, apparently 5 minors donated kidneys.

Congratulations Quim!

The Mercury of 15 October 2010 had the following report:

"The pupillage system for advocates may be an "unnecessary obstacle" to recruits to the bar, a senior counsel has told the Judicial Service Commission.

Johan Ploos van Amstel, SC, of Durban, was being interviewed for a permanent post as a judge in the KwaZulu-Natal High Court.

He said most entrants wanting to go to the bar were attorneys with three or four years' experience.

"Maybe (the attorney is) married and he's got a young child. Now he's got to do pupillage for a year, with no income. And I just question whether that system doesn't need to be revisited.

¹ To be rather than to appear, in other words do not be a hypocrite.

"How many young (black) attorneys can take a year off and say 'I'm now going to do pupillage with no income for a year'?"

Pupillage is a system in which an aspirant advocate is placed under the mentorship of an experienced advocate, attends formal lectures, and writes a bar exam.

Ploos van Amstel said an alternative might be to allow candidates to study for the bar exam in their own time, without doing full pupillage.

"And depending on his experience, and his performance in the bar exam, you may then say to him, 'You come and do two or three months' pupillage and then you can practise', maybe under some sort of supervision.

SEMBLE

This is exactly what IAASA is doing!
Congratulations to adv Dougie Shaw who was the best pupil this year and who passed cum laude! (85%)

We made a review of the IAASA advocates who have been admitted more than ten years ago and there are 57, not bad.

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SOUTH AFRICAN LAW REPORTS
NOVEMBER 2010

The jingle bells case!

WINGAARDT AND OTHERS v GROBLER AND ANOTHER 2010 (6) SA 148
(ECG)

Nuisance - What constitutes - Christmas lights at home in residential area - Lights attracting sightseers who create noise - Lights not constituting nuisance. Displaying Christmas lights at a home in a residential area, from 19h00 to 23h00, from 14 December to the end of the first week of January, where this attracts sightseers who create a noise, will not constitute a nuisance.

The issue in this appeal concerns the question whether or not the switching-on of Christmas lighting in and outside her house in Jeffreys Bay by the respondent constitutes a nuisance or disturbance of the appellants' right to free and undisturbed use and possession of their property. The appellants sought a final interdict in the Humansdorp magistrates' court for an order prohibiting the respondents from switching on any Christmas lights at their home during the festive season, which order was refused by the court a quo. The appellants come on appeal against such refusal.

Since November 2004 the respondent and her husband have been decorating the exterior of their double-storey home with Christmas lights and various other Christmas decorations. The string of lights follows the contours and apex of the upper roof and gables, and then runs along the fascia of the lower roof, to eventually extend into the garden, decorating trees and a number of smaller handmade decorations, such as images of stars, trees and also that of a Christmas Father. In addition, a 'live' Christmas Father was also present. The decorations and lightings create an atmosphere of festive cheer and Christmas spirit and, not surprisingly, attract locals and visitors alike to view the spectacle. Parents take their little children to see and experience the festive spirit, and the children become enthralled by the live 'Father Christmas' sitting and walking in the front garden. Of course, the noise levels, caused by vehicles stopping and starting and by people talking and laughing, increase.

It appears that from 2004 a custom developed whereby parents would surreptitiously leave Christmas presents for their children with the 'Father Christmas', and then take the children on Christmas Eve or Christmas Day to the house to collect their presents from him. In addition, sightseers are invited to make monetary donations which are used by the respondent to support two charity organisations, namely the St Francis Hospice (Kouga) and the Hankey Children's Home. This much is common cause. These factors nevertheless contribute to the increase of activity and noise levels.

The appellant (applicant in the court a quo) is an elderly, retired housewife and pensioner who lives with her husband, also a pensioner, in their home which is situated diagonally opposite that of the respondent; or, put differently, directly opposite the immediate neighbour of the respondent. The appellant's house fronts on

AD Keet Street (which intersects Nell van der Poll Street) and is situated on the corner of Nell van der Poll Street (where the respondents live) and AD Keet Street. Nell van der Poll Street runs roughly from east to west and AD Keet Street from north to south.

It appears that the living area of the appellant's home fronts on AD Keet Street, but the main bedroom fronts on and looks out to Nell van der Poll Street, where the respondents live. A photo taken from the respondents' home in Nell van der Poll Street, of the appellant's home, shows that a massive tree obscures most of the rear side of the appellant's home where the bedroom is situated.

AD Keet Street is a busy thoroughfare and vehicular traffic in both AD Keet and Nell van der Poll streets increases dramatically during the festive period of December and January of each year. Such increase is compounded by the activities at the respondent's residence.

In the past the respondent switched the lights on from 1 December until the end of the first week of January. Since litigation started, in an apparent attempt to settle the dispute, she undertook to and did switch the lights on only on 14 December until the end of the first week in January. The lights are switched on at 19h00 and are switched off no later than 23h00 each evening. This remains the prevailing situation.

Held: Displaying Christmas lights at a home in a residential area, from 19h00 to 23h00, from 14 December to the end of the first week of January, where this attracts sightseers who create a noise, will not constitute a nuisance.

MALACHI v CAPE DANCE ACADEMY INTERNATIONAL (PTY) LTD AND OTHERS 2010 (6) SA 1 (CC)

Debtor and creditor - Arrest *tanquam suspectus de fuga* - Constitutionality - Statutory procedure - Magistrates' Courts Act 32 of 1944, s 30(1) and (3) - Arrest *tanquam suspectus de fuga* not constituting just cause for infringing on constitutional right to freedom and security of person - High Court order of constitutional invalidity of s 30(1) and (3) confirmed - Section 30(1) capable of being remedied by striking out offensive parts - Section 30(3) not capable of being so remedied and wholly unconstitutional.

Section 30(3) of the Magistrates' Courts Act 32 of 1944 is unconstitutional because the common-law process it codifies - arrest *tanquam suspectus de fuga* - constitutes deprivation, without just cause, of the constitutional right to freedom and security of person. For the same reason the words '*tanquam suspectus de fuga*' are to be excised from s 30(1) of the Act.

OSHRY AND ANOTHER NNO v FELDMAN 2010 (6) SA 19 (SCA)

Administration of estates - Claim against deceased estate - Maintenance of surviving spouse - Nature and calculation of claim - Deceased spouse's duty of

support devolving on his estate upon his death, provided jurisdictional requirements of Maintenance of Surviving Spouses Act met - In calculating claim, following to be disregarded: (1) acts of financial generosity by third parties (such as children) to surviving spouse; and (2) proceeds of deceased's life-insurance policies in respect of which there are nominated beneficiaries - Maintenance of Surviving Spouses Act 27 of 1990, s 3. I

CASINO ENTERPRISES (PTY) LTD (SWAZILAND) v GAUTENG GAMBLING BOARD AND OTHERS 2010 (6) SA 38 (GNP)

Gaming and wagering - Gambling - Online gambling - Legality - Foreign-based online casino operator - What takes place at gambler's web-linked device constituting gambling - Foreign-based operator, not licensed to operate casino in SA/Gauteng, conducting illegal casino operation to extent that gamblers in Gauteng gamble on its online casino - National Gambling Act 7 of 2004 read with Gauteng Gambling Act 4 of 1995, s 77(1).

