

# LEGAL NOTES VOL 4/2011

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## EDITORIAL

I waited to get the ALL SA LAW Reports for March 2011 but to no avail.

The new Companies Act is again on hold. (Although the Regulations have not been promulgated, this is only possible in South Africa.)

### McDONALD v YOUNG

This case could affect gay couples and I am sure will be reported one of these days.

On 24 March 2011 the Supreme Court of Appeal dismissed an appeal against an order of the Western Cape High Court refusing to declare that a joint venture agreement existed between the appellant and the respondent and holding that there was no legal duty on the respondent to support the appellant.

The parties had cohabited, as husband and wife, for approximately seven years before the relationship broke down. The appellant did not possess any meaningful assets and had a very limited income while, on the other hand, the respondent was a woman of considerable means. During the subsistence of the cohabitation the respondent acquired immovable property at her own expense. The appellant claimed that he was entitled to a half-share of the property, alleging that the parties had concluded an express oral joint venture agreement in terms of which the respondent would contribute financially to the acquisition, completion and refurbishment of the property while he would contribute his time and expertise to oversee the development of the property. The appellant claimed, in the alternative, that the respondent was under a duty (by operation of law, or alternatively, by virtue of a tacit contract) to support him subsequent to their cohabitation.

The SCA held, in respect of the claim based on the alleged joint venture agreement, that the appellant's evidence was contrary to all reasonable probabilities and that, despite the fact that it was unchallenged, it counted for nothing. It held, therefore, that the appellant had not discharged the onus resting on him. It held, in respect of the alternative claim for maintenance, that there is no reciprocal duty of support on cohabitants. It held further that it could not infer a tacit contract from the proven facts, because such an

inference would conflict with the appellant's evidence that the alleged joint venture agreement was intended to ensure that he gained financial independence.

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The respondent, Mr Vusumzi Mdeyide, who is blind, illiterate and innumerate, was involved in a motor vehicle collision on 8 March 1999. His claim for compensation from the Road Accident Fund was lodged on 11 March 2002, three years and three days from the date of the collision.

Section 23(1) of the Road Accident Fund Act stipulates that the right to claim compensation prescribes three years after the date upon which the cause of action arose.

In the High Court Mr Mdeyide claimed that prescription only commenced running against him on 17 September 1999, when he first consulted with his attorneys and became aware that he had a right to claim compensation from the Fund; further that given his personal circumstances and because he has no concept of time and space, he was entitled to lodge his claim beyond the three-year period.

Notshe AJ held that the problem with section 23(1) of the Act was that it imposed a complete bar, irrespective of how worthy, unusual or exceptional particular circumstances might be, or that a claimant may in a particular instance have been unaware of the basis of the claim or the identity of the debtor. He consequently declared the section unconstitutional and referred the order to this Court for confirmation.

The Fund appealed the decision and the Minister of Transport, who was admitted as an intervening party in this Court, made common cause with it.

Navsa AJ, writing for a unanimous Court, held that the fundamental problem in this case was the lack of proper inquiry into Mr Mdeyide's mental capacity before and during the trial. It appeared from the evidence that the respondent's attorney had experienced difficulty in extracting information from him during consultations. Furthermore, his medical records indicated that he had sustained a head injury as a result of the collision and on two occasions displayed signs of confusion. Moreover, he testified that he had been mentally affected as a result of the collision. All of this ought to have suggested to all the protagonists that something was badly amiss.

If Mr Mdeyide had indeed been of unsound mind, that called into question the validity of the proceedings in the High Court. An inquiry into his capacity to litigate and manage his own affairs should therefore be conducted. The result might enable Mr Mdeyide to seek refuge in section 13(1)(a) of the Prescription Act which provides that prescription does not run against a person of unsound mind.

