

# **LEGAL NOTES VOL 3/2011**

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## **EDITORIAL**

**HEADS OF ARGUMENT:** There is a tendency amongst advocates to use footnotes<sup>1</sup> in their Heads of Argument. The Heads in the Constitutional Court is drafted in this fashion but it is not a requirement in the other courts. In fact the judges that I know do not want it as it forces them to look down. Also, you are supposed to quote the law, why put it in a footnote?

Conclusion: Keep it simple unless you hear from the Bench that the format has changed.

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### **SOUTH AFRICAN LAW REPORTS FEBRUARY 2011**

#### **VIKING PONY AFRICA PUMPS (PTY) LTD t/a TRICOM AFRICA v HIDRO-TECH SYSTEMS (PTY) LTD AND ANOTHER 2011 (1) SA 327 (CC)**

State tender - Tender process — Fraud — Duty of State organ upon detection of fraud — Must act against successful tenderer when detecting that preference

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<sup>1</sup> This looks so cool!

obtained on fraudulent basis — Obtaining information giving rise to reasonable suspicion of fraud amounting to detection — Once tenderer plausibly accused, State organ obliged to investigate matter — Preferential Procurement Regulations, 2001, pertaining to Preferential Procurement Policy Framework Act 5 of 2000, reg 15(1). D

**SA METAL MACHINERY CO (PTY) LTD v CITY OF Cape Town 2011 (1) SA 348 (WCC)**

Local authority - Contracts by — Sale — Disposal of capital assets — Legality — Whether asset required for provision of minimum basic services to community — Whether alienation of asset having unjustifiably adverse effect on municipality's financial position — Whether fair market value obtained — Request for quotation procedure (RFQ) effective method of determining fair market value — Local Government: Municipal Finance I Management Act 56 of 2003, s 14.

*Held*, that the applicant's contention that the *merx* of the goods referred to in the RFQ was unknown or incapable of determination had no merit. The nature and quantity of the goods in the accumulated stockpile were readily ascertainable by inspection, or on enquiry, in terms of the procedures available in terms of the advertised RFQ process, and further information in terms of the RFQ process could have been obtained by questioning the respondent's contact person.

*Held*, further, as to whether the items in question were 'capital assets', as contemplated in s 14 of the MFMA, that this was a factual issue that depended on whether or not the assets were taken into account in determining the local authority's financial position.

A *Held*, further, on the assumption that the goods referred to in the RFQ were indeed capital assets, that their disposal did not contravene s 14(1), since the items in question were obsolete, surplus items that had residual value only as scrap and which were clearly not required to provide a minimum level of basic municipal services.

*Held*, further, as to the requirements of s 14(2) (b), that the RFQ was probably the B best method available to determine the fair market value of the items in question.

*Held*, accordingly, that the RFQ process had not been shown by the applicant to be one that would necessarily result in an unlawful outcome because of a vitiating non-compliance with s 14 of the MFMA.

Application for the setting-aside of the RFQ refused.

**McLUCKIE v SULLIVAN 2011 (1) SA 365 (GSJ)**

Liquidations-section 424 Companies Act

Company - Directors and officers — Liability for debts of company — Reckless or fraudulent conduct of business of company — Reckless conduct — What constitutes — Sole director of company causing company to incur debt at time when he knew company would be unable to repay it without his assistance — Then winding up company while attempting to use its formal identity to avoid repaying debt —

Behaviour of director amounting to reckless conduct of business of company — Director personally liable for debt incurred — Companies Act 61 of 1973, s 424(1).

A sole director of a company who repudiates, on the company's behalf, a contract which he caused the company to enter into, and then causes the company to be wound up while fully aware that the creditor will not receive any dividend from the insolvent estate of the company, is thus guilty of the reckless conduct of the affairs of the company, as intended in s 424(1) of the Companies Act 61 of 1973, and liable to the creditor for the debt incurred.

### **MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD v DUNGA 2011 (1) SA 374 (WCC)**

Credit agreement - Consumer credit agreement — Debt review — Termination — When competent — Credit provider may only terminate debt review if acting in good faith — National Credit Act 34 of 2005, s 86(10).

Credit agreement - Consumer credit agreement — Debt review — Resumption — Court that may order — Words 'or High Court' to be read in after 'Magistrate's Court' — National Credit Act 34 of 2005, s 86(11).

### **BETLANE v SHELLY COURT CC 2011 (1) SA 388 (CC)**

Execution - Application for leave to execute pending appeal — Operation and execution of order suspended pending appeal — Application to execute pending appeal to be made to same court that gave order — Writ issued by appeals registrar of same court unlawful — Uniform Rules of Court, rule 49(11).

Following a dispute over arrear rental, Shelly Court CC approached the High Court and obtained an eviction order against one of its tenants. The tenant applied for leave to appeal against the eviction order. While the application for leave to appeal was pending, Shelly Court CC secured a writ of execution, on the strength of which the tenant was evicted.

*Held*, that an application for leave to appeal suspended the execution of an order, unless leave to execute was sought and obtained, not from a registrar, but from the court that granted the order. In the present case the respondent had obtained the writ of execution and executed the eviction order, while aware of the pending application for leave to appeal; and, in addition, the writ had been issued by the appeals registrar of the same High Court in which the application for leave to appeal was pending. All this flew in the face of rule 49(11) of the Uniform Rules of Court.

*Held*, accordingly, that the warrant of eviction should not have been granted while the applicant's application for leave to appeal was pending, and hence the execution of that order was unlawful. The writ was unlawful and fell to be set aside.

## **LAW SOCIETY OF SOUTH AFRICA AND OTHERS v MINISTER FOR TRANSPORT AND ANOTHER 2011 (1) SA 400 (CC)**

Constitutional law - Legislation — Validity — Road Accident Fund Amendment Act 19 of 2005, s 21 — Abolishing road accident victim's common-law right to claim balance of damages not compensable by Road Accident Fund — Measure reasonable and justifiable in light of urgent need to establish financially viable and equitable compensation regime — Provision valid.

On the 25<sup>th</sup> of November 2010 the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the North Gauteng High Court. The High Court dismissed a constitutional challenge to certain provisions of the 2005 amendment to the Road Accident Fund Act (Act).

In this Court, the Law Society of South Africa, the South African Association of Personal Injury Lawyers, the QuadPara Association of South Africa, the National Council for Persons with Physical Disabilities in South Africa and various persons with actionable claims affected by the amendment mounted a constitutional challenge impugning two provisions of the amendment and a regulation made under the Act. They challenged a provision abolishing road accident victims' residual common law right to claim losses which are not compensable under the Act; another provision limiting the amount of compensation that the Road Accident Fund (Fund) is obliged to pay for claims of loss of income or a dependent's loss of support arising from the bodily injury or death of a motor accident victim; and a regulation in which the Minister for Transport (Minister) has prescribed medical tariffs for health services which are to be provided to accident victims by public health establishments.

The core of the constitutional challenge was that the impugned provisions did not comply with the constitutional principle of rationality; and that each of the provisions unjustifiably limits one or more fundamental rights. The specific fundamental rights the applicants sought to enforce were the right to the security of the person, the right not to be arbitrarily deprived of property, the right of access to health care and the right to adequate remedy. The application was opposed by the Minister and the Fund.

In their contentions on rationality, the applicants sought to persuade the Court to apply a "true rationality test" that would render unconstitutional a legislative measure that unfairly deprives people of constitutional protection or is substantively unjust. The Court declined the request to adapt the rationality standard developed and recognized in this Court's jurisprudence. In applying the established standard, the Court found the abolition of a claimant's residual common law claim a necessary and rational part of an interim legislative scheme whose primary thrust is to achieve financial viability and a more effective and equitable platform for the delivery of social security services. The court found that, in this instance, the state indeed incurs obligations to realize the right to the security of the person of road accident victims. However, the court found that the abolition of the common law residual claim is a justifiable limitation of that right. Furthermore, the Court found that the cap on compensation for the loss of income or of dependents' support does not infringe the

right to property as there was no arbitrary deprivation of property by the amendments, and that the right to adequate remedy had not been infringed. Accordingly, the application for leave to appeal was dismissed in as far as these constitutional attacks were concerned.

The applicants' attack on the constitutional validity of the medical tariff for health services prescribed by the Minister was, however, successful. On the facts, the Court found the tariff to be wholly inadequate and unsuited for paying compensation for the medical treatment of road accident victims in the private health care sector. Accordingly, the Court found that the tariff is irrational because it is incapable of achieving the purpose which the Minister was seeking to achieve, namely to enable innocent road accident victims to obtain the health services they require.

The Court declared that the regulation is inconsistent with the Constitution and invalid and made an order obliging the Minister to make a fresh determination. The Court ordered that until the Minister prescribes a new tariff for health services for road accident victims a third party who has sustained bodily injury and the Fund is obliged to compensate is entitled to compensation or health services as if he or she had been injured before the amendment came into operation.

The Minister and the Fund have been ordered to pay one third of the costs of the applicants including costs of two counsel.

#### **COMPANY UNIQUE FINANCE (PTY) LTD AND ANOTHER v JOHANNESBURG NORTHERN METROPOLITAN LOCAL COUNCIL AND ANOTHER 2011 (1) SA 440 (GSJ)**

Estoppel - Estoppel by representation — Agency by estoppel — Whether defendant estopped from denying authority of agent — Defendant local authority having created façade of regularity and approval of conduct of its officials in their dealings with plaintiffs — Plaintiffs' reliance thereon justified — Defendant estopped from denying authority of officials — Acts of officials binding on defendant.

Local authority - Officers — Ostensible authority — Local authority having created façade of regularity and approval of conduct of its officials in their dealings with plaintiffs — Plaintiffs' reliance thereon justified — Acts of officials binding on local authority — Local authority estopped from denying authority of officials.

Penalty - Whether penalty excessive — Onus — Onus on party claiming reduction of penalty to prove penalty disproportionate to prejudice suffered by party relying on penalty — Evidence required to be led by party claiming reduction — Conventional Penalties Act 15 of 1962, s 3.

Persons transacting with a local authority are entitled to rely on an appearance or façade of regularity created by the local authority in the course of such transactions, so that the local authority will be estopped from contending that its officials had lacked authority to act as they had. Thus, where a business entity had entered into a series of agreements with a local authority that were signed on its behalf by high-ranking officials in its employ; where the documents embodying the agreements could only have been obtained from the local authority; where meetings between the

officials in question and the business's representatives had taken place at the local authority's premises; and where the officials had shown the representatives an extract from a council resolution purportedly authorising the conclusion of agreements J (a document that could only have been obtained from the council), the resulting façade of regularity was sufficiently credible for the local A authority to be bound by the purported agreements.

Where a court is called upon to decide whether a penalty on an amount overdue under a contract fell to be reduced as intended in s 3 of the Conventional Penalties Act 15 of 1962, the onus is on the party claiming reduction of the penalty to prove that the penalty is disproportionate to the prejudice suffered by the party relying on the penalty, and the former must lead evidence to this effect.

### **FIRSTRAND BANK LTD v MVELASE 2011 (1) SA 470 (KZP)**

Credit agreement - Consumer credit agreement — Debt review — Termination — Notice — Section 86(10) notice can terminate s 87 debt review pending in magistrates' court — National Credit Act 34 of 2005, ss 86(10) and 87.

Credit agreement - Consumer credit agreement — Debt review — Resumption — Whether reference in s 86(11) of Act to 'magistrates' court hearing the matter' and which 'may order that the debt review resume' is to magistrates' court hearing debt review in terms of s 87, or to magistrates' court or High Court hearing enforcement claim in terms of s 130(4) — Reference is to magistrates' court hearing debt review — National Credit Act 34 of 2005, s 86(11).