HENRIQUES v GILES NO 2010 (6) SA 51 (SCA)

Will - Rectification - Requirements - Court may rectify will where, due to mistake by testator or drafter, will not correctly reflecting intention of testator - Applicant for rectification to establish (a) that alleged discrepancy between expression and intention due to mistake; and (b) what testator really meant to provide - Though will to be formally valid for it to be amenable to rectification, court not to sacrifice testamentary intention to needless formalism.

CITY OF CAPE TOWN v MACCSAND (PTY) LTD AND OTHERS 2010 (6) SA 63 (WCC)

Environmental law - Environmental legislation - Enforcement - Environmental authorisation - Meaning - Whether environmental authorisation under law other than National Environmental Management Act (NEMA) qualifying as 'environmental authorisation' as defined - 'Environmental authorisation' meaning authorisation under NEMA, unless competent authority, empowered to issue NEMA authorisation, accepting environmental authorisation under other law as NEMA authorisation - National Environmental Management Act 107 of 1998, ss 24(8) and 24L(4).

Local authority - Town planning - Town planning and zoning schemes - Mining activities - Possessor of mining rights having to comply with town planning and zoning schemes - Mineral and Petroleum Resources Development Act 28 of 2002, s 25(2) (d) read with Land Use Planning Ordinance 15 of 1985 (Western Cape).

HAWEKWA YOUTH CAMP AND ANOTHER v BYRNE 2010 (6) SA 83 (SCA) 2010 (6) SA p83

Delict - Liability - Liability of teacher for injuries sustained by pupil - School excursion - Pupil falling from upper bunk with inadequate protective barrier - Teacher should have foreseen risk of fall and guarded against it - Teacher liable.

MUNGAL v OLD MUTUAL LIFE INSURANCE CO SA LTD;
FREEMAN v OLD MUTUAL LIFE INSURANCE CO SA LTD 2010 (6) SA 98 (SCA)

Pension - Pension fund - Pension funds adjudicator (PFA) - Determination of dispute - Jurisdiction - Underwritten retirement annuity funds managed by respondent - Respondent also underwriting insurer - Complaint by fund member in respect of endowment policy issued by respondent (members being 'lives assured') - Underwriting insurer not conducting purely insurance business where it is also administrator of fund - PFA having jurisdiction D to extent that possible to construe complaints against respondent as complaints relating to administration of fund.

Insurance - Liability of insurer - Endowment policy - Surrender value - Calculation - Insured's right to be paid out before full term of policy not policy benefit, but separate entitlement - Insurer may reduce value of policy (as E reflected in accumulation account) to bring sum being paid out in line with market value of portfolio at time of surrender, even where policy making no specific provision for this.

WOODLANDS DAIRY (PTY) LTD AND ANOTHER v COMPETITION
COMMISSION 2010 (6) SA 108 (SCA)

Trade and competition - Competition - Competition Commission - Complaint procedures - Initiation of complaint - Requirements - Commission must at least be in possession of information giving rise to reasonable suspicion of existence of prohibited practice - Competition Act 89 of 1998, s 49B(1).

Trade and competition - Competition - Competition Commission - Investigation A procedures - Summons - Validity - Valid complaint initiation prerequisite for validity of summons - Scope of summons may not be wider than scope of initiation statement - Competition Act 89 of 1998, ss 49A(1).

ROAD ACCIDENT FUND v CLOETE NO AND OTHERS 2010 (6) SA 120 (SCA)

Arbitration - Submission of question of law for adjudication by court - Whether High Court having jurisdiction to hear matter - Whether question referred by arbitrator amounting to question of law - Question whether existing E case correctly decided on facts not amounting to question of law - Court lacking jurisdiction to entertain matter - Arbitration Act 42 of 1965, s 20(1).

Section 20(1) of the Arbitration Act 42 of 1965, which permits an arbitrator at any time during the course of an arbitration to refer to the High Court 'any question of law' in the form of a special case 'for the opinion of the court', does not confer jurisdiction on the High Court to entertain a question as to whether an existing case was correctly decided on its facts, since this does not amount to a 'question of law', but instead calls for a value judgment.

WOODWAYS CC v VALLIE 2010 (6) SA 136 (WCC)

Equality legislation - Discrimination - Religion - Religious accoutrements - Request for removal - Whether amounting to unfair discrimination - Muslim customer asked to remove fez before being served at business premises - Religious grounds cited for request - Conduct discriminatory - Discrimination unfair - Argument, that owner of business entitled to express her Christian beliefs by requesting removal of fez,

rejected on ground that owner not entitled to exercise right to freedom of expression in violation of rights of others.

The promise of equality and easy access to justice that the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 seeks to fulfil will not be realised if litigants in cases were expected to be meticulous in the manner in which they pleaded their causes of action

When the respondent, a Muslim, went to shop at the appellant's wholesale business he was asked by an attendant to remove his fez, a procedure that was insisted upon by the owners, who cited their Christian beliefs as grounds for doing so. The respondent felt that he had been unfairly discriminated against on the ground of his religion and approached the Equality Court for appropriate relief. The court upheld his complaint. In an appeal to the Cape High Court, *Held*, that the respondent had been unfairly discriminated against, even if it were accepted that the request that he remove his fez was not stated as a direct precondition for service, since it nevertheless imposed a disadvantage on him by calling on him to make a hard choice to either remove his fez or take his business elsewhere.

Held, further, that the argument, that the discrimination was fair because the shop owners had been entitled to request the respondent to remove his fez in the exercise of their constitutional right to freedom of speech and religion, was untenable, given that the incident had taken place in a context in which the respondent's religious beliefs were irrelevant. In such circumstances the owners had, by requesting the respondent to remove his fez, unfairly discriminated against him on the ground of his religion. Appeal dismissed.

NCUBE v DEPARTMENT OF HOME AFFAIRS AND OTHERS 2010 (6) SA 166 (ECG)

Execution - Against State - Application to execute order against State pending appeal - State appealing against order directing it to issue applicant with teacher's work permit - Conduct of State from beginning characterised by obstructionism and inaction - Applicant in interim unemployed and schoolchildren deprived of English teacher - Irreparable harm shown - State ordered to forthwith issue applicant with work permit - Uniform Rules of Court, rule 49(11).