Because the High Court had not considered Mr Mdeyide's capacity to litigate and manage his own affairs, its order was premature, and for that reason the order of invalidity could not be confirmed. The matter is remitted to the High Court for an inquiry into Mr Mdeyide's capacity. Should the High Court establish that Mr Mdeyide was at material times of sound mind and reinstate its original order, the Fund would be entitled to re-enrol the matter in this Court for a decision on the merits.

## **COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE v NWK LTD 2011 (2) SA 67 (SCA)**

Contract — Consensus — Simulation — Test — Test not simply whether intention to give effect to contract in accordance with its terms — Test should go further and require examination of commercial sense of transaction: of its real substance and purpose.

The Commissioner for the South African Revenue Service had levied additional assessments against NWK, a maize trading company, formerly a co-operative, for the years 1999 to 2003. He had also imposed additional tax (at the rate of 200 per cent) as a penalty for making false statements in tax returns, and interest. The basis of the assessment was that NWK had concluded transactions with First National Bank and its subsidiary that were simulated. While intending to borrow R50m from FNB, NWK, in April 1998, had purported to borrow over R96m from a subsidiary of

FNB, repayable by the delivery of a specified quantity of maize five years after the contract was concluded. It had paid interest on the sum of R96m, and claimed that as a deduction from income tax on the basis that it was expenditure in the production of income.

A number of other agreements were entered into which in effect cancelled out the obligation to deliver maize. The real sum lent was R50m, while deductions were claimed in respect of interest paid on R96m. The Tax Court, Johannesburg found that the parties had intended to perform the contracts on the terms agreed: there was no simulation. It took into account the performance, five years later, by the parties of their respective obligations under the various contracts, including the constructive delivery of maize (by exchange of silo certificates in front of a notary) by NWK to FNB and the immediate delivery of the same quantity of maize by FNB to NWK. It upheld NWK's appeal against the Commissioner's assessments.

The Tax Court also declined to invoke the former s103(1) of the Income Tax Act 58 of 1962 (which allows the Commissioner to impose tax where he is satisfied that a transaction has been entered into for the purpose of avoiding liability for tax) on the basis that it could not be used as an alternative ground to a finding that a transaction was simulated.

The Supreme Court of Appeal upheld the Commissioner's appeal against the decision of the Tax Court. It held that the loan was simulated, and that there had never been an intention to effect delivery of maize as repayment. The court did, however, reduce the penalty, imposing only 100 per cent of the amount assessed as additional tax.

The SCA held that the test to determine simulation cannot simply be whether there is an intention to give effect to a contract in accordance with its terms. Invariably where parties structure a transaction to achieve an objective other than the one ostensibly achieved they will intend to give effect to the transaction on the terms agreed. The test should thus go further, and require an examination of the commercial sense of the transaction: of its real substance and purpose. If the purpose of the transaction is only to achieve an object that allows the evasion of tax, or of a peremptory law, then it will be regarded as simulated. And the mere fact that parties do perform in terms of the contract does not show that it is not simulated: the charade of performance is generally meant to give credence to their simulation.

### **MANONG AND ASSOCIATES (PTY) LTD v CITY OF CAPE TOWN AND ANOTHER 2011 (2) SA 90 (SCA)**

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having misdirected itself in various respects and consequently failing to exercise its discretion judicially — Manner in which litigation conducted and motives behind complaints justifying costs order against complainant.

On 1 December 2010 the Supreme Court of Appeal dismissed an appeal by Manong & Associates (Pty) Ltd, a company specialising in civil, structural and development engineering, against a decision of the Western Cape Equality Court in terms of which it was held that the City Council of Cape Town (the CCT) and Futuregrowth Property Development Company (Pty) Ltd (FG) had not discriminated against it on the basis of race by excluding it from the development of a central business district in Khayelitsha. Furthermore, it dismissed the company's appeal against a decision of the Equality Court upholding FG's plea of misjoinder in respect of a complaint concerning the Setsing project in the Free State.