Credit agreement - Consumer credit agreement — Debt review — Jurisdiction — Debt-enforcement court may conduct debt review in limited circumstances in s 130(4) of NCA — National Credit Act 34 of 2005, s 130(4).

### **CROOKES v SIBISI AND OTHERS 2011 (1) SA 491 (KZP)**

Criminal procedure - The prosecution — Private prosecution — When competent — Abuse of process — Prosecutor's motives — Role of compensation — Allegation of extortion — Whether justified.

The respondents instituted a private prosecution against the appellant on charges of contravening s 23(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). Before the prosecution could proceed, however, the appellant brought an application for a permanent stay of prosecution. The application was dismissed, following which the appellant approached the High Court, basing his appeal on three grounds. Firstly, that various summonses had been served upon him in the matter over a period of five years, only to be withdrawn. This was a violation of his right to a speedy trial and, in effect, the threat of prosecution was nothing more than an attempt to obtain money from him, which constituted an abuse of court process. Secondly, that the passage of time had resulted in inevitable prejudice to him, since witnesses and documents were no longer available and memories had been dimmed. Thirdly, that a private prosecutor was entitled to institute a private

prosecution only once, and must then pursue or abandon it; the repeated E institution of fresh prosecutions was thus impermissible.

*Held*, that the present proceedings were at least the third brought against the appellant on the same charges. However, it was apparent that various discussions had taken place between 2002 and 2007, with a view to resolving the disputes between the parties; these may have influenced the decisions not to pursue earlier proceedings. On the evidence as a whole, there was insufficient basis for finding that the dominant motive of the respondents was one of extortion or oppression, rather than a desire to have justice done.

*Held*, further, that the prejudice of which the appellant complained was not such as to deny him a fair trial. As to the alleged destruction of court files, the onus of proving the unlawfulness of the evictions (with which the appellant had been charged) was upon the respondents, and it was for them to prove that no court order for the evictions had been obtained. In the face of the secondary evidence that the appellant and his then attorneys ought to be able to present, the prejudice seemed to lie rather on the side of the respondents. All in all, it was insufficient to justify the extreme remedy of a stay of prosecution.

*Held*, further, that s 6 (a) of the Criminal Procedure Act 51 of 1977 provided that anyone conducting a prosecution at the instance of the State could withdraw a charge at any time before an accused had pleaded to it. There was no similar provision in relation to the conduct of a private prosecution. However, it could not be inferred, from the absence of a positive provision allowing the withdrawal of charges by a private prosecutor, that such withdrawal was prohibited. For example, it would be absurd to suggest that, if a private prosecutor received legal advice that a prosecution had no prospects of success, he or she could not withdraw it, but must simply leave it hanging in the air. Furthermore, it was recognised that parties to a private prosecution could settle their differences; there was no good reason why a private prosecutor who was offered acceptable compensation could not retire from the battle. As in any other private litigation, the prosecutor was *dominus litis* and should be able to withdraw the proceedings if he or she wished to do so. As to the objection that criminal proceedings could be repeatedly instituted and withdrawn in order to harass the accused and enhance the bargaining position of the private prosecutor, such an approach would constitute an abuse of process that the court, exercising its inherent powers, would constrain. (

*Held*, accordingly, that the contention, that a private prosecutor could not withdraw criminal charges before the accused was required to plead, was incorrect; and, *in casu*, the withdrawal of the previous charges and the institution of fresh proceedings were not an abuse of the process of the court.

Appeal dismissed with costs.

### **S v MARAIS 2011 (1) SA 502 (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' — Pith of applicant's complaint no more than that trial court wrong on 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.

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, 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.

Application for leave to appeal dismissed. Application for admission as amicus curiae not granted.

### **McMILLAN NO v POTT AND OTHERS 2011 (1) SA 511 (WCC)**

Company - Shares and shareholders — Shareholders — Oppression — What constitutes — Not sufficient that relationship between parties having broken down irretrievably — No right of unilateral withdrawal when trust and confidence between shareholders no longer existing — But different if breakdown in relations causes majority to exclude minority shareholder from management of company, or otherwise to cause him prejudice as shareholder — Useful test is to ask whether exercise of power or rights by majority would involve breach of agreement or understanding between parties — Companies Act 61 of 1973, s 252.

Oppression — Relief — I Application — Who may apply — Sole trustee of trust with 30 percent shareholding in company — M, in terms of understanding between joint venturers in acquisition of shares of company, appointed managing director of company and in executive control of company — Consequent on disputes between M and other joint venturers, M removed as managing director of company —

Exclusion of M from business as relevant to trust's position qua member of company as it would have been had M been member in personal capacity — M entitled to apply for relief — Companies Act 61 of 1973, s 252.

One M and certain of his business colleagues had in a joint venture purchased all the shares in a certain company. In terms of the underlying understanding between the joint venturers, 30 percent of the issued share capital in the company was to be allotted to M, with the remainder to be divided in smaller percentages between the other joint venturers, save that a 28 percent holding was to be allotted to a black economic empowerment partner. The understanding between the joint venturers also contemplated that M would be engaged in executive control of the company as managing director, with each of the other envisaged shareholders being entitled to a representative on the board. It was also understood that M would be enabled, over time, to acquire from the other participants sufficient shares to give him the majority interest in the company within five years

Consequent upon certain disagreements and disputes between the joint venturers, M was at a shareholders' meeting of the company removed as a director of the company. M and his wife were later dismissed as employees of the company, following disciplinary proceedings against them. M, in his capacity as sole trustee of the trust, subsequently applied to a High Court for relief in terms of s 252 of the Companies Act 61 of 1973, on the ground that his removal as a director constituted unfairly prejudicial, unjust or inequitable conduct towards the trust.

A basis to claim relief in terms of s 252 can inure in certain circumstances, even if it is accepted that the applicant for relief had been wholly or in part to blame for his removal from the board of directors and dismissal from employment. The prejudicial unfairness or inequity lies not in the legally justifiable exclusion of the affected member from the company's management, H but in the effect of the exclusion on any such member — who had become a member only on the understanding that he or she would have an actively participative role amounting to employment by the company — if a reasonable basis is not offered in the circumstances for a withdrawal by the member of his or her capital. The issue of fault should, in general, not negate the right of a so-called quasi-partner member to relief under s 252, when such member has been excluded by the other members from the direct participation in the management of the company contemplated when the member's investment in the company was made. Having regard to the equitable nature of the remedy, and the attendant wide ambit of the judicial discretion to grant or withhold it on terms appropriate to the peculiar characteristics of the given case, there is no compelling reason why fault on the part of the applicant should as a rule preclude the grant of relief in terms of s 252.

### **JW v SW 2011 (1) SA 545 (GNP)**

Husband and wife - Divorce — Proprietary rights — Forfeiture of patrimonial benefits of marriage — Patrimonial benefit — What constitutes — Quaere: Whether

spouse can be ordered to forfeit asset he/she brought into joint estate — Since spouse can only benefit from asset brought into joint estate by other spouse, spouse cannot be ordered to forfeit his/ her own asset brought into joint estate — Divorce Act 70 of 1979, s 9(1).

Husband and wife - Divorce — Proprietary rights — Pension benefits — Non-member spouse's share — Parties married in community of property — Non-member spouse claiming half of member spouse's share of pension benefits — Court having discretion whether to allow claim, in exercising of which may consider fairness — *In casu*, *not allowing non-member spouse's share being fair and just* — Divorce Act 70 of 1979, s 7(8) (a)(i).

### **COCHRANE v CITY OF JOHANNESBURG 2011 (1) SA 553 (GSJ)**

State - Actions by and against — Actions against — Notice — Failure to give notice — Proper response by State — Not to proceed under rule 30 (irregular proceedings), but rather either to object to notice before institution of action or to deliver special plea after action instituted — In latter case proper ventilation of issues relating to condonation can take place — Institution of Legal Proceedings against certain Organs of State Act 40 of 2002.

An organ of State such as the municipality *in casu* should not proceed in terms of rule 30 of the Uniform Rules of Court, with a view to objecting to the validity of a plaintiff's notice given to it in terms of s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. The appropriate course to adopt is either to object to the notice in terms of the Act or to deliver a special plea after summons is served. The delivery of a special plea will allow the plaintiff to file a replication in terms of rule 25 of the Uniform Rules of Court, and will allow a proper ventilation of the issues relating to condonation.

### **NDIMENI v MEEG BANK LTD (BANK OF TRANSKEI) 2011 (1) SA 560 (SCA)**

Recusal - On grounds of appearance of bias — What constitutes — Acting judge having executed mortgage bonds for litigant, and litigant listing acting judge's firm as one to which such instructions to be given — Reasonable apprehension of bias found.

A reasonable person would reasonably apprehend bias where the acting judge in a matter has executed mortgage bonds for one of the litigants, and where that litigant lists the acting judge's law firm as one to which such instructions are to be given.

### **WINLITE ALUMINIUM WINDOWS & DOORS (PTY) LTD v PYRAMID FREIGHT (PTY) LTD t/a UTI 2011 (1) SA 571 (SCA)**

Tender - Costs — Cost incurred subsequent to offer of settlement — Discretion of court — Whether trial court exercised proper discretion in concluding that plaintiff not justified in proceeding with trial when tender more than capital awarded, but less

than sum of capital and accrued interest at date of tender — Uniform Rules of Court, rule 34(12).

It appeared that at the time the tender was made the accrued interest exceeded R50 000, or 20 percent of the capital, and that the sum of the capital and the accrued interest exceeded the sum tendered by at least R20 000, or 8 percent. A full bench upheld an appeal against the trial court's costs order. In a further appeal the SCA,

*Held*, that the trial court had erred in viewing the interest claim as a mere ancillary issue: the real issue was the amount of money that was due by the defendant to the plaintiff when the tender was made, however composed, and that there had been no reason for the trial court to accord more weight to one element than to the other.

*Held*, further, that when the defendant had tendered, it had done so with full knowledge of the nature and extent of the plaintiff's claim (including the basis of the interest calculations), and that in formulating its offer 'in full and final settlement of all the plaintiff's claims', it had to be taken to have included whatever liability might be determined for interest accrued to the date of tender.

*Held*, further, that the full bench had been correct in finding that the plaintiff had been entitled to reject the tender, and that, having done so, it faced the risk successfully, which carried with it the costs of the action.

Appeal dismissed.

### **RIBEIRO AND ANOTHER v SLIP KNOT INVESTMENTS 777 (PTY) LTD 2011 (1) SA 575 (SCA)**

Credit agreement - Consumer credit agreement — What constitutes — Whether agreement guaranteeing obligations of sureties under cancelled agreement constituting credit guarantee to which NCA not applicable or credit agreement to which NCA applying — National Credit Act 34 of 2005, s 8(5) read with s 4(2)(c).

The appellants were sureties in terms of a loan agreement between the principal debtor and the respondent. This agreement, to which the NCA did not apply, was later cancelled by agreement and replaced with a new agreement between the same parties, in terms of which the principal debtor was discharged and the appellants agreed to obligations and undertakings that were specifically acknowledged to have originated in their suretyship obligations in terms of the initial agreement. The obligations under the initial loan agreements and those under the new agreement were thus interdependent, and this could only mean that the new agreement was in substance an agreement to guarantee the principal debtor's obligations under the initial loan agreements, and was therefore a credit guarantee to which the NCA did not apply.