Costs - Special order - When to be awarded - Baseless opposition by State to application to execute order against it pending appeal - State's opposition leading to entirely unnecessary litigation - Costs awarded against State on attorney and client scale.

The applicant, a Zimbabwean national, had in January 2008 applied to the respondents for the issuing of a work permit that would have allowed him to take up a post as an English teacher. The respondents had, after procrastinating for seven months, denied the application. The applicant launched an internal appeal against the respondents' refusal, but it was met by further delays and obstructionism. The applicant applied for, and was in December 2008 granted, a High Court order directing the respondents to issue the permit in question, but the respondents immediately launched an appeal to the Supreme Court of Appeal that, by its nature, had the effect of suspending the execution of the High Court's order. The applicant

then launched the instant application - predictably opposed by the respondents - under rule 49(11) of the Uniform Rules of Court for leave to execute the High Court's order pending the appeal. (It was common cause that the post had at the time of the instant application not yet been filled.)

The court found that the balance of convenience was, for the following reasons, overwhelmingly in the applicant's favour. If the application were to be denied, the applicant would remain unemployed until the appeal was disposed of, and in any event probably lose the job, while his prospective students would for such time be deprived of an English teacher. The respondents, who had ill-served the applicant by entangling him in a bureaucratic web from which he must have despaired of ever freeing himself, had, on the other hand, failed utterly to show the existence of any prejudice to them, should the applicant be granted a work permit pending the finalisation of the appeal.

The court accordingly exercised its discretion under rule 49(11) by granting the order sought on just and equitable grounds, amending it only to provide that the work permit would lapse if the issues were to be determined in respondents' favour.

As to costs, the court pointed out that the respondents' opposition to the application had been baseless and had led to entirely unnecessary litigation, and that, having regard to their conduct in general, costs had to be awarded against them on an attorney and client scale

JMV TEXTILES (PTY) LTD v DE CHALAIN SPAREINVEST 14 CC AND OTHERS 2010 (6) SA 173 (KZD)

Credit agreement - Consumer credit agreement - Credit provider - Whether obligation to register as - Transaction whereby goods supplied, with payment deferred for defined period, and where interest only payable in default of timeous payment - Such constituting incidental credit agreement, not credit facility - Not giving rise to obligation to register as credit provider - National Credit Act 34 of 2005, ss 1, 8(3) and 40(1).

With an incidental credit agreement a fee, charge or interest only arises when the consumer is in default; where by contrast, in the case of a credit facility, it is a term of the facility that the consumer is entitled to defer payment in full and to make lesser payments, subject to paying interest.

JOHANNESBURG METROPOLITAN MUNICIPALITY v GAUTENG DEVELOPMENT TRIBUNAL AND OTHERS 2010 (6) SA 182 (CC)

Constitutional law - Legislation - Validity - Chapters V and VI of the Development Facilitation Act 67 of 1995 - Whether Act, by authorising provincial development tribunals to determine applications for the rezoning of land and the establishment of townships, inconsistent with s 156 of Constitution reserving 'municipal planning' to municipalities - 'Municipal planning' meaning control and regulation of use of land, including zoning of land and establishment of townships - Act in conflict with constitutional reservation of 'municipal planning' function to municipalities - Supreme Court of Appeal order of unconstitutionality of Chs V and VI of Act confirmed - Declaration of invalidity suspended for 24 months on certain terms.

TONGOANE AND OTHERS v MINISTER OF AGRICULTURE AND LAND AFFAIRS AND OTHERS 2010 (6) SA 214 (CC)

Constitutional law - Parliament - Act of Parliament - Passage of Bill through Parliament - Competence of Parliament to legislate in particular field to be distinguished from tagging of Bill as either affecting or not affecting provinces - In latter procedure question of extent of impingement of Bill on functions of provinces, and not its substance or true purpose, conclusive - If incorrect legislative procedure followed due to incorrect tagging of Bill, resulting legislation invalid - Constitution, ss 75 and 76.

Constitutional law - Legislation - Validity - Communal Land Rights Act 11 of 2004 - Corresponding Bill incorrectly tagged as Bill 'not affecting provinces' instead of Bill 'affecting provinces' - Correct legislative procedure not followed in enactment of Bill - Resulting legislation (Communal Land Rights Act) invalid.

NEL v LAW SOCIETY, CAPE OF GOOD HOPE 2010 (6) SA 263 (ECG)

Attorney - Misconduct - Disciplinary proceedings - Evidence - Judgment containing negative observations regarding conduct of attorney - Not admissible - Rule in *Hollington v F Hewthorn* applied - Civil Proceedings Evidence Act 25 of 1965, s 42. The appellant, an attorney, was summoned to appear before the law society's disciplinary committee on a charge of unprofessional conduct. The committee found against him, basing their findings on a judgment of the Supreme Court of Appeal in which certain negative observations were made about his conduct as an attorney. *Held*, that the rule in *Hollington v F Hewthorn & Company Ltd* [1943] KB 587 (CA) ([1943] 2 All ER 35), which stated that a conviction in a criminal court was not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he was convicted, was applicable. Also excluded were adverse findings against witnesses who were subsequently summoned to answer charges emanating from findings made by a court in such prior proceedings.

Held, further, that, according to s 42 of the Civil Proceedings Evidence Act 25 of 1965, the disciplinary hearing would have to amount to civil proceedings for the rule to apply. Since the Attorneys Act 53 of 1979 contained explicit references that equated such disciplinary hearings to civil court proceedings, the disciplinary hearing did amount to civil proceedings.

Held, accordingly, that, once the judgment was excluded, the admissible F evidential material before the committee was wholly insufficient to justify a finding that the appellant had contravened the society's rules. The committee's finding and the sentence imposed set aside.

STT SALES (PTY) LTD v FOURIE AND OTHERS 2010 (6) SA 272 (GSJ)

Discovery and inspection - Discovery - Application proceedings - Discovery granted only in exceptional circumstances and then only once all affidavits filed - Discovery not designed for obtaining of evidence for incorporation into affidavits - Application for discovery of documents (taken by sheriff in execution of Anton Piller order granted at applicant's behest) in order to bolster applicant's founding affidavit in main application - No exceptional circumstances justifying deviation from general rule shown - Discovery application dismissed - Uniform Rules of Court, rule 35(13).

Trade and competition - Unlawful competition - Confidential information used by ex-employees to copy employer's processes and plant in order to make product identical to that made by employer - Conduct plainly unlawful - Interdict *pendent lite* granted.