The SCA also upheld a cross-appeal by the CCT against a decision of the Equality Court in terms of which it held that the CCT had discriminated against the company on the basis of race by excluding it from municipal contract opportunities in Khayelitsha. The Equality Court held that the CCT had employed measures, which although they appeared legitimate, were aimed at maintaining exclusive control by white professional firms.

In respect of municipal opportunities in Khayelitsha allegedly being denied to the company on the basis of racial discrimination, the SCA held that the Equality Court had not conducted a proper factual analysis of the evidence and had adopted the wrong approach concerning the onus of proof. The SCA found that the allegations of race discrimination were wholly unfounded and that the individuals complained of had in fact provided the company with opportunities. This court held that the CCT was justified in its view that the allocation of work in Khayelitsha should not be viewed in isolation but should be considered across the metropole. In nine years the CCT had awarded 27 municipal projects to the company with a total value of more than R140 m.

The SCA expressed concern about the manner in which the company had conducted the litigation in the Equality Court. Its complaint spanned almost 100 pages. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 envisaged that complaints should be succinctly stated. This would focus the minds of the parties and the court and would contribute to expedition. The litigation in the Equality Court extended beyond three years and was the antithesis of what was intended.

This court was dismayed at some of the comments made by the company's managing director during the course of the enquiry in the Equality Court. A number of outrageous statements were made deserving of censure.

The SCA considered the submission on behalf of the CCT and FG that the Equality Court should, instead of making no order as to costs, have ordered the company to pay their costs, including the costs of two counsel. It took into account that in general, parties genuinely asserting their constitutional rights should not have to pay the State's costs even where they lost the case. Having regard to the manner in which the litigation was conducted by the company and the wholly unfounded charges of racism, the SCA reversed the order of the Equality Court and ordered the company to pay the respondents' costs, including the costs of two counsel. The SCA ordered the company to pay the CCT and FG's costs of appeal, including the costs

of two counsel, and the costs of a postponement of the appeal occasioned by the sudden illness of the company's senior counsel.

Appeals dismissed and cross-appeals upheld.

### **SCOIN TRADING (PTY) LTD v BERNSTEIN NO 2011 (2) SA 118 (SCA)**

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### **ELS v WEIDEMAN AND OTHERS 2011 (2) SA 126 (SCA)**

Contempt of court — Disobedience of court order — Breach of interdict — Scope of interdict — Appellant granted order interdicting first respondent (editor) from publishing magazine article in which appellant named as sex abuser — Magazine subsequently publishing truncated version of article in which name of appellant blacked out, together with editorial by first respondent, in which appellant identified as applicant for interdict — Interdict breached by reproduction of substance of article — Intention of first respondent having been to enable readers to identify appellant as abuser from reading of editorial together with truncated article — *Mala fides* established — First and second respondents guilty of contempt of court.

**Jurisdiction** — High Court — To try proceedings for contempt of order of another High Court — High Court having such jurisdiction.

In February 2008 the Johannesburg High Court granted a temporary interdict to Mr Jurie Els against the publication of an article which Media 24 proposed to publish in its magazines *Huisgenoot* and *You*.

A week later Media 24 published a version of the article in the magazines in which references to Els and facts which might have led to his identification were blackened out. Weideman, the editor of the magazines wrote an editorial in which she named Els as the applicant for the interdict.

Els applied to the Western Cape High Court for an order that Weideman and Media 24 were guilty of contempt of court. That court held that it possessed no jurisdiction to hear the application and dismissed it.

Els appealed to the SCA. On 30 November 2010 the Court upheld the appeal. It found that the Cape Court did have jurisdiction to try proceedings for contempt of the order of another High Court. It held, further, that the interdict forbade the publication of the whole article and would be breached by reproducing its substance. Weideman and Media 24 had so breached the article if the edited article were read with the editorial as it was intended to be. Furthermore they had planned the article and the editorial with the intention of enabling their readers to identify Els with the abuser who could not be directly named in the article. Both Weideman and Media 24 were wilful and guilty of bad faith in so acting.