### **MINISTER OF TRADE AND INDUSTRY AND ANOTHER v EL ENTERPRISES AND ANOTHER 2011 (1) SA 581 (SCA)**

Counterfeit goods - Search and seizure — Without warrant — Application for order of confirmation of search and seizure — Requirements — Not formal application on notice of motion — Confirmation to be sought and given in chambers, on oath or affirmation — Notice to respondent not required — Counterfeit Goods Act 37 of 1997, s 5(4)(a).

**AB VENTURES LTD v SIEMENS LTD 2011 (1) SA 586 (GNP)**

Delict - Pure economic loss — Supply of products — Duty of care — Defendant supplying mining equipment under contract with joint venture — Plaintiff construction contractor incurring losses under separate contract with mining company — Plaintiff alleging defendant liable for losses due to defendant's negligence in supply of equipment — Defendant not delictually liable to plaintiff — Policy considerations such that defendant's conduct in circumstances not wrongful.

Delict - Liability — Product liability — Whether subsisting — Claim for pure economic loss — Defendant supplying mining equipment under contract with joint venture — Plaintiff construction contractor incurring losses under separate contract with mining company — Plaintiff alleging defendant liable for losses due to defendant's negligence in supply of equipment — Defendant not delictually liable to plaintiff — Policy considerations such that defendant's conduct in circumstances not wrongful.

A construction contractor (the plaintiff) was employed by a mining company for the construction of a copper mine. A joint venture involved on the project contracted with the defendant for the design, manufacture and supply of specialised drives to be used on the mine.

The plaintiff alleged that the defendant had negligently breached its contractual obligations to the joint venture, thereby causing the plaintiff to suffer loss, in that it had to pay contractual penalties to the mining company, and also incurred additional, site-related expenses. It was argued that the defendant had a legal duty to ensure that the drives would not be defective so as to cause loss or damage to the owner of the mine or to the plaintiff.

The defendant argued that an independent delictual duty to perform contractual obligations would generally not be recognised in cases of pure economic loss, and that, when obligations were assumed within a multi-party contractual context, it would be inferred that the parties intended their rights inter se to be regulated by contract, and not delict. There were no policy reasons why the contractual splitting of construction and services responsibilities between the parties should place the defendant in the position where its liability for economic loss, in the performance of its contractual duties, would be governed by delict, as well as contract.

The plaintiff submitted that a consumer of a product, who suffered harm as a result of a defect in a product, had an action in delict against the manufacturer. The existence of a contract between a manufacturer and the merchant-dealer did not have the effect of non-suiting a third-party plaintiff who had indirectly acquired the

negligently manufactured goods. The case law relied on drew no distinction between physical loss and pure economic loss.

The defendant argued that the principles relevant to product liability did not extend that liability to claims for pure economic loss. The various parties had contracted among themselves, and had been able to assume, limit or exclude liability in these contracts. Public-policy considerations would not allow the liability assumed by the plaintiff in its contract with the mining company to be imported into the contract that the defendant had signed with the joint venture.

*Held*, that wrongfulness was about whether public-policy considerations demanded that, in the circumstances, the plaintiff had to be compensated for the loss caused by the negligent act or omission of the defendant. In light of all the considerations and the case law, the defendant's conduct had not been wrongful in relation to the plaintiff, and even less was it wrongful in relation to the world at large. Extending the limits of liability to that which the plaintiff sought would be an unjustifiable extension of the principles set out by the Supreme Court of Appeal.

### **HARVEY v UMHLATUZE MUNICIPALITY AND OTHERS 2011 (1) SA 601 (KZP)**

Constitutional law - Human rights — Right to property — Expropriation — Purpose — Change in purpose of use of property after expropriation — Property initially expropriated for public purpose, which purpose later proving unfeasible — Municipality then rezoning property for another purpose — Former owner not entitled to reclaim property where municipality responding to changed circumstances and acting in good faith, as well as complying with statutory duties — Constitution, ss 25 and 33.

Expropriation - Purpose — Change in purpose of use of property after expropriation — Property initially expropriated for public purpose, which purpose later proving unfeasible — Municipality then rezoning property for another purpose — Former owner not entitled to reclaim property where municipality responding to changed circumstances and acting in good faith, as well as complying with statutory duties — Constitution, ss 25 and 33.

A municipality had planned to develop a certain area for use as a public open space with recreational facilities, and expropriated the applicant's property, on which he resided, for this purpose, along with several other properties. The applicant was paid an agreed compensation. When the plans to develop the area for this purpose turned out to be unfeasible, the municipality decided instead to use the area for a medium-density residential development. The area was rezoned accordingly.

Asserting his rights to property and to just administrative action under ss 25 and 33 of the Constitution, the applicant claimed the return of his property on the basis that the municipality, having expropriated his property for a specific purpose, could not then use it for a purpose unrelated to the purpose initially relied upon. The applicant argued that a property could only be expropriated for a public purpose, or in the

public interest. It followed that, if this public purpose fell away, the expropriation was no longer legally sustainable.

Application dismissed.

## **SOUTH AFRICAN CRIMINAL LAW REPORTS FEBRUARY 2011**

### **FALK AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2011 (1) SACR 105 (SCA)**

International co-operation in investigation of crime — International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA) — Registration of foreign restraint order — Applicability of provisions of Prevention of Organised Crime Act 121 of 1998 (POCA) — Section 26(10) (b) of POCA not applying to foreign restraint orders — South African courts lacking jurisdiction to rescind order of foreign court — If defendant wishing to undo effect of registered foreign restraint order, remedy lying not in POCA, but in s 26 of ICCMA — Latter definitive of grounds upon which registration of foreign restraint order could be set aside.

Prevention of crime — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Rescission of in terms of s 26(10) (b) read with s 17(b) — No basis for argument that 'court convicting the defendant' in s 17 (b) meaning only court of first instance — If appeal by NDPP against refusal of confiscation order upheld, convicting court's order would be set aside and replaced with order deemed appropriate by appeal court — On appellants' argument, if NDPP were to appeal, protection afforded by restraint order would be lost, no matter how good prospects of success on appeal — This absurdity and not law.

The appellants had applied to the Western Cape High Court for an order setting aside the registration, in terms of s 24 of the International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA), of a foreign restraint order against the first appellant. The first appellant had stood trial in Germany for various offences, including fraud, and an order had been issued authorising the attachment of certain of his assets — a copy of which order was registered in the Western Cape High Court. The appellants argued that, since the foreign court had ultimately declined to make a confiscation order against the first appellant, the matter had been 'concluded' within the meaning of s 17 (b) of the Prevention of Organised Crime Act 121 of 1998 (POCA); and that this triggered the application of s 26(10) (b) of POCA, which provided for the rescission of a restraint order when proceedings against a defendant C were concluded. In the alternative, they argued that the setting-aside was in the interests of justice, as contemplated in s 26(1) (d) of ICCMA, since South African law required a restraint order to be set aside if the court convicting a defendant, meaning the court of first instance, did not make a confiscation order against him.

### **S v NDUNA 2011 (1) SACR 115 (SCA)**

Evidence — Admissibility — Similar fact evidence — Of modus operandi of robbers — Such evidence admissible to prove that accused person perpetrator, but not to prove commission of crime itself — Absurd to exclude evidence of modus operandi merely because appellant charged with more than one count of robbery — Ultimate test being relevance — *In casu*, evidence relating to modus operandi, supported by fingerprint evidence, relevant and admissible — Cumulative effect of evidence of similar conduct weighing heavily against appellant.

### **S v RAMABOKELA AND ANOTHER 2011 (1) SACR 122 (GNP)**

#### **2011 (1) SACR p122**

Evidence - Of identification — Dock identification — Value of — While dock identification not carrying same weight as evidence emanating from proper identification parade, not to be equated to answer to leading question — Dock identification to be evaluated in same manner as all evidence regarding identification: with caution — Weight to be attached to such evidence depending on circumstances of individual case, and on evaluation of totality of evidence, with usual cautionary rule having been applied.

Sentence - Imposition of — Factors to be taken into account — Appellants convicted of kidnapping, assault and culpable homicide during course of strike — Whether mitigating factor that strike was legal — Public order central concern to community and to State — No citizen to be subjected to disorder and violence when other citizens decide to strike — Whether strike legitimate or unlawful in this respect irrelevant — Fact that strike legal not mitigating factor — Appeal against sentence dismissed.

### **COETZEE v NATIONAL COMMISSIONER OF POLICE AND OTHERS 2011 (1)**

Arrest — Legality of — Constitutional rights, in particular, right to freedom, not to be compromised by infringement thereof by government officials, in particular, police — Courts should jealously guard those rights — Those who act in violation of those rights should face whole force of legal system to bring them to book and to restrain them.

Arrest — Law relating to arrest — Purpose of to secure attendance of accused at court — If preferable method of securing such attendance is through summons, that method to be employed — But risk of accused absconding or committing further crime to be considered — Arrest without reasonable basis therefor should not occur indiscriminately, no matter how severe alleged offence is — Person to be arrested still presumed innocent person whose right to freedom, dignity and right to fair treatment should be upheld.

Arrest — Unlawful arrest — Application for release brought by way of interdict *de libero homine exhibendo* — Such interdict still part of South African law — On facts, court holding on return day that order for release correctly made.

Costs — Costs *de bonis propriis* — When to be ordered — Government officials — Can be ordered against government official where his actions unlawful and caused litigation and costs in respect thereof — Taxpayer should not be made to bear costs for unlawful, indiscriminate and illegal actions committed by government officials — Time has come to consider costs de bonis propriis against public officials acting in bad faith and causing unnecessary legal costs and litigation — Likewise for government officials who act in breach of constitutional imperatives contained in ss 38, 195(1), 237 and Bill of Rights in Ch 2 of Constitution of the Republic of South Africa, 1996 — Such orders may constitute 'appropriate relief' as contemplated in s 38 of Constitution and may act as deterrent against public officials acting unlawfully and in bad faith.

Any public official ( *in casu* police officers in the South African Police Service and certain Metro Police officers from Pretoria) who knows that he would be ordered personally to pay costs of any court application or litigation flowing from his unlawful actions, will think twice before acting in the manner and fashion that those responsible in this matter have acted. The time has come to order such public officials, not only to right the wrong that has been caused and to avoid the taxpayer having to fund their unlawful frolics, but also to act as a deterrent to public officials in future — to grant an order in terms of which all the costs of the litigation caused should be carried by those responsible. Only in the event of those responsible not being able to pay the full costs of the parties to the litigation, should the taxpayer be called upon to make good any payment of costs to a person who has been wronged and whose rights have been infringed.

### **LEGAL AID BOARD v THE STATE AND OTHERS 2011 (1) SACR 166 (SCA)**

Appeal — Powers of court on appeal — Supreme Court of Appeal not necessarily bound by grounds of appeal on which leave granted  
Court — Powers of — Separation of powers — Between judiciary and executive — Court ordering Legal Aid Board to provide accused with two counsel in private practice, to be remunerated at maximum tariff — Whether such order exceeding court's

The Supreme Court of Appeal (SCA) upheld an appeal by the Legal Aid Board (LAB) against a judgment by Borchers J in the Johannesburg High Court that it provide legal aid to Gary Porritt and Sue Bennett who have been indicted together with various companies that they represent on a total of 3 160 fraud charges. Both Porritt and Bennett are on bail. The former's bail was fixed at one million Rand, an amount subsequently reduced to R800 000. And Bennett's bail was fixed in the amount of R100 000.

Although they first appeared before Borchers J during January 2006, the criminal trial proper is yet to get under way. When they initially appeared in the High Court

they were legally represented by counsel and an attorney of their choosing. Since May 2007 they have been without legal representation. Until then, they spent some 23 million Rands on various preliminary legal skirmishes. According to Porritt those legal costs were funded by certain trusts of which, as he puts it, he was a discretionary beneficiary. Since then those trusts, so he says, have resolved to withdraw their financial support and to distance themselves from the criminal trial.