The applicant sought discovery of certain documents that the sheriff had seized pursuant to an *Anton Piller* order granted at applicant's behest. The applicant had no proprietary interest in the documents and indicated that the purpose of the discovery application was to obtain evidence that it wished to use to supplement its founding affidavit in the main application. The court, citing the principles outlined above, dismissed the application for discovery, pointing out that the applicant had chosen to commence motion proceedings, well knowing that it had insufficient evidence, and could be heard to complain that its choice was causing it prejudice that had to be relieved, notwithstanding the fact that general principles prohibited such relief. The applicant sought interlocutory relief in the form of a series of interim C interdicts designed to prevent the respondents, of whom two were its ex-employees, from operating, pending final relief, a plant that was an exact copy of that of the applicant to manufacture an identical product, using identical processes and formulae. The court found that the conduct of the respondents was, if established in the main proceedings, plainly unlawful, and granted the interim relief requested.

GARVIS AND OTHERS v SATAWU (MINISTER FOR SAFETY AND SECURITY, THIRD PARTY) 2010 (6) SA 280 (WCC)

Constitutional law - Human rights - Right to assemble, demonstrate, picket and petition - Section 11(1) of Act making organisation holding gathering liable for riot damage resulting from gathering - Section 11(2) providing defence against liability if organisation proving, inter alia, that act or omission causing damage 'was not reasonably foreseeable' (s 11(2) (b)) - Whether requirement inconsistent with constitutional right - Requirement not inconsistent - Constitution, s 17, read with Regulation of Gatherings Act 205 of 1993, ss 11(1) and 11(2) (b) Section 11(1) of the Regulation of Gatherings Act 205 of 1993 provides that, where an organisation holds a gathering that results in riot damage, the organisation will be liable for the damage. Section 11(2) provides a defence against such liability, if the organisation can prove, inter alia, that the act or omission which caused the damage 'was not reasonably foreseeable' (s 11(2) (b)).

This requirement, that the act or omission not be reasonably A foreseeable, is not inconsistent with the right to assemble, demonstrate, picket and petition, in s 17 of the Constitution.

AFRICAN BANK LTD v MYAMBO NO AND OTHERS 2010 (6) SA 298 (GNP)

Credit agreement - Interaction between judgment by consent procedure in magistrates' court and procedure under NCA - Procedures compatible - If cause of action arising under NCA, request for consent judgment constituting institution of proceedings under NCA - Relevant procedural requirements of NCA to be complied with - Summons or letter of demand to include allegation to this effect - Request for judgment to include notice of default - Clerk of court to refer matter to magistrate if unsure whether relevant requirements of NCA complied with - Magistrate entitled to require proof of facts or documents establishing such compliance - Magistrates'

Courts Act 32 of 1944, s 58 read with National Credit Act 34 of 2005, ss 86(10), 129(1) (b) , 130(3) and 172

Held , that where the cause of action in a consent to judgment procedure was a credit transaction as intended in the NCA, the summons or letter of demand, whichever was appropriate, had to contain allegations that - (1) s 129 or s 86(10) of the NCA had been complied with; (2) that the consumer was in default and had been in default for at least 20 business G days and; (3) a 10-day period had expired since delivery of the s 86(1) or s 129(1) notice. The request for judgment had to have attached to it a true copy of the s 129 notice.

Held , further, that s 58 proceedings were also 'proceedings commenced in a court' for the purposes of s 130(3) of the NCA, and therefore the clerk of the court had to be satisfied that each of the facts mentioned in s 130(3) had been dealt with before he or she could determine the matter. A general allegation in the letter of demand or summons that ss 129 and 130 of the NCA had been complied with was not sufficient: the credit provider had to deal with each one of the relevant requirements of s 130(3), alleging that each one had been met.

Held , further, that where a plaintiff sought judgment by consent under s 58, and if the cause of action was a credit agreement under the NCA, magistrates were entitled to interrogate the application for judgment and, in so doing, were entitled to require proof by a plaintiff of any fact or document that enabled the court to determine - (1) whether a credit agreement under the NCA was in issue; (2) whether credit was recklessly granted; (3) whether the plaintiff was registered as a credit provider with the National Credit Regulator; (4) the extent of the admitted debt; (5) whether the debtor failed to respond to the plaintiff's letter of demand issued in terms of s 129 of the NCA or whether the debtor rejected a proposal made therein; and (6) whether it was to act in terms of s 85 where allegations of over-indebtedness had been made. (*Held* , further, that for the consumer's consent to have been informed, he or she must have understood the available alternatives to legal proceedings and must have been given an opportunity to pursue such alternatives. The wording of the s 129 notice therefore had to be in plain language, understandable, and had to contain a meaningful proposal

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S v SA METAL & MACHINERY CO (PTY) LTD 2010 (2) SACR 413 (SCA)

Corporate body - Criminal liability of - Company charged together with one of its employees with acquiring stolen goods in contravention of s 37(1) of General Law Amendment Act 62 of 1955 - Employee acquitted on appeal to High Court, but company's conviction confirmed - However, in charge-sheet State expressly identifying such employee as one on whose conduct it was relying for holding company liable - Consequently, absent amendment of charge-sheet to include other employees, which amendment was prejudicial, High Court having erred in upholding company's conviction.

The appellant, a company dealing in scrap metals, was charged, along with one of its employees, D, with the theft of a quantity of copper cathodes, copper wire and conductor cable. They were also charged, in respect of the same items, with a contravention of s 37(1) of the General Law Amendment Act 62 of 1955, in that they had allegedly acquired or received into their possession stolen goods from another person or persons. A senior employee, B, was cited as the representative of the appellant. Both the appellant and D were acquitted on both counts relating to the copper wire.

S v MDLONGWA 2010 (2) SACR 419 (SCA)

Evidence - Admissibility - Video footage - Bank security cameras - Whether such footage original - Each branch of bank having own hard drive on which footage from security video cameras captured, and from which such footage downloaded - Video footage unquestionably original and constituting real evidence - No tampering having occurred before footage handed over to police - Consequently, neither authenticity nor originality of video footage could be rejected.

Evidence - Assessment of - Identification - Dock identification - Generally carrying little weight, but no rule that it be discounted altogether - Witness having ample opportunity to observe two robbers, one of whom later identified as appellant - Witness having no reason to falsely implicate appellant - His evidence, taken together with other evidence in case, establishing appellant's participation in robbery.

Evidence - Expert evidence - Approach of court - Expert witness lacking academic qualifications - Lack of academic qualification sometimes indicating lack of sufficient training, but this not case where witness having vast experience as police officer for 30 years and member of Facial Identification Unit for 18 years - Methods employed meeting standards generally accepted in relevant department - No reason to doubt accuracy of her findings

The appellant was convicted in a regional court of robbery with aggravating circumstances and sentenced to 20 years' imprisonment. His appeal to the High Court against both conviction and sentence having failed, he approached the Supreme Court of Appeal. The matter arose from a bank robbery in which the

appellant had been implicated by eyewitness and video evidence. Although he did not testify, the appellant put forward an alibi defence. The sole issue in the appeal against conviction was the correctness of the identification, which was challenged on three grounds: that the eyewitness testimony of M, a security guard, and his dock identification of the appellant, were unreliable; that a police officer, N, who had conducted a facial comparison lacked academic qualifications, and was thus not an expert; and that the video footage of the robbery, C not being original, ought not to have been admitted.

Held, that each branch of the bank had its own hard drive on which footage from security video cameras was captured, and from which such footage could be downloaded. The video footage *in casu* was, therefore, unquestionably original and it constituted real evidence. As to the question of possible interference with the recordings, the evidence established that no tampering had occurred before they were handed over to the police. Consequently, neither the authenticity nor the originality of the video footage could be rejected; and what emerged from it was unmistakably the identification of the appellant as one of those participating in the robbery. Against the totality of the evidence, the appellant's bald denial of involvement I must be rejected as false, and the appeal against conviction must fail. *Held*, further, regarding sentence, that the aggravating features of the robbery far outweighed the mitigating. Although the appellant was a first offender, and had spent a year in prison, the brazen conduct of entering a bank, robbing it with impunity in the presence of members of the public, and assaulting a J staff member, was deserving of the sentence imposed. The period of imprisonment, which was five years more than the minimum prescribed, was not a shocking sentence, but a salutary one

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v MOOLLA 2010 (2) SACR 429 (GSJ)

Prevention of crime - Forfeiture order - Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 - Preservation order in terms of s 38 of Act lapsing after 90 days - Notice of forfeiture application served on respondent on ninety-first day after publication of preservation order - Balance to be struck between individual's constitutional rights and obligation to eliminate crime - Service of application, not merely issuance, necessary to make it pending - Forfeiture application having been brought day after preservation order lapsing - Accordingly, in terms of s 48 of Act, applicant not entitled to bring application.

Prevention of crime - Forfeiture order - Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 - Whether court having F discretion to condone applicant's non-compliance with statutory provisions regarding notice and service of application - Relevant statutory requirements peremptory, and strict compliance called for - No reason to condone applicant's non-compliance or to find substantial compliance - No evidence explaining non-compliance having been placed before court - No substantive application for condonation having been made - Forfeiture application materially defective - Under circumstances, any possible discretion not to be exercised in favour of applicant.

Prevention of crime - Forfeiture order - Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 - *Semle* : Section 39(3) of

Prevention of Organised Crime Act 121 of 1998 providing that any person with interest in property subject to preservation order entitled to give notice of intention to oppose making of forfeiture order - Where such notice providing attorney's address for purposes of proceedings, service of forfeiture application on attorney, rather than on respondent personally, appearing to be perfectly proper.

S v VIKI 2010 (2) SACR 444 (ECG)

Sentence - Prescribed sentences - Charge-sheet - No specific reference in charge-sheet to provisions of s 51 - Appellant's legal representative clearly aware of applicability of minimum sentence provisions - Arguing for existence of substantial and compelling circumstances - Accordingly, lack of reference to provisions in charge-sheet not rendering trial unfair.

Committing an unlawful act under the influence of an intoxicating substance - Contravention of s 1(1) of Criminal Law Amendment Act 1 of 1988 - Sentence - Appellant charged with one count of murder and one of attempted murder - Trial court imposing 15 years' imprisonment - Trial court not mentioning appellant's personal circumstances, and dealing only with seriousness of offences - Magistrate seeming not to appreciate difference between offences of which appellant convicted, and offences of murder and attempted murder - Misdirections entitling court to interfere with sentence - Appellant having clean record and evidence showing he was useful and responsible member of society - However, actions having serious consequences, including violent loss of life - In society's interests that courts impose sentences to deter alcohol-related violent behaviour - Previous cases compared - Appreciably lower sentences imposed than would have been if relevant accused or appellants convicted of underlying prohibited acts - *In casu*, appropriate sentence one of seven years' imprisonment on first count, and four years' on second, running concurrently. B

The appellant was convicted in a regional court on two counts of contravening s 1(1) of the Criminal Law Amendment Act 1 of 1988. The prohibited acts which constituted the contraventions were murder and attempted murder, respectively. Regarding the appropriate punishment, the magistrate applied the provision that a contravention of s 1(1) could attract the same penalty as that which might be imposed for the unlawful act itself. He found that no substantial and compelling circumstances existed that would justify a sentence of less than the 15 years' imprisonment stipulated in s 51(2) of the Criminal Law Amendment Act 105 of 1997, and proceeded to impose that sentence, treating the two counts as one. The appellant appealed against the sentence on the grounds, firstly, that no reference had been made in the charge-sheet to the provisions of Act 105 of 1997; and, secondly, that the sentence was startlingly inappropriate.

Held, that it was clear from the address of the appellant's legal representative on sentence that she had been aware of the applicability of the minimum sentence provisions. She had submitted that substantial and compelling circumstances were present, and had not been surprised by the trial court's application of these provisions. Accordingly, the lack of reference thereto in the charge-sheet had not rendered the trial unfair. (Paragraphs [4] and [5] at 447 a–d.)

Held, further, that in its judgment on sentence the trial court had not mentioned the appellant's personal circumstances, and had dealt only with the seriousness of the

offences. The magistrate seemed not to have appreciated F the difference between the offences of which the appellant had been convicted, and the offences of murder and attempted murder. These amounted to misdirections that entitled the court to interfere with sentence. The appellant had a clean record and his employment, for which he was pursuing higher qualifications, and his support for his family, all showed that he was a useful and responsible member of society. On the other hand, G his actions had had serious consequences, including violent loss of life. There was also a high incidence of alcohol-related assaults, and it was in society's interests that the courts be seen to impose sentences that would deter that kind of behaviour. A custodial sentence was the only appropriate one. It emerged from a consideration of previous cases, however, that appreciably lower sentences were imposed than would have been if the H relevant accused or appellants had been convicted of the underlying prohibited acts. *In casu*, a sentence of seven years' imprisonment on the first count, and four years on the second, was appropriate; since the two offences had been closely linked in time and circumstance, the sentences should run concurrently. (Paragraphs [16]–[27] at 448 *h*– 450 *f*.)