They accordingly made application to the LAB for legal representation at State expense. It was required to complete a standard form briefly setting out their financial position. They declined to do so and their applications were accordingly refused by the LAB.

During September 2008, Borchers J decided to invoke the provisions of section 3(b) of the Legal Aid Act that empowers a court to direct that a person be provided with legal representation at state expense after having taken into account the personal circumstances of the person concerned, the nature and gravity of the charge and any other factor which in the opinion of the court should be taken into account. Borchers J directed the LAB to furnish her with a report contemplated by that section and Porritt and Bennett to answer a number of questions pertaining to their personal circumstances.

On the strength of the information that served before her, Borchers J concluded that Porritt and Bennett had shown themselves to be indigent as defined she accordingly directed the LAB to provide each with two practitioners, who were to be remunerated at the maximum fee permitted by the Legal Aid Guide, to represent them in their criminal trial. Later the Judge clarified that all four practitioners to be appointed by the LAB to represent Porritt and Bennett were to be advocates in private practice and not employees of the LAB.

The SCA held that a court undertaking such an enquiry must ask itself two questions: first, would substantial injustice ensue were the accused to proceed to trial without representation and, if so, second, could the costs of that representation be borne by the accused from his or her own resources? The first in this case proved uncontroversial. The criminal trial, if and when it eventually starts is likely to be a complex one. The indictment runs to over 1 400 pages. In excess of 3 000 witnesses are expected to testify. It is anticipated that approximately 1 million pages of documentary material will have to be read in preparation for trial and that the trial is expected to last in the region of 3 years. Against that backdrop there could hardly be any dispute that Bennett and Porritt will require legal representation and that the trial would be rendered unfair were they to appear in person. For the SCA, the second question proved more troublesome. It accepted that Borchers J, to her credit, was concerned at the delays that had plagued the trial since inception and motivated by a desire that the trial commence and proceed to conclusion as soon as possible. But having analysed their responses to the learned Judge's questions, the SCA concluded that it illustrated a complete lack of candour on the part of both Bennett and Porritt. The SCA accordingly concluded that Borchers J had been wrong in finding that Bennett and Porritt had shown themselves to be indigent as defined.

The SCA proceeded then to consider whether Borchers J had the power to order the LAB to provide each of the respondents with two advocates in private practice to be

remunerated in accordance with the maximum rates permitted by the Legal Aid Tariff. The SCA held that in that regard Borchers J had misconceived the nature and scope of her power and it refused to endorse that order.

**DIRECTOR OF PUBLIC PROSECUTIONS, TRANSKEI v DUBO 2011 (1) SACR 191 (ECM)**

**Appeal** — Against sentence — By Director of Public Prosecutions in terms of s 310A of Criminal Procedure Act 51 of 1977 — Appellant having to show that difference, between sentence imposed by trial court, and sentence which appeal court would have imposed, of such nature and degree as to mean that trial court exercising sentencing discretion unreasonably — Magistrate miscalculating respondent's age — Conclusion that, since respondent 16 years old, wholly suspended sentence was appropriate, therefore misdirection vitiating proper exercise of trial court's discretion — No indication on record that trial court taking into consideration gravity of offence and interests of society — Seriousness of offence, including fact that victim only 14 years old, and protection of society, should have been considered, together with any mitigating factors — Matter remitted to trial court for structuring of sentence that would best suit needs and interests of offender, promote his rehabilitation, and encourage his reintegration into his family and community.

The respondent was convicted of rape and an entirely suspended sentence of 10 years' imprisonment was imposed. Acting in terms of s 310A of the Criminal Procedure Act 51 of 1977, the appellant sought to have the sentence set aside on the grounds that it was irregular, unreasonable, unbalanced, and based on an improper exercise of discretion.

**PRINSLOO v NASIONALE VERVOLGINGSGESAG EN ANDERE 2011 (1) SACR 196 (GNP)**

**Arrest** — Law relating to arrest — Duty to bring arrested person before court within 48 hours — Criminal Procedure Act 51 of 1977, s 50(1)(d) — *Expiry of 48-hour period outside normal court hours* — *Arrested person then to be brought before court during and not later than end of first court day after his arrest* — *Object of s 50(1) (d)* is to avoid arrested person being detained over weekend and to avoid person who has not been convicted being detained longer than necessary.

**Costs** — *Costs de bonis propriis* — Can be ordered against member of South African Police Service where he has acted entirely beyond his powers and has acted mala fide, intentionally, unreasonably and improperly.

**AII SA LAW REPORTS JANUARY 2011 VOL 1**

**Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another [2011] 1 All SA 1 (SCA)**

Contract – Existence of compromise agreement in dispute – Whether an oral agreement subsequently entered into by the parties introduces a variation or waiver of the original written agreement – Whether the appellant is entitled to invoke a right of lien over goods received on behalf of the first respondent – Court held that the no compromise agreement had been reached and therefore the standard terms and conditions of the appellant had remained applicable.

The appellant carried on business as a freight forwarding and clearing agent, while the first respondent was a furniture importer and retailer which used its services. In that regard, the appellant had extended a credit facility to the respondent. The relationship between the parties was governed by the appellant's standard trading conditions. One of the clauses therein provided that the appellant would have a special and general lien over all goods as security for all monies owing by the customer.

In 2007, the first respondent experienced financial difficulties and breached its contractual obligations by failing to pay the appellant within the agreed time frame and in some instances not paying at all. In 2008, various post-dated cheques were issued in an attempt to settle the debt. Two were met, but a cheque for R306 604,40 was dishonoured by an instruction to stop payment. Subsequent to the dishonouring of the cheque, the appellant received five containers on behalf of the first respondent. The appellant, accordingly, incurred further handling and storage charges, and the first respondent's indebtedness to the appellant increased. The parties then met to discuss payment of the first respondent's indebtedness. The parties were in dispute as to what exactly was agreed upon (in an agreement which came about on 5 May 2008). When the first respondent did not make payment as the appellant believed it had agreed to, the appellant indicated its intention to exercise the lien referred to above.

The question raised on appeal was whether the appellant was entitled to invoke the right of lien over the goods received by it on behalf of the first respondent, and whether an oral arrangement subsequently entered into by the parties disentitled the appellant from relying on its trading terms and conditions.

In the High Court, the appellant claimed confirmation of the lien; payment of the money due to it; and an order authorising the appellant to sell all the goods which formed the subject matter of the lien. The court approached the matter on the basis that the facts pertaining to the agreement of 5 May 2008 were in dispute and that there had been no request by the appellant that the matter be referred for evidence or trial. It applied the principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) where it was held that the court must deal with the matter on the basis of the respondent's version coupled with the admitted facts in applicant's papers.

**Held** – The Court should be prepared to undertake an objective analysis of disputes such as that referred to above when required to do so. A court must always be cautious about deciding probabilities in the face of conflicts of facts in affidavits. If the High Court had heeded that, when considering the first respondent's defence and version of what happened at the meeting of 5 May 2008, it would have concluded that no genuine factual dispute existed and that the version propounded by the respondents was fanciful and untenable. The Court concluded that no compromise

agreement had been reached on 5 May 2008 as contended for by the respondents. Instead, the standard trading terms and conditions of the appellant had remained applicable.

Upholding the appeal, the Court confirmed the appellant's lien over the goods received for the first respondent, and granted the remaining relief sought.

**Combined Business Solutions CC v Courier and Freight Group (Pty) Ltd t/a XPS [2011] 1 All SA 10 (SCA)**

Contract – Breach of contract – Claim for damages – Proof of loss – Whether loss has been sustained in consequence of a breach of contract is a factual enquiry – Court must determine what would have occurred had the contract been fulfilled – Due to volume of business, appellant required respondent to supply necessary software and a litho printer – Court found that the evidence did not establish that if the printer had been installed the appellant would immediately have commenced to do business and there was no reason simply to assume that that would have occurred.

The appeal was dismissed with costs.

**Groenewald NO and others v M5 Developments (Cape) (Pty) Ltd [2011] 1 All SA 17 (SCA)**

Administrative law – Local authority – Municipal tenders – Appeal against award of contract – An unsuccessful tenderer enjoys a right of appeal in terms of section 62(1) of the Local Government: Municipal Systems Act 32 of 2000 – Whether the appeal authority is entitled to award a contract to an unsuccessful tenderer who had not appealed against the initial decision to award it to another – Held that an appeal authority is not entitled to award a tender to another unsuccessful tenderer who did not appeal.

**SA Reserve Bank v Khumalo and another [2011] 1 All SA 26 (SCA)**

Civil procedure – Appeals – Grounds of appeal – As an appeal lies against an order that is made by a court and not against its reasons for making the order, on appeal a respondent is entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court below.

Revenue – Exchange control regulations – Regulation 22C – Regulation deals with untainted money and goods, with regulation 22C(1) providing for the attachment of untainted money and goods – Regulation 22C(1) is not invalid for failing to incorporate a time period not exceeding that laid down in 9(2)(g) of the Currency and Exchanges Act 9 of 1933 – Plain meaning of section 9(2) is that while the President is empowered to make regulations under which money and goods may be attached and frozen, no such attachment or freezing is to last for longer than the prescribed period.

**Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk t/a Pha Phama Security [2011] 1 All SA 34 (SCA)**

Delict – Pure economic loss – Where loss sustained is purely economic, the question must be asked whether public policy, or the convictions of the community, require that there should be such a legal duty of care – Wrongfulness had to be determined by whether public policy dictates that a claim should be afforded to a third party where the owner of premises who has arranged for security, and pays for it, is denied one.

Delict – Wrongfulness – Whether security guard's conduct was wrongful in allowing unauthorised removal of truck from site where security provider had contract with owner of site to protect it, but where contract excluded liability for provider's services – Court held that the security provider was not liable as it owed no duty to owner to prevent theft of its truck.

**Hospital Association of SA Ltd v Minister of Health and another; ER24 EMS (Pty) Ltd and another v Minister of Health and another; SA Private Practitioners Forum and others v Director-General of Health and others [2011] 1 All SA 47 (GNP)**

Administrative law – National Health Reference Price List – Promulgation of regulations – Review – Main challenge was that the Minister did not first consult with the National Health Council as required in section 90(1) of the National Health Act 61 of 2003, before promulgating the Regulations – Regulations were subject to review under the provisions of the Promotion of Administrative Justice Act 3 of 2000 – Exercise by the Minister of powers under the National Health Act 61 of 2003 to promulgate the Regulations was subject to the requirement of legality and constitutional sovereignty – As nothing that was done in terms of the Regulations was salvageable, anything done under the Regulations had to be set aside and the whole process had to commence de novo and in a proper, open and transparent manner and in terms of reconsidered regulations.

Administrative law – Promulgation of regulations – Minister has impermissibly delegated to the Director-General the powers afforded the Minister under subsections 90(1)(u) and (v) of the National Health Act 61 of 2003 – Minister offended against the principle that a person to whom the power to make legislation was delegated may not delegate those powers further, a principle expressed in the maxim *delegatus delegare non potest* – Court held that as the delegation was impermissible, it followed that the regulations became unworkable.

Three applications for review were consolidated by the court. The administrative conduct or decisions which were the subject of the review were those of the Minister of Health and the Director-General of the Department of Health.

The applicants sought relief in respect of the promulgation by the Minister of Health of Regulations in terms of section 90 of the National Health Act 61 of 2003 (“NHA”) and the determination and publication by the Director-General of the Department of Health, of a national health reference price list (“NHRPL”).

**Mvumvu and others v Minister of Transport and another [2011] 1 All SA 90 (WCC)**

Civil procedure – Motor vehicle accidents – Claim for damages – Capping of claims – Road Accident Fund Act 56 of 1996 – Section 18(1) and (2) – Constitutionality – Act distinguishes between two broad categories of people and treats them differently – Pedestrians and the occupiers (including passengers) of an “innocent” vehicle have unlimited claims for compensation and passengers in an “offending” vehicle, have claims that are capped by section 18 – Court held that the differentiation amounted to unfair discrimination and was unconstitutional.

Constitutional law – Claim for damages – Capping of claims – Road Accident Fund Act 56 of 1996 – Section 18(1) and (2) – Constitutionality – Act distinguishes between two broad categories of people and treats them differently – Pedestrians and the occupiers (including passengers) of an “innocent” vehicle have unlimited claims for compensation and passengers in an “offending” vehicle, have claims that are capped by section 18 – Court held that the differentiation amounted to unfair discrimination and was unconstitutional.

## **All SA LAW REPORTS JANUARY 2011 VOL 2**

### **Delphisure Group Insurance Brokers Cape (Pty) Ltd v Kotzé and others [2011] 1 All SA 109 (SCA)**

Delict – Claim for damages – Negligent misrepresentation – Foreseeability of harm relevant to issue of negligence – Causation – Two enquiries involved – Court must determine whether the particular action concerned can be identified as the cause without which the loss in question would not have been suffered, and whether the wrongful act is sufficiently closely linked to the loss to attract legal liability.

Delict – Pure economic loss – Misrepresentation of fact – Where a claim is for pure economic loss, even if the conduct causing such loss is negligent, it will only be regarded as unlawful and therefore actionable if there are public or legal policy considerations which require liability to follow for the damage it caused.

The first and second respondents, wheat farmers from Piketberg, cancelled applications they had made to Mutual & Federal Insurance Co Ltd for crop insurance for the 2004 growing season upon the appellant having marketed an alternative product known as Farmsure for which they applied instead. When it later became apparent that Farmsure did not exist, it was too late for them to obtain other insurance and, when their crops failed, they suffered financial loss which they were unable to recoup from insurance. They sued the appellant for damages, contending that as a result of the appellant's negligent misrepresentation that the Farmsure product existed they had suffered loss. Their claims succeeded in the Western Cape High Court.

The appellant appealed to the Supreme Court of Appeal, which upheld the appeal in part, the court having concluded that the second respondent would probably have withdrawn his crop insurance application to Mutual & Federal and been uninsured even had the appellant's misrepresentation not been made. However the appeal against the claim of the first respondent was dismissed, the court holding that the misrepresentation had been negligently made, that it had been unlawful and that it caused the first respondent to suffer loss in circumstances in which the appellant should be held liable.

### **Oshry NO and another v Feldman [2011] 1 All SA 124 (SCA)**

Administration of estates – Deceased estate – Duty of support to surviving spouse – Where deceased estate had limited ability to meet maintenance obligation, a lump sum payment was the most appropriate and competent award.

Administration of estates – Deceased estate – Duty of support to surviving spouse – Whether insurance policies from which the deceased's children were to benefit rightly constituted part of the total assets of the deceased's estate – Court had

regard to section 63 of the Long Term Insurance Act 52 of 1998 – Court held that the proceeds of insurance policies in which children of deceased were nominated beneficiaries had to be excluded from estate where clear that they intended accepting the benefit.

Persons – Marriage – Reciprocal duty of support between spouses – Maintenance of Surviving Spouses Act 27 of 1990 – In the event of a marriage being terminated by death, the primary obligation by a spouse is transferred to his deceased estate, provided that it has the means to meet that obligation and provided that the surviving spouse is unable to have her maintenance needs met from own means and earnings.

In 1987, the respondent entered into a marriage which lasted 18 years, until the death of her spouse (“the deceased”) in May 2005. The marriage of the respondent and the deceased was the second for each of them, with each having children from their previous marriages. The second appellant was the daughter of the deceased from his first marriage, and the first appellant was her husband. They were the executors of the deceased’s estate.

After her marriage to the deceased, the respondent lived with him in his flat. She stopped working at age 75, from which point, the couple’s financial position gradually deteriorated. The deceased informed the respondent that in the event of his death, his flat would devolve upon his children. He, therefore, asked her to turn to her sons for assistance, envisaging that the respondent’s sons should start contributing to her maintenance.

When executing his will, the deceased bequeathed the sum of R150 000 to the respondent and recorded his desire that she be allowed to remain in his flat until her death or remarriage, or until his children decided to sell it. The flat had in fact been bequeathed to his children in terms of his first wife’s will, so did not form part of the deceased’s estate. The balance of his estate was left to his children.

About three years after the death of the deceased, the respondent moved into a residential unit which she had previously purchased in a retirement village. At some point after the demise of the deceased, the respondent indicated her intention to claim maintenance from his deceased estate. That caused resentment on the part of the deceased’s family. The respondent eventually instituted action in the High Court for maintenance and for payment of an amount of R50 000 which she alleged had been a donation by the deceased to her during his lifetime, which had not been paid prior to his death.

The High Court ordered the appellants to recognise the claim for maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (“the Act”) and to pay to her maintenance in the sum of R9 628,63 per month with effect from 6 October 2006, until her death or remarriage, or until otherwise varied, suspended or discharged according to law. The appellants were also ordered to pay the respondent the amount of R50 000 referred to above.

Appealing against the judgment, the appellants argued that since the respondent had been maintained by her two sons from the time of the death of the deceased, she had not established a need for maintenance. The appellants also contended that the evidence established that the donation claimed had been paid to her by the deceased during his lifetime.

In a cross-appeal, the respondent challenged the High Court's ruling that maintenance in a lump sum was not competent in terms of the Act. She was also aggrieved that the High Court had rejected her application to amend her particulars of claim to increase her quantum. She sought an order that the increased lump sum be paid to her from 9 January 2006 (the date on which she had noted her claim) rather than from 6 October 2006 (the date of delivery of the appellants' plea).

**Held** – The issue of the R50 000 donation payable by the deceased would be decided first. The Court found the appellants' contentions in that regard to be based on pure speculation, and having pleaded that the debt had been discharged failed to discharge the burden of proof resting on them. The High Court's order that the amount be paid from the deceased estate was thus confirmed.

The primary question for consideration was whether the deceased estate in the circumstances of this case owed a duty of support to the respondent. In other words, the question was whether the respondent had established a claim for maintenance in terms of the Act. The issue was coloured by the fact that a duty of support has been recognised as existing on the part of a child in respect of an indigent parent. That was relevant in the present case in light of the appellants' argument that the respondent should be taken care of by her sons.

One of the invariable consequences of marriage is a reciprocal duty of support between spouses. At common law, a surviving spouse had no claim for maintenance against the estate of his or her deceased spouse. That position was changed by the advent of the Act. In the event of a marriage being terminated by death, the primary obligation by a spouse has now been transferred to his deceased estate, in the event that it has the means to meet that obligation and provided that the surviving spouse is unable to have her maintenance needs met from own means and earnings. Section 3 of the Act sets out factors that a court should take into account in determining a surviving spouse's reasonable maintenance needs. In determining an award of maintenance, a court always considers the needs of the claimant and the means of the party bearing the maintenance obligation.

Section 3(a) requires a court, in determining the reasonable maintenance needs of a surviving spouse, to have regard, right at the outset, to the amount in the estate available for distribution to heirs and legatees. This provision relates to the estate's ability to meet a maintenance claim.

Having established the respondent's right to maintenance, the Court proceeded by considering whether the respondent was indeed unable to have her maintenance needs met from own means and earnings. The income of the respondent was confirmed as being inadequate for her to meet her needs. However, critical to a proper determination of the matter was the question of whether insurance policies from which the deceased's children were to benefit rightly constituted part of the total assets of the deceased's estate. The Court had regard to section 63 of the Long Term Insurance Act 52 of 1998, before concluding that in determining the respondent's maintenance claim the proceeds of the policies fell to be excluded from the amount available for distribution.

The respondent accepted that the proceeds of the insurance policies were payable directly to the beneficiaries and did not form part of the estate to be administered by the executor, but attempted to argue that it was necessary for the beneficiaries to

have accepted the benefit of the policies in order to acquire the right to payment and that there was no evidence that the beneficiaries accepted the benefit. That submission was rejected by the court. The beneficiaries of the policies had yet to be afforded the opportunity of accepting the benefits intended for them, and the indications were clear that they would accept them at that juncture.

Had the High Court appreciated the principles set out above, it would have come to the conclusion that the amount available for an award of maintenance to the respondent was limited, and further that a lump sum award, might in the circumstances be the most appropriate. The Court therefore turned to consider the issue raised by the respondent in her cross-appeal, namely, whether a lump sum payment was competent and secondly whether it was appropriate in the present circumstances. As already alluded to, the Court was of the opinion that a lump sum maintenance award was both competent and appropriate.

### **Mkhize v Umvoti Municipality and others [2011] 1 All SA 144 (KZP)**

Civil procedure – Proper interpretation of an order of court – Courts must pay regard to the whole factual matrix or context surrounding the use of those words and is not restricted to what was formerly described as “background circumstances”, with reference to “surrounding circumstances” being limited – Involves a determination of the legal context within which the words were used.

Civil procedure – Residential property – Sale in execution – Validity – Magistrates Court Act 32 of 1944 – Section 66(1)(a) – Constitutional Court in *Jaftha v Schoeman and others*; *Van Rooyen v Stoltz and others* 2005 (1) BCLR 78 (CC) declared that section 66(1)(a) was unconstitutional and invalid in certain respects and it remedied the defect by reading words into the section providing for judicial oversight of the process of execution against immovable property – Court held that the orders in *Jaftha* are ambiguous because they are capable of being construed as being generally applicable to all cases of execution against immovable property in the magistrates’ court, whereas the case concerned only the possibility of such execution infringing the debtor’s right of access to adequate housing in terms of section 26(1) of the Constitution.

The plaintiff owned certain immovable property against which a warrant of execution was issued. The property was attached and then sold in execution to the third defendant. The latter sold the property to the fourth and fifth defendants in 2004. They took ownership, and were currently in possession of the property, to which they had effected improvements.

However, in the present action, the plaintiff contended that the sale in execution was void and sought a declaratory order to that effect. In addition, he sought an order setting aside the subsequent sale to the fourth and fifth defendants and an order that the property be re-transferred to him.

All the steps in respect of the sale in execution of the property were taken before the judgment of the Constitutional Court in *Jaftha v Schoeman and others*; *Van Rooyen v Stoltz and others* 2005 (1) BCLR 78 (CC). Prior to that decision, a sale in execution of immovable property consequent upon a judgment in the magistrates’ court was a routine matter with the relevant steps in the process being undertaken

by the clerk of the court in terms of section 66(1)(a) of the Magistrates Court Act 32 of 1944. In Jaftha, the Constitutional Court declared that section 66(1)(a) was unconstitutional and invalid in certain respects. It remedied the defect by reading words into the section providing for judicial oversight of the process of execution against immovable property. The plaintiff contended that the Constitutional Court had held that judicial oversight is a pre-requisite to a valid sale in execution under section 66(1)(a) and because the sale of his property took place without such judicial oversight, it was void and had to be set aside.

Held – The orders in Jaftha are ambiguous because they are capable of being construed as being generally applicable to all cases of execution against immovable property in the magistrates' court, whereas the case concerned only the possibility of such execution infringing the debtor's right of access to adequate housing in terms of section 26(1) of the Constitution.