Appeal upheld. Sentence of 15 years' imprisonment set aside and sentence of 1 seven years' and four years' imprisonment, running concurrently, imposed.
[zCAz] Cases Considered

CLAASSEN v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER 2010 (2) SACR 451 (WCC)

Court - Immunity from actions for damages arising out of judicial duties - Magistrate disregarding both substantive and procedural requirements for cancellation of appellant's release on warning - Appellant deprived of liberty - Magistrate having acted negligently, but not C maliciously - Matter of legal policy that judges and others exercising adjudicative functions held immune against actions for damages arising out of discharge of judicial functions - Only exception where conduct malicious or in bad faith - Albeit magistrate's acts fundamentally misdirected, nevertheless judicial acts; accordingly, immunity applying to them. D

Court - Independence of judiciary - Section 165 of Constitution of Republic of South Africa, 1996 - Doctrine of judicial immunity from civil liability - Doctrine consonant with s 165 of Constitution - Only exception where judicial conduct malicious or in bad faith - Where magistrate negligently cancelling appellant's release on warning, despite fundamental misdirection of act, and consequent deprivation of liberty suffered by appellant, act judicial one and immunity applying to it. E

Fundamental rights - Right to freedom and security of the person - Section 12 of Constitution of Republic of South Africa, 1996 - 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 F 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. G

Trial - The accused - Failure to appear in court - Enquiry in terms of s 72(4) of Criminal Procedure Act 51 of 1977 - Magistrate failing to hold enquiry and cancelling appellant's release on warning in manner other than that provided for in terms of s

72A, read with s 68(1) and (2) of Act - Magistrate H thus acting in disregard of both substantive and procedural requirements for exercise of power to curtail appellant's right to personal freedom - Magistrate's explanation, that s 72(4) permissive and not peremptory, inherently implausible in context of his conduct - Without s 72(4) enquiry no basis for committing appellant to prison. I

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 J

2010 (2) SACR p452

A 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 next scheduled hearing of the matter. He had taken the precaution of B 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 C [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 power he had to curtail the appellant's right to personal freedom. The D 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. (Paragraphs [12]–[15] at 457 *b*– 458 *d*.)

E *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 damage; and he had unreasonably failed to avoid such harm occurring. As F 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 G 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 of the Republic of South Africa, 1996, 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. (Paragraphs [16]–[24] at I 458 f– 461 f .)

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 J applied to them. (Paragraph [27] at 462 c–e .) 2010 (2) SACR p453

Held , further, that the doctrine of judicial immunity was consonant with the A 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 B 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. C (Paragraphs [31] and [32] at 464 i– 465 e .)

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) of the ICCPR, South Africa would have to enact legislation to do so. Finally, D 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. (Paragraphs [36] and [37] at 466 e–g .)

Appeal dismissed. No order as to costs.

S v GS 2010 (2) SACR 467 (SCA)

Rape - Attempted rape - What constitutes - Complainant testifying that appellant E fondling her intimately - No suggestion of attempt to have intercourse - Both remaining dressed in underwear at all times - Even on State's version appellant's actions not amounting to attempted rape - Conviction set aside.

Rape - Proof of - Complainant's evidence lacking credibility - Inconsistencies and improbabilities - Certain points raised only in cross-examination - Her actions far more consistent with appellant's version of consensual sexual contact - Aspects of appellant's version corroborated - Complainant's description of circumstances of

intercourse difficult to accept - Complainant not calling for assistance of roommate - Complainant not complaining G immediately after incident to people she could trust - Only after complainant's mother making enquiries about her having been out late at hotel that rape allegation made - Real suspicion that complaint made in attempt to deflect mother's anger - State not discharging onus of proving appellant's version false - Conviction set aside.

The appellant was convicted in a regional court on one count of attempted rape and one of rape. He was sentenced to three years' imprisonment on the first count and to ten years' on the second, the two sentences to run concurrently. His appeal to the High Court having failed, he was granted further leave by the Supreme Court of Appeal. The appellant admitted having had intimate contact with the complainant, a 16-year-old girl, in the outside room in which he slept at the house where they both resided, and also that he had had sexual intercourse with her in her bedroom; however, he claimed that she had consented to both. Given the material conflict of fact between their respective versions, the appeal turned largely on the credibility of the witnesses. Before considering this aspect, however, the court dealt with the conviction for attempted rape.

Held, that the State's case had fallen far short of proving an attempted rape in the outside room. On the complainant's version, while the appellant had intimately fondled her, he had at no stage attempted to have intercourse with her, and their underwear had remained on at all times. Even on the State's case considered in isolation, the appellant's actions could not be construed as an attempt at rape, and consequently this conviction could not stand. (Paragraph [11] at 472 a-d.)

Held, further, that the State's case rested solely upon the credibility of the complainant. The High Court's conclusion that her evidence was 'satisfactory in every material respect and is also credible' was a startling statement, since a detailed examination showed that her evidence was inherently unreliable, and riddled with inconsistencies and improbabilities. Firstly, it was only in cross-examination that she alleged that the appellant had made improper advances for some time before they had entered the outside room. Had such events occurred, it was surprising, to say the least, that she had not mentioned them in her evidence-in-chief. Secondly, if she had been obliged to resist these earlier advances, it was surprising that she would have voluntarily accompanied the appellant into the outside room where, on her own version, she had voluntarily kissed him. Her actions were far more consistent with the appellant's version that she had consented to the sexual contact. Thirdly, the complainant admitted during her evidence that she had been taking an oral contraceptive at the time. This was something that the appellant claimed she had told him, and he could hardly have known it unless she had imparted the information to him. It was implausible that she could have told him this if she had felt threatened by him. (Paragraphs [14]–[16] at 473 b–h.)

Held, further, that the complainant's description of events after she had left the appellant's room was also unsatisfactory. She claimed that, on escaping, she had seen him following directly behind her, fully clothed. Not only was this inconsistent with her version that he had been wearing only underpants when she left the room, it was also consistent with the appellant's version that they had both dressed before going into the house itself. Again, she denied having brought the appellant a duvet while he waited inside the house, but the witness, J, confirmed that she had done so. J also testified that the complainant had told her the following day that she had

enjoyed her evening 'playing' with the appellant. J's evidence was not shaken in cross-examination and there was no reason to doubt her truthfulness. As to the complainant's description of the circumstances under which intercourse had taken place, it was difficult, firstly, to accept that penetration could have been achieved; and, secondly, that she had not immediately called for the H assistance of J, who was present in the room. (Paragraphs [17]–[21] at 473 i– 474 j.)

Held, further, that the complainant had not complained immediately after the incident to people that she could trust and in circumstances where she could be expected to have done so. It was only after her mother had made enquiries about the complainant's having been out late at an hotel the I previous evening that the allegation of rape had been mentioned. There was a very real suspicion that this complaint had been made in an attempt to deflect her mother's anger. In the result, there were grave reservations about the complainant's credibility, and it could not be said that the State had discharged the onus of proving that the appellant's version was false. The rape conviction, therefore, could not stand. (Paragraphs Appeal upheld.

S v KHAN 2010 (2) SACR 476 (KZP)

Fundamental rights - Admissibility of evidence of pointing out where suspect not informed of her rights in terms of s 35 of Constitution of Republic of South Africa, 1996 - Provisions of s 35 applying only to 'arrested', 'detained' and 'accused' persons, and not to 'suspects' - Rights of suspects adequately catered for by provisions of G Judges' Rules - To oblige police not only to caution suspect in terms of Judges' Rules, but also in terms of s 35, not striking even balance between interests of suspects and need not to hamstring police in their investigation of crime.