The right of access to adequate housing was not compromised in this case. the orders made by the Constitutional Court should be construed as applying only when the immovable property in respect of which execution is sought is the debtor's home. The plaintiff never lived in the property in question in this case. There was, accordingly, no constitutional requirement of legal oversight before the clerk of the court issued a warrant of execution.

### **Muller v BOE Bank Ltd and others [2011] 1 All SA 166 (WCC)**

Contract – Rectification – A party who seeks rectification must show facts entitling him to that relief in the clearest and most satisfactory manner – A claimant for rectification must prove that the written agreement does not correctly express what the parties had intended to set out therein.

Evidence – Photocopy of affidavit – Admissibility – Civil Proceedings Evidence Act 25 of 1965 – Section 34(2) – Section affords the court a discretion to admit a copy of the document proven to be a true copy of the original or the part thereof relied upon if, having regard to all the circumstances of the case, the presiding officer is satisfied that undue delay or expense would otherwise be caused, and that the copy sought to be introduced has been proved to be a true copy of the original – All that is required is that the copy in question be proved to be a true copy – Court pointed out that the measure of proof would be proof on a balance of probabilities.

At a time when he was an insolvent, the plaintiff instituted action against the defendants. The second, third and fourth defendants were the joint trustees of his insolvent estate. Between the institution of action and the commencement of the trial, the plaintiff became automatically rehabilitated in terms of the Insolvency Act. The trial related therefore only to the first defendant (a bank).

The plaintiff's claims against the bank arose from an agreement in terms of which the bank would purchase the plaintiff's shares in his company, so as to enable him to settle his debts to the bank as well as his other creditors.

The court decided to deal with three of the claims separately and prior to any of the other issues in dispute. Thus the issues for determination were the plaintiff's claim for rectification of the agreement; the proper meaning of the agreement; whether the

bank was liable to the plaintiff in terms of the third claim; and whether the plaintiff's money claims in terms of the second and third claims were extinguished by prescription as contended in the bank's special plea.

Before the trial commenced, the bank sought to introduce into evidence the content of an affidavit made by a person who had since died. The bank sought to introduce the affidavit as evidence in terms of section 34 the Civil Proceedings Evidence Act 25 of 1965; alternatively, in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988.

**Held** – The document that the bank sought to introduce was a photocopy of the one actually signed by the deponent. Section 34(2) of the Civil Proceedings Evidence Act affords the court a discretion to admit a copy of the document proven to be a true copy of the original or the part thereof relied upon if, having regard to all the circumstances of the case, the presiding officer is satisfied that undue delay or expense would otherwise be caused, and that the copy sought to be introduced has been proved to be a true copy of the original. All that is required is that the copy in question be proved to be a true copy. There is no prescription of what evidence should constitute such proof. The Court pointed out that the measure of proof would be proof on a balance of probabilities. Based on the evidence of three witnesses, the Court was satisfied that the photocopy of the affidavit was a true copy of the original document. It was also satisfied that the affidavit fell to be admitted in evidence in terms of Part VI of the Civil Proceedings Evidence Act.

Regarding the claim for rectification, the plaintiff bore the onus of proving that the agreement fell to be rectified in the respects claimed. He was unable to discharge that onus, and the claim was dismissed.

The Court found further that the second and third claims were extinguished by prescription as contended by the bank.

### **Zokufa v Compuscan (Credit Bureau) [2011] 1 All SA 203 (ECM)**

Civil procedure – National Credit Act 34 of 2005 – Credit information – Right of access – Jurisdiction – Court found that the applicant essentially sought to enforce a right guaranteed by the Constitution and that such right vested within the area of jurisdiction of the present Court, and that the breach affected her constitutional rights in the area of jurisdiction of the court – Respondent was obliged to deliver the requested information to the applicant, and that the court had jurisdiction to entertain the application.

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## **Distell Ltd and another v Commissioner, SARS [2011] 1 All SA 225 (SCA)**

Customs and excise – Classification of goods for purpose of determining excise duty payable – Nature and characteristics of wine coolers – In dispute was whether the coolers fell into the first or second part of the tariff heading – Court held that the respondent's contentions were found to be unsustainable insofar as they were based on the allegation that the coolers were a fermented product – Respondent's determination was replaced with the correct determination by the court.

Customs and excise – Customs and Excise Act 91 of 1964 – Classification of goods for purpose of determining excise duty payable – Approach to determination of tariff heading explained – Three stages in tariff classification process involves interpretation of the meaning of the word used in the headings which may be relevant to the classification of the goods concerned; consideration of the nature and characteristics of those goods; and the selection of the heading which is most appropriate to such goods.

## **Libazi and another v S [2011] 1 All SA 246 (SCA)**

Constitutional law – Constitution of Republic of South Africa, 1996 – Section 35(3) – Right to fair trial – Right to challenge evidence is integral to constitutional guarantee of fair trial.

Criminal law – Conspiracy to commit murder – Requirements for offence – For a conviction on a charge of conspiracy to be achieved, the commission of an offence must be the focal point of the agreement between the perpetrators – It not being found that murder was specifically within the contemplation of the appellants at the relevant time, the conviction was set aside.

Evidence – Extra-curial statement – Admissibility – Where the maker of the statement had died and could not testify, the court was prevented from evaluating the evidence in the statement and applying the necessary cautionary rules, and clearly militated against the admission of the statement as hearsay evidence against the appellants.

The appellants were convicted of conspiracy to commit murder, and sentenced to ten years' imprisonment on that count. The first appellant was also convicted on three counts of attempted murder and the second appellant on two counts of attempted murder. They were each sentenced to ten years' imprisonment on each of the latter counts. The court ordered that nine years of each of the sentences imposed on the attempted murder counts were to run concurrently with the sentence imposed on the conspiracy count. That resulted in an effective term of imprisonment of 13 years for the first appellant and 12 years for the second appellant.

The present Court granted the appellants leave to appeal against their convictions for attempted murder and against all the sentences imposed by the High Court.

The proceedings against the appellants arose from an incident of taxi violence. In convicting the appellants, the High Court relied predominantly on the evidence of a person who testified that the appellants had sought his assistance in committing the crimes, and a number of eye witnesses (including the complainants in the attempted murder counts), as well as on an extra curial statement signed by an accomplice and given to a magistrate. Although the appellants had opposed the State's application to have the extra curial statement admitted in evidence against them in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, the High Court ruled that the statement was admissible hearsay evidence against the appellants.

On appeal, the appellants relied on two grounds. The first was that the High Court had erred in ruling that the extra curial statement was admissible against the appellants. The second was that the evidence of the State witnesses was unreliable due to the influence of the rivalry between the taxi associations and further due to inadequate opportunity for reliable identification during the shooting incidents.

The appellants argued that the statement properly construed amounted to a confession and as such was inadmissible against anyone other than its maker in terms of the provisions of section 217 of the Criminal Procedure Act 51 of 1977. An alternative argument was that if it were found that the statement was not a confession but an admission, that it was similarly not admissible against the appellants in terms of section 219A of the Criminal Procedure Act.

**Held** – Our Constitution requires rights to be construed generously to ensure the widest protection possible. Rights ought not be cut down by reading implicit restrictions into them. In-roads into the protection that the right affords should in all instances be justified. The right to challenge adverse evidence is an essential component of the constitutionally guaranteed right to a fair trial.

The admissibility of the extra curial statement was approached against the backdrop of the fact that the maker of the statement had since died, and was therefore an "absent witness." He was clearly an accomplice and did not testify. That effectively prevented the court from evaluating the evidence in the statement and applying the necessary cautionary rules, and clearly militated against the admission of the statement as hearsay evidence against the appellants.

The Court turned to consider whether the appellants' convictions were sustainable having expunged any role played by the extra-curial statement. A trial court must consider the totality of the evidence to determine if the guilt of any accused person has been proven beyond reasonable doubt. For a conviction on a charge of conspiracy to be achieved, the commission of an offence must be the focal point of the agreement between the perpetrators. The State relied on the evidence of the person referred to earlier, who testified that the appellants had sought his assistance in committing the crimes. However, the Court pointed out that the high-water mark of his evidence was that the appellants shared a common purpose to engage in violent conflict with a rival association. It was not shown that murder was specifically within the contemplation of the appellants at the time. The offence of conspiracy to commit murder was therefore not established and that conviction could not stand.

In relation to the convictions on the attempted murder counts, the primary submission was that the evidence tendered by the State was unreliable on two bases as mentioned earlier. The Court found that the direct identification evidence by

three witnesses was not shown to be unreliable. The conclusion was that the convictions of the appellants for attempted murder were justified.

On the issue of sentence, the Court held that as the conspiracy conviction had been set aside, the sentence imposed on that score had to consequently also fall away. The Court went on to find that a sentence of 10 years' imprisonment on each count of attempted murder was justified but each of the sentences should run concurrently resulting in an effective sentence in the case of each appellant of 10 years' imprisonment.

### **Minister of Safety and Security v Van der Merwe [2011] 1 All SA 260 (SCA)**

Criminal procedure – Search and seizure warrants – Appeal against order setting aside warrants on ground that they failed to specify the offences in relation to which the warrants were issued – Criminal Procedure Act 51 of 1977 – Section 21 – Court confirming that it is an essential prerequisite for the validity of a warrant that it specifies the offence in question.

Criminal procedure – Search and seizure warrants – Broad principles – For a warrant to be justified, the information that is placed before the court or judicial officer will necessarily need to demonstrate, first, that there are reasonable grounds to believe that a crime has been committed, and secondly, that there are reasonable grounds to believe that an article connected with the suspected crime is to be found upon particular premises – In order to demonstrate the existence of those jurisdictional facts the information on oath will necessarily need to disclose the nature of the offence that is suspected.

### **Nkengana and another v Schnetler and another [2011] 1 All SA 272 (SCA)**

Contract – Claim for specific performance – Every party to a binding contract who is ready to carry out its own obligations under it, has a right to demand from the other party, so far as it is possible, performance of that other party' obligations in terms of the contract.

Contract – Sale of property – Whether tender of performance by purchasers was sufficient to entitle them to specific performance – In order to be a valid tender where performance consists of payment of money, the tender must be for payment of the full amount owing, otherwise the creditor is entitled to refuse the tender and the debtor is not entitled to specific performance.

Contract – Sale of property – Whether the running of interest a tempore morae did not affect the calculation of the total amount owing by the appellants – Court pointed out that there can be no mora ex re if the creditor has expressly or tacitly waived his right to rely on the time clause or is estopped from relying on it – Respondent, in failing strictly to enforce the terms of the original agreement and in accepting payment of bond instalments instead, had unequivocally waived his right to rely on the time clause.

### **Rawlins v Kemp t/a Centralmed [2011] 1 All SA 281 (SCA)**

Labour law – Dismissal – Whether refusal of offers of reinstatement after being unfairly dismissed was reasonable – Appeal against Labour Appeal Court’s finding that refusal of reinstatement was unreasonable – Supreme Court of Appeal will not lightly interfere with a Labour Appeal Court decision insofar as that court was a specialist tribunal whose value judgment should be deferred to.

Labour law – Unfair dismissal – Whether refusal of offers of reinstatement after being unfairly dismissed was reasonable – Court refusing to grant compensation on ground that refusal of reinstatement was unreasonable.

### **Simcha Properties 6 CC v San Marcus Properties (Pty Ltd) [2011] 1 All SA 287 (SCA)**

Company law – Disposal of company’s assets – Authorisation– Whether new agreement entered into after original agreement lapsed required renewed authorisation of director by shareholder – Where authorisation provided for transaction had already been made, a new resolution to authorise is not necessary for the same transaction.

Company law – Disposal of company’s assets – Companies Act 61 of 1973 – Section 228 – When a company wishes to dispose of all its assets or a major part thereof, the transaction by which that objective is to be achieved requires the authorisation to be expressed by the shareholders – In a one-shareholder company, as in casu, it is that shareholder’s explicit expression of her authorisation, that will suffice for the transaction to comply with section 228 – Court held that the resolutions signed by the respondent’s sole shareholder represented her explicit expression of will that as the sole shareholder, she gave the director the authority, to conclude the sale transaction and to sign all and any documents necessary to give effect to that transaction.

In 2007, the appellant and the respondent concluded a written agreement in terms of which the appellant purchased from the respondent certain immovable property. The respondent was represented in concluding the agreement by its sole director (“Harris”). The sole shareholder in the respondent was Harris’ mother. The transaction was initially intended to be concluded with a company (“Dynadeals”) which was the sole shareholder of the appellant. When the deal was negotiated with the appellant instead, it was agreed that Dynadeals would be the surety and co-principal debtor for the appellant’s obligations.

The sale was subject to a suspensive condition. The suspensive condition was not fulfilled, with the result that the agreement lapsed. In terms of a new agreement, the original agreement was reinstated, and the date for fulfilment of the suspensive condition extended. Harris again represented the respondent when concluding the reinstatement agreement and it was his authority to conclude the reinstatement agreement that was the subject of this appeal.

Despite the fulfilment of the suspensive condition, the appellant failed to comply with its obligations in terms of the agreement. The respondent, accordingly,

approached the High Court seeking to enforce the agreement against the appellant and Dynadeals. The appellant contended that it was entitled to resile from the agreement as Harris was not properly authorised in terms of section 228 of the Companies Act 61 of 1973, to conclude the reinstatement agreement on behalf of the respondent. That contention was based on two arguments. The first was that the reinstatement agreement was not properly authorised. It was argued that when the original agreement lapsed, a new and specific authorisation was required for the reinstatement agreement to comply with section 228. The second argument was that when the reinstatement agreement was formally ratified by the sole shareholder in the respondent almost a year later, section 228 had been amended and at that stage a special resolution of the company, duly registered, was required for the ratification to be effective. It was common cause that no special resolution had been taken or registered.

The court a quo, reasoned that Harris was properly authorised to conclude both agreements, in view of the application of the principle of unanimous assent. In this regard, the court found that a resolution signed on 3 October 2007 empowered Harris to dispose of the property in terms of the original agreement. The court further found that the fact that that agreement had lapsed and then been reinstated was irrelevant. In that regard, the court found that until the authority bestowed on Harris in terms of the resolution of 3 October 2007 was revoked, Harris remained authorised to dispose of the property in terms of the original agreement.

**Held** – The enquiry on the first basis of the appellant’s argument related to whether the reinstatement agreement was properly authorised. That required that attention be given to section 228 as it applied when the original agreement was concluded.

Section 228 provides that when a company wishes to dispose of all its assets or a major part thereof, the transaction by which that objective is to be achieved requires the authorisation to be expressed by the shareholders. In a one-shareholder company, as in this case, it is that shareholder’s explicit expression of her authorisation, that will suffice for the transaction to comply with section 228. The Court found that the resolutions signed by the respondent’s sole shareholder represented her explicit expression of will that as the sole shareholder, she gave Harris the authority, to conclude the sale transaction and to sign all and any documents necessary to give effect to that transaction. The argument suggesting that new and specific authorisation for the reinstatement agreement was required ignored the fact that that agreement did not introduce a new transaction. It was the same transaction that Harris had authority to conclude and the reinstatement agreement became necessary when the original agreement lapsed due to the non-fulfilment of the suspensive condition.

The appeal was thus dismissed.

### **Van der Merwe v Master of the High Court [2011] 1 All SA 298 (SCA)**

Succession – Wills – Appeal against dismissal of application to accept unsigned document as will of deceased – Wills Act 7 of 1953 – Section 2(3) – Section sets out the power of a court in relation to a will which does not comply with the prescribed formalities– A lack of a signature has never been held to be a complete bar to a

document being declared to be a will in terms of section 2(3) – In casu, the appellant had provided proof that the document had been sent to him by the deceased via email, lending the document an aura of authenticity – From the surrounding circumstances, it was clear from the document title that the deceased had intended the document to be his will.

**Casino Enterprises (Pty) Ltd (Swaziland) v Gauteng Gambling Board[2011] 1 All SA 305 (GNP)**

Gambling – Online casino – Lawfulness – Whether and to what extent that which took place when a player in Gauteng interacted through the internet with the plaintiff's servers in Swaziland, constituted gambling for the purposes of the Gauteng Gambling Act 4 of 1995 and the National Gambling Act 7 of 2004 – Court held that the conduct which took place in Gauteng could not be described as insignificant as the decision to play the game was made in Gauteng and the act of communicating that decision to the plaintiff was performed in Gauteng – Plaintiff's actions were therefore prohibited, and its claims were dismissed.

**JMV Textiles (Pty) Ltd v De Chalain Spareinvest 14 CC [2011] 1 All SA 318 (KZD)**

Consumer credit – Credit agreement – Claim for payment – Plaintiff's obligation to register as credit provider – National Credit Act 34 of 2005 – Section 40(1) – A person is obliged to register as a credit provider if it was the credit provider under at least one hundred credit agreements, other than incidental credit agreements; or the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeded the threshold of R500 000 – A person who enters into incidental credit agreements is not obliged to register and does not run the risk of the agreements being rendered void for lack of registration – An incidental credit agreement cannot also be a credit facility.

**Louw and others v SA Mohair Brokers Ltd [2011] 1 All SA 328 (ECP)**

Company law – Members of company – Exclusion from AGM – Lawfulness – As a registered shareholder the first applicant was entitled to be present at the AGM and to participate fully in its proceedings – Applicant was denied that right when his proxy was evicted which constituted a violation of his rights and his exclusion was thus unlawful.

Company law – Proxy holders – Exclusion from the AGM – Right of a member of a company to participate in the affairs of the company – Every member is vested with the right to attend the meetings of members of the company, and to participate in its proceedings and, in particular, to address members present and to speak for or against any motion tabled for adoption and to register his vote for or against the motion – Ruling that excluded certain proxy holders from participating in the AGM offended the audi alteram partem rule and denied the proxy grantors, who were still registered shareholders in the company, from the full enjoyment of their rights.

The first five applicants were shareholders in the first respondent. They sought the setting aside of an ordinary resolution and a special resolution passed at the annual general meeting of the first respondent in 2009, and interdicts preventing the implementation of the resolutions.

In October 2009, the third respondent entered into an agreement with the directors of the first respondent, for the purchase of a 66% shareholding in the fourth respondent. Since that was the major asset of the first respondent, its shareholders were required to approve the sale in a special resolution.

The sixth applicant, a competitor in the mohair industry, was opposed to the sale since it would result in the third respondent acquiring the entire shareholding in the fourth respondent. It therefore decided to itself submit an offer to the first respondent for the purchase of shares in the fourth respondent. In the weeks prior to the first respondent's AGM, the sixth applicant concluded agreements with numerous shareholders in the first respondent for the purchase of their shares. It also obtained a proxy from each of those shareholders to attend the AGM and vote on the shareholder's behalf, the intention being to vote against the adoption of the special resolution. However, at the AGM, the fifth respondent, in his capacity as chairman, ruled that the proxies granted by 706 shareholders of the first respondent were invalid. The proxy holders were evicted from the AGM at the commencement of the meeting. In their absence, the special resolution was passed.

The respondents did not dispute that the proxy holder of the first applicant should have been allowed to remain in the AGM and that he was entitled to participate in the meeting but disputed that his shares carried sufficient votes to prevent the special resolution from being approved by the requisite majority.

Held – The issue was not whether sufficient votes attached to the shares of the first applicant to alter the outcome of the vote but whether the decision to exclude him from participating in the AGM was justifiable or not. As a registered shareholder the first applicant was entitled to be present at the AGM and to participate fully in its proceedings. He was denied that right when his proxy was evicted and it constituted a violation of his rights. His exclusion was thus unlawful.

An issue that the exclusion of the proxy holders from the AGM (and in effect therefore the proxy grantors) raised in respect of all the applicants was the right of a member of a company to participate in the affairs of the company. Subject to any justifiable limitation imposed by the Articles of Association regarding a member's rights vis-à-vis the company, every member is vested with the right to attend the meetings of members of the company, to participate in its proceedings and, in particular, to address members present and to speak for or against any motion tabled for adoption and to register his vote for or against the motion. The ruling that excluded certain proxy holders from participating in the AGM offended the audi alteram partem rule and denied the proxy grantors, who were still registered shareholders in the company, from the full enjoyment of their rights.

The relief sought by the applicants was granted.

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### **Cadac (Pty) Ltd v Weber-Stephen Products Company [2011] 1 All SA 343 (SCA)**

Civil procedure – Inquiry into a claim for damages – Claim arising from confiscation of goods – Counterfeit Goods Act 37 of 1997 – Sections 10(1) and 17(1) – Whether proceedings launched by appellant for an inquiry into damages was competent because it is not permissible to bring an illiquid claim by means of motion proceedings – Where appellant was not seeking to have its illiquid claim decided by means of motion proceedings but was seeking directions as to how to proceed with the quantification of its claim for damages to which it was entitled, proceedings were competent.

Civil procedure – Prescription – Prescription Act 68 of 1969 – Section 15(2) – Section provides that the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment – There is no time limit stated in section 15(2) within which the claim must be prosecuted with success.

Intellectual property – Counterfeit goods – Claim for damages arising from confiscation of goods in terms of section 17(1) of the Counterfeit Goods Act 37 of 1997 – Section 17(1) provides that any person suffering damage or loss caused by the wrongful seizure, removal or detention of goods alleged to be counterfeit is entitled to claim compensation from the complainant for that damage or loss.

### **Falk and another v NDPP [2011] 1 All SA 354 (SCA)**

Civil procedure – Appeal – Registration of foreign restraint order in South Africa High Court – Prevention of Organised Crime Act 121 of 1998 – Section 24A – Section provides that a restraint order and an order authorising the seizure of the property concerned shall remain in force pending the outcome of any appeal against the decision.

Public international law – Effect of foreign restraint order registered in South Africa High Court – Appeal against registration in terms of the provisions of section 24 of the International Co-operation in Criminal Matters Act 75 of 1996 – Section 25 of the International Co-operation in Criminal Matters Act, in providing that a foreign restraint order shall have the effect of a restraint order made by the division of the High Court at which it has been registered, does not convert the foreign restraint order into an order of the South African High Court.

### **Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd [2011] 1 All SA 364 (SCA)**

Mining and minerals – Refusal of access to holder of old order mining right by property owners, on ground that no mining operations were being conducted on their properties immediately before the date on which the Mineral and Petroleum Resource Development Act 28 of 2002 took effect – The creation of an old order right depends not upon use of any particular portion of land to which a mining licence

relates but rather upon whether mining operations were being conducted according to the terms of the licence on the relevant date – Even though mining activities were not yet taking place on or in relation to the subdivision owned by the first and second respondents immediately before the Act took effect, their properties formed part of the ongoing mining project on the area with respect to which the appellant was entitled to conduct mining operations, and these properties cannot be separated from those areas on which operations were physically being conducted.