Fundamental rights - Right to a fair trial - Rights of suspect - Duty on police H to warn suspect in terms of Judges' Rules - Police having reasonable apprehension that appellant suspect in offence under investigation - Accordingly obliged to caution her in terms of Judges' Rules - Failure to do so infringement of her rights.

Evidence - Admissibility - Of pointing out - By suspect not warned in terms of I s 35 of Constitution of Republic of South Africa, 1996 - Provisions of s 35 applying only to 'arrested', 'detained' and 'accused' persons, and not to 'suspects' - Rights of suspects adequately catered for by provisions of Judges' Rules - Police failing to warn suspect in terms of Judges' Rules - Suspect's rights infringed - However, remaining evidence sufficient to prove guilt beyond reasonable doubt - Accordingly, admission of evidence J of pointing out not prejudicial.

The appellant was convicted of contravening ss 4 (b) and 5 (b) of the Drugs and A Drug Trafficking Act 140 of 1992, and sentenced to five years' imprisonment, half of which was conditionally suspended. She appealed against the conviction only. It was contended on her behalf that evidence of a pointing out by the appellant ought not to have been admitted, since the police had not warned her of her right to remain silent and her right against self-incrimination before she produced the drugs in question.

Held, that it was clear on the State's version that the police had not warned the appellant of her rights before telling her to hand over the drugs. (The court then embarked on an extensive review of authority on the question of whether a person was entitled to be informed of his or her rights prior to the point of arrest.) The provisions of s 35 of the Constitution of the Republic of South Africa, 1996, applied

only to 'arrested', 'detained' and 'accused' C persons, and not to 'suspects'. The rights of the latter were adequately catered for by the well-established provisions of the Judges' Rules. To cast an obligation upon the police not only to caution a suspect in terms of the Judges' Rules, but also to advise him or her of the rights encompassed in s 35 of the Constitution, would not strike an even balance between the interests of suspects and the need not to hamstring the police in their investigation of crime. (Paragraphs [10]–[24] at 481 c– 484 d .)

Held , further, that, at the time the police approached the appellant, they had a reasonable apprehension that she was a suspect in the offence they were investigating. They were accordingly obliged to caution her in terms of the Judges' Rules, and their failure to do so was an infringement of her rights. It had therefore to be determined whether, if the evidence of the production E of the drugs by the appellant were excluded, the remaining evidence was sufficient to prove that she possessed the drugs.

Held , further, that, when due weight was given to the fact that the appellant was untruthful as to the place where the drugs were found, as well as to the nature and extent of her involvement in the running of the shop in which it F were found, which shop bore her name, the inference was irresistible that the appellant had been aware of the existence of the drugs and of its location. Such awareness, combined with the evidence of her involvement in the running of the shop, had as a necessary consequence that the appellant had physical control over the drugs, as well as the intention to exercise such control. Accordingly, the remaining evidence established her G guilt beyond reasonable doubt, and the admission of the pointing out evidence would therefore not be prejudicial to her. Furthermore, the production of the drugs by the appellant had not played a material role in their discovery. The police, who believed in the correctness of the information they had been given, would have lawfully located the drugs in any event, and such location, together with the rest of the evidence, would have resulted in the appellant's conviction. (Paragraphs [35]–[39] at 486 j– 487 g .) H Appeal dismissed.

S v GL 2010 (2) SACR 488 (WCC)

Sentence - Where convicted person primary caregiver of minor children - Reiterated that focused and informed attention to be given to interests of children at appropriate moments in sentencing process - Purpose thereof adequate balancing of various interests involved - Form of punishment imposed should be one C least damaging to interests of children - Guidelines to be adopted in such situations summarised.

Culpable homicide - Sentence - Imposition of - Factors to be taken into account - Desire of deceased's parents to see accused incarcerated - Such no more than an aspect of interests of community in imposition of D sentence, and one of sentencing elements to be taken into account.

Culpable homicide - Sentence - Imposition of - Factors to be taken into account - Fact that death occurred within family or marriage sphere and at hands of person who had responsibility to protect his wife and children are legitimate considerations to be taken into account.

Culpable homicide - Sentence - Deceased's death caused by appellant during altercation in which he applied choke-hold on deceased's neck, applying pressure to her throat - Deceased and appellant having been married and had very young twin sons - Adequate arrangements made for care of children - Sentence of 10 years'

imprisonment of which four years suspended held not to be disturbingly inappropriate or inducing sense of F shock - No material misdirections - Appeal against sentence dismissed.

The court, in an appeal against a sentence imposed in a regional court upon the appellant's conviction of culpable homicide arising out of the death of his wife, held that, where an accused had children and the accused was the primary caregiver for the children, focused and informed attention needed G to be given to the interests of children at appropriate moments in the sentencing process. The objective was to ensure that the sentencing court was in a position adequately to balance all the various interests involved, including those of the children placed at risk. The form of punishment imposed should be the one least damaging to the interests of the children, given the legitimate range of choices available to the sentencing court. The H court then summarised the guidelines to be applied in such situations, which were adopted by the Constitutional Court in *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) (2008 (3) SA 232; 2007 (12) BCLR 1312). (Paragraphs [17]–[18] at 493 *h*– 494 *e* .)

The desire of the parents of the deceased in a case of culpable homicide to see the accused incarcerated is no more than an aspect of the interests of the community in the imposition of sentence; one of the elements in the *Zinn* I triad which must be taken into account in arriving at the appropriate sentence. (Paragraph [24] at 496 *d* , paraphrased.)

In cases of culpable homicide, the fact that the death occurred within the family or marriage sphere and, furthermore, at the hands of the husband/father who bore a responsibility to protect both his wife and his children, are legitimate considerations to be taken into account in imposing sentence.

The appellant and the deceased, who had been married and had twin sons A (14 months old at the time of the deceased's death), had had an altercation in which the deceased had attacked the appellant with kicks and punches. During the course of the altercation the appellant had grabbed the deceased from behind and applied a choke-hold to her neck, applying pressure to her throat, which resulted in the deceased's death. The court on appeal found that adequate arrangements for the care of the children had been made, and B held that the sentence imposed by the regional court, of 10 years' imprisonment of which four years had been conditionally suspended, although substantial, was not disturbingly inappropriate and did not evoke a sense of shock. There had, furthermore, been no material misdirections by the regional magistrate. The appeal against the sentence was accordingly dismissed.