### **Legal Aid Board v S and others [2011] 1 All SA 378 (SCA)**

Constitutional law – Right to legal representation – Constitution of the Republic of South Africa, 1996 – Section 35(3)(g) – Although the right to choose a legal representative is a fundamental one to be protected by the courts, it is not an absolute right and is subject to reasonable limitations – Court must ask two questions: first, would substantial injustice ensue were the accused to proceed to trial without representation, and if so, second, could the costs of that representation be borne by the accused from his or her own resources.

Courts – Appellate court – Powers on appeal – Court will not necessarily consider itself bound by the grounds upon which leave has been granted – If the court is of the view that in a ground of appeal, not covered by the terms of the leave granted, there is sufficient merit to warrant consideration of it, it will allow such ground to be argued.

Criminal law – Rights of accused – Right to legal aid – Applicant required to provide information regarding means – While applicant should not be regarded as having to discharge an onus of proof regarding his means, where the information sought is peculiarly within his knowledge, he has a clear obligation to assist the court's enquiry – Failure to assist the court in those circumstances might well be fatal to quest for legal assistance at State expense.

### **MEC KZN for Local Government, Housing and Traditional Affairs v Amajuba District Municipality and others [2011] 1 All SA 401 (SCA)**

Administrative law – Municipality's executive committee – Composition of – Local Government: Municipal Structures Act 117 of 1998 – Section 43(1) – Section provides that if the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 percent of the councillors or 10 councillors, whichever is the least, are elected – Court held that the municipal council was vested with the choice to determine who should be on its executive committee, and that the members of that committee were to be appointed by way of a majority vote.

Interpretation – Statutes – While the ambit of interpretation is to give effect to the object or purpose of the legislation under consideration, in doing so the words used must be given their ordinary grammatical meaning unless to do so would lead to an absurdity that the Legislature could not have contemplated – Meaning of "elect" in section 43(1) of the Local Government: Municipal Structures Act 117 of 1998 – Legislature used the same word in the same sense throughout the same enactment,

particularly in relation to similar matters – “Elect” should be interpreted widely to connote “select” in the sense that the council is obliged to accept the councillor put forward by a party entitled to have a councillor in the executive committee.

The first respondent was a municipality, in terms of the Local Government: Municipal Structures Act 117 of 1998 (“the Act”). The Act sets out the composition of the municipality’s executive committee. Section 43(1) provides that if the council of a municipality establishes an executive committee, it must elect a number of councillors necessary for effective and efficient government, provided that no more than 20 percent of the councillors or 10 councillors, whichever is the least, are elected. The executive committee must be composed in such a way that parties and interests represented in the municipal council are represented in the executive committee in substantially the same proportion they are represented in the council. Thus, the first respondent’s executive committee comprised five members: two from the African National Congress (“the ANC”), two from the Inkatha Freedom Party (“the IFP”) and one representing a minority party.

Initially, the ANC held a majority in the council. That situation subsequently changed, and the IFP obtained the majority. The new majority promptly called for a council meeting with the view of removing the ANC councillors from the posts of mayor, deputy-mayor and speaker. As the speaker had ignored the request for a council meeting, the IFP had to obtain an order to compel from the high court. Its application was opposed by the executive committee, but as already stated the application succeeded. Subsequently, the council proceeded to hold an investigation into the possible waste of municipal funds by the opposition to the application. On that basis, it removed the two councillors from the executive committee.

Although the two councillors remained members of the council, they were neither disciplined nor sanctioned. Moreover, no steps were taken to recover the wasteful expenditure from them under the Municipal Finance Management Act 56 of 2003. Section 53(3) of the Act provides for members of an executive committee who are removed from office to be replaced by way of an election. The effect was that the ANC was entitled to have two councillors elected to fill the vacancies created by the removal of councillors in order to reflect the proportional representation of the parties in the council. The ANC nominated the same councillors once again for election to fill those vacancies. The majority of the council refused to elect them and the ANC councillors, in turn, refused to put up any other candidates for election.

In the face of the deadlock, the appellant adopted the position that the council had enjoyed no right to refuse to approve whoever the ANC nominated to the executive committee. He then proposed a resolution to the provincial executive council that either an administrator be appointed to run an election aimed at the installation of the ANC’s nominees as members of the executive committee of the first respondent’s council or, alternatively, that the first respondent’s council be dissolved and fresh elections held with the first respondent’s functions being performed by the administrator until a new council was established. When the proposal was accepted by the provincial executive council, the first respondent launched an application in the High Court, the dismissal of which led to the present appeal.

On appeal, the appellant confined his argument to the contention that the ANC was entitled to nominate any two of its municipal councillors in the first respondent for the two vacancies on the executive committee, including those councillors whose

removal had caused the vacancies in the first place, and that the council was thereupon obliged to accept such persons onto that committee.

**Held** – Section 160(1)(c) of the Constitution provides for a municipal council to elect an executive committee subject to national legislation. Such legislation in this case was the Act itself. Section 160(3)(c) provides that questions before a municipal council such as the election of an executive committee are to be decided by a majority of the votes cast. The appellant's suggestion that the Act should be interpreted to mean that a municipal council was obliged to accept a decision taken by another, on who should be a member of its executive committee, was wholly inconsistent with this constitutional requirement.

A requirement that the members of the executive committee of a municipal council be elected by a majority of the members of that council does not do violence to democracy or the underlying values of the Constitution. An essential element of democracy is that effect be given to the will of the majority.

Accordingly, the court found that a system whereby a majority vote of councillors is used to determine the members of a municipal executive committee is in no way undemocratic. It allows a minority party to put forward its candidates and its views to be heard and considered as to their suitability to be elected. It also ensures that the will of the majority shall prevail: and that is the hallmark of democracy. On the other hand, the same cannot be said of the interpretation put forward by the appellant viz that the majority of a municipal council is obliged to accept the views of a minority on a crucial issue such as the suitability of a person to be entrusted with the conduct of the executive functions of a municipality.

The Court also pointed out that the appellant's argument did violence to the language used by the Legislature. While the ambit of interpretation is to give effect to the object or purpose of the legislation under consideration, in doing so the words used must be given their ordinary grammatical meaning unless to do so would lead to an absurdity that the Legislature could not have contemplated. The interpretation that the appellant sought to place upon section 43(1) could not be reconciled with the ordinary grammatical meaning of the words used by the Legislature.

The conclusion was that the council was vested with the choice to determine who should be on its executive committee, and that the members of that committee were to be appointed by way of a majority vote. The word "elect" in section 43(1) of the Act had to be ascribed that meaning rather than that which the appellant put forward.

The appeal was dismissed. (See MEC of KwaZulu-Natal for Local Government, Housing and Traditional Affairs vi Amajuba District Municipality and others **reported** at [2010] 2 All SA 89 (KZP))

### **Guga v Minister of Safety and Security [2011] 1 All SA 413 (ECM)**

Police – Seizure of vehicle – Lawfulness – Police Act 68 of 1995 – Section 13(8) – Section regulates the setting up of police road blocks and the procedure to be followed in a road block – Element of reasonable suspicion in section 20 of the Act is a common jurisdictional factor which precedes the issuing of both a search warrant in terms of section 21(1)(a) and a certificate in terms of section 13(8) of the Police

Act – Court found that the respondents had not shown that the applicant’s motor vehicle was an item to be seized under section 13(8) of the Police Act as they failed to satisfy the requirements of section 20 of the Act.

The applicant’s motor vehicle was seized by members of the South African Police service in a road block. The applicant sought the setting aside of the seizure of his motor vehicle and the certificate purporting to authorise it issued in terms of section 13(8) of the Police Act 68 of 1995. He also sought a restraining order interdicting the respondents from further unlawfully seizing the motor vehicle from the possession of the applicant as well as a mandamus that they should release the vehicle to the applicant.

**Held** – In light of the constitutional protection of property, a seizure of property is prima facie unlawful and will need to be justified. The need for strict interpretation of a statutory provision which authorises the seizure of a person’s property arises from the fact that it limits the individual right to property.

Section 13(8) of the Police Act regulates the setting up of police road blocks and the procedure to be followed in a road block. The element of reasonable suspicion in section 20 of the Act is a common jurisdictional factor which precedes the issuing of both a search warrant in terms of section 21(1)(a) and a certificate in terms of section 13(8) of the Police Act.

The Court found that the respondents had not shown that the applicant’s motor vehicle was an item to be seized under section 13(8) of the Police Act as they failed to satisfy the requirements of section 20 of the Act.

Having found that the search and seizure were unlawful, the Court turned to consider whether or not the applicant could lawfully possess the motor vehicle notwithstanding the finding of discrepancies on its engine and chassis numbers. The applicant’s explanation was satisfactory to the Court, and the application succeeded.

### **Mudaly v Gwala and others [2011] 1 All SA 420 (KZD)**

Criminal procedure – Search and seizure warrants – Validity – Applicant’s standing – Respondents resisted the application principally on the ground that the applicant lacked standing to challenge the warrants because he had not shown that he was in any way connected to the items seized or the premises searched – Court held that the applicant had not established any link to the items seized and the premises searched and he had also not admitted to any facts in the summary of substantial facts in the charge sheet.

### **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another [2011] 1 All SA 427 (KZP)**

Civil procedure – Summary judgment – Affidavit – Applicant’s attorney a deponent to – Court held that the applicant’s attorney had no direct and personal knowledge in relation to the claims as his affidavit was based entirely on hearsay because he was not a person who could swear positively to the facts and verify the cause of action or the amount owing – Such an affidavit is nothing more than an affidavit of information

and belief containing inadmissible hearsay – An application founded on such an affidavit is as a result defective.

Civil procedure – Summary judgment – Affidavit – Deponent to – Personal knowledge – Uniform Rules of Court – Rule 32(2) – Rule requires an applicant for summary judgment to deliver a notice of application together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed, stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

**Tongaat Paper Co (Pty) Ltd v Master of the KwaZulu Natal High Court, Pietermaritzburg and others [2011] 1 All SA 438 (KZP)**

Insolvency – Objection to liquidation and distribution account – Rejection of objection – Review – Exceptions to claim – Locus standi – Plaintiff was at all material times the owner of certain assets sold by the liquidators to the fifth defendant – Plaintiff clearly had a legal grievance and fell within the concept of a person aggrieved and accordingly had the requisite locus standi to institute the action – Court held that the plaintiff did not have to be a proved creditor or to have lodged an objection to the estate account as suggested by the liquidators.

The second, third and fourth respondents were liquidators of an insolvent company. Acting in such capacity, they had sold certain assets of the company to the fifth respondent. When the second liquidation and distribution account was lodged, a creditor of the company lodged an objection against the account. However, the first respondent rejected the objection on the ground that to do so involved a dispute of fact and he was not empowered by the provisions of the Insolvency Act 24 1936, to hear evidence to resolve such disputes.

The plaintiff, alleging that it was a person aggrieved by the first defendant's decision as contemplated in sections 111(2)(a) and 151 of the Insolvency Act, sought to review and set aside the decision. It alleged that it was at all material times the owner of certain assets that formed the part of the said assets sold to the fifth defendant. The second, third and fourth defendants then filed an exception to the plaintiff's particulars of claim.

In the exceptions, it was averred that the plaintiff had no locus standi to sue, and that the facts pleaded by the plaintiff did not sustain a cause of action.

**Held** – It was pleaded that the plaintiff was at all material times the owner of certain assets sold by the liquidators to the fifth defendant. Therefore, the plaintiff clearly had a legal grievance and fell within the concept of a person aggrieved and accordingly had the requisite locus standi to institute the action. It did not have to be a proved creditor or to have lodged an objection to the estate account as suggested by the liquidators.

The exceptions were dismissed.