S v NDZIMA 2010 (2) SACR 501 (ECG)

Sentence - Increase of on appeal - Power of full bench to increase sentence imposed by single judge - Section 22 (b) of Supreme Court Act 59 of 1959 empowering Supreme Court of Appeal or High Court having appeal jurisdiction to confirm, amend or set aside judgment being appealed against - Purpose of power to increase sentence on appeal to ensure proper and adequate sentences imposed - Enactment of s 316B of Criminal Procedure Act 51 of 1977 not meaning that s 22(b) of Act limited only to civil matters - Necessary for court of appeal to be able to prevent miscarriages of justice in cases where State not appealing against sentence

- Accordingly, full bench of High Court having power to increase sentence imposed by single judge.

Sentence - Increase of on appeal - When appellate court may intervene - Increase of sentence as much an interference in trial court's decision as reduction of sentence - Same considerations applying - Presence of material irregularity or sentence so light as to be shockingly inappropriate - Sentences imposed by trial court unduly lenient, overemphasising provocation and under-emphasising seriousness of crimes - Appropriate B sentence indeed ten years in respect of each offence, but trial court erring in suspending half of each sentence - Half of second sentence to run concurrently with first sentence, giving effective sentence of 15 years' imprisonment.

Sentence - Imposition of - Factors to be taken into account - Provocation - C Appellant shooting two assailants in cold blood - Extent to which provocation mitigatory factor depending on whether accused's loss of control regarded by reasonable person as excusable human reaction - Reasonable person not accepting that appellant's execution of victims understandable, even though justifiably angry at having been assaulted - Execution of deceased when appellant no longer in any danger not D excusable human reaction to provocation.

The appellant was convicted in the High Court on two counts of murder and sentenced to an effective ten years' imprisonment. He appealed to a full bench against this sentence. The latter court gave notice that it required argument as to why the sentence should not be increased. However, the E question of whether or not a full bench of the High Court had the power to increase a sentence on appeal had first to be dealt with.

Held, that no section of the Criminal Procedure Act 51 of 1977 (the CPA) empowered a full bench of a High Court to increase a sentence imposed by a single judge, but s 316B of the CPA provided for an appeal by the State against a sentence from a single judge to the Supreme Court of Appeal. F However, s 22 (b) of the Supreme Court Act 59 of 1959 (the Act) empowered the Supreme Court of Appeal or a High Court having appeal jurisdiction, inter alia, to confirm, amend or set aside the judgment being appealed against. This clearly entitled a court of appeal to increase a sentence imposed by a High Court. The purpose of the power to increase sentence on appeal was to ensure that proper and adequate sentences were G imposed, and when this purpose was taken into account it was clear that the enactment of s 316B - authorising the State to appeal against sentence - did not mean that s 22 (b) of the Act was limited only to civil matters. It remained necessary for the SCA or a High Court with appeal jurisdiction to be able to prevent miscarriages of justice in cases where the State had not appealed against sentence. Accordingly, the court had the power to increase H the sentence imposed *in casu*. (Paragraphs [5]–[10] at 504 g–506 b.)

Held, further, that, because an increase of sentence was as much an interference in the trial court's decision as a reduction of sentence, the same considerations applied: there must have been a material irregularity or the sentence must be so light as to be shockingly inappropriate. (The court proceeded to review the circumstances of the murders and the personal circumstances of I the appellant.) The appellant had endured intense provocation at the hands of the two deceased, both of whom had assaulted him. However, after the appellant had fired a shot in self-defence, what followed was so out of proportion to the threat he faced, and so vicious, that it could certainly not be regarded as self-defence carried too far. He had cold-bloodedly

executed the deceased as they lay helpless and wounded on the ground. The fact that J his training as a soldier might have taken over and led him to continue shooting after the initial shot, was an aggravating, rather than mitigating, A factor, since it was indicative that he might act similarly in future, thus remaining a danger to society.

Held, further, that, in view of the circumstances, the sentences imposed were unduly lenient: they overemphasised the provocation and under-emphasised the seriousness of the crimes. However, substantial and compelling B circumstances existed - in the form of the appellant's personal circumstances and the provocation he had endured - to justify a departure from the minimum 15-year sentence for each murder. An appropriate sentence was indeed ten years in respect of each offence, but the trial court had erred in suspending half of each sentence and thus effectively imposing a ten-year sentence. At the same time, a sentence of 20 years would be too severe. In C order to achieve a just result, half of the second sentence should run concurrently with the first sentence, giving an effective sentence of 15 years' imprisonment.

Held, further, that, while it was a feature of provocation as a mitigatory factor that the criminal act that resulted from it was usually committed immediately D after the provocative act, the extent to which it was mitigatory depended on whether the accused's loss of control as a result of his or her anger would be regarded by a reasonable person as an excusable human reaction. *In casu*, a reasonable person would not accept that the appellant's execution of his victims was understandable, even though he was justifiably angry at having been assaulted, and no doubt fearful when he fired the first shots. To execute the deceased when he ought to have been able to reflect on what he E had already done, and to realise that he was no longer in any danger, cannot be regarded as an excusable human reaction to provocation. Sentence set aside. Appellant sentenced to ten years' imprisonment in respect of each count, five years of the second sentence to run concurrently with the sentence on the first count.

Cases Considered

S v HODGKINSON 2010 (2) SACR 511 (GNP)

Arms and ammunition - Pointing firearm or object likely to be believed to be firearm - Intent, not culpa, to be proved - No strict liability - Wording of F provision requiring conscious decision to point object resembling firearm under circumstances constituting threat - Appellant having jokingly pointed water pistol at complainant - Conviction and sentence set aside - Firearms Control Act 60 of 2000, s 120(6).
[zHNz] Headnote : Kopnota

The appellant was convicted of contravening s 120(6) of the Firearms Control G Act 60 of 2000, unlawfully pointing a firearm or something likely to be believed to be a firearm, without good reason to do so. The charge arose from a practical joke in which he had pressed a water pistol against the body of one of his employees. The trial court rejected the complainant's evidence that he had been threatened with a real firearm, but found that the complainant had believed the water pistol to be a real gun. H

Held, that, since the trial court had rejected the complainant's emphatic evidence that the firearm was a real one, which had been cocked in his presence, it was

difficult to understand on what basis the magistrate could have found that the complainant had believed the water pistol to be a real gun. Apart from this, however, the magistrate had erred in interpreting the statutory provision. The mens rea that had to be proved was intent, not culpa or, as the trial court's judgment suggested, strict liability. The words '. . . without good reason to do so' clearly suggested a conscious decision to point an object resembling a firearm under circumstances that would constitute a threat. The verb 'to point' similarly described a conscious and deliberate action. The Act's predecessor, the Arms and Ammunition Act 75 of 1969, expressly required that the pointing be wilful in order to be an offence, and while the present provision was differently worded, it was clear that the legislature had not intended to introduce a different form of mens rea. Appeal upheld. Conviction and sentence set aside.