The SCA held, accordingly, that both editor and publisher were guilty of contempt of court. It referred the matter back to the High Court to impose an appropriate sanction.

### **VAN NIEKERK v VAN NIEKERK AND ANOTHER 2011 (2) SA 145 (KZP)**

Administration of estates — Executor — Removal — Grounds — Where purpose and intent of executor is to use office to resist all claims, or all claims from a particular source, irrespective of their merits and without fair-minded consideration thereof — Such strengthened where motive is to secure personal financial benefit in capacity of heir — Administration of Estates Act 66 of 1965, s 54(1)(a)(v).

### **NATIONAL STADIUM SOUTH AFRICA (PTY) LTD AND OTHERS v FIRSTRAND BANK LTD 2011 (2) SA ?? (SCA)**

Servitude — Personal servitude — Registrability — Naming rights — To be registrable, right in question to restrict right of exercise of ownership of immovable property in some way — Must carve out portion of dominium — Matter of interpretation — Right to name sports stadium — Naming rights not imposing duty on owner of property — Naming right carved out of owner's full ownership right — Naming right registrable as personal servitude — Deeds Registries Act 47 of 1937, s 63(1). I

**Servitude** - Personal servitude — Termination — Destruction of subject-matter of servitude — Owner of servient tenement deliberately destroying subject-matter of servitude — To be distinguished from destruction by vis major, particularly where similar structure erected in place of destroyed structure, and new structure also covered by servitude — In such case destruction of subject-matter of servitude not leading to its termination.

The SCA dismissed an appeal by the City of Johannesburg and the managers of the Soccer City Stadium in Soweto against an order that the naming rights of the stadium belonged exclusively to Randbank Ltd.

The effect of the judgment is that the name of the stadium must revert to 'FNB Stadium' and that the City and the managers may not purport to sell the naming rights for the duration of a servitude registered in favour of Firstrand Bank.

### **LOUW AND OTHERS v NEL 2011 (2) SA 172 (SCA)**

Company — Shares and shareholders — Shareholders — Oppression — Relief in event of oppressive conduct by company — Criterion for granting of relief that of fairness — Applicant to establish (1) that particular act or omission committed, or that affairs of company conducted in manner alleged, and that such act or omission or conduct of company's affairs unfairly prejudicial, unjust or inequitable to him or some part of members of company; (2) nature of relief to be granted to end matters complained of; and (3) that just and equitable to grant such relief — Court's jurisdiction to make order not arising until specified statutory criteria satisfied — Companies Act 61 of 1973, s 252.

The Supreme Court of Appeal delivered judgment in an appeal and cross appeal against a judgment by Mavundla J in the North Gauteng High Court (Pretoria) ordering the appellants, the directors in a company, to purchase the shares of the respondent, a minority shareholder in the company.

The respondent, Christiaan Nel (Nel), the first appellant, Johannes Louw (Louw) and the second appellant Willem du Preez (Du Preez) formed a partnership known as EPI-USE Financials Partnership (the partnership), which conducted business in the implementation and continuous operation, including training and problem-solving, of a computer programme used by big business known as SAP. During early 2003 the partnership became involved in certain projects together with the third appellant, Lukas Lejara Mothupi (Mothupi). After negotiations between the three partners and Mothupi it was decided that the future business of the partnership should be conducted through a company and to that end a shelf company, first named Lejara Business Intelligence (Pty) Ltd and thereafter Lejara Consulting (Pty) Ltd (the company) was acquired. It was decided that the company would expand its business operation. Money had to be borrowed from a financial institution and security in the form of suretyships was required from each of the shareholders for that purpose. That marked the beginning of discontent and distrust between Nel on the one hand and the other shareholders on the other. Nel felt that this was a move to sideline him while the other directors argue that Nel acted in an obstructive and disruptive matter which strained the relationship between him and the other directors and shareholders.

Matters came to a head when a general shareholders' meeting of the company resolved by a majority vote that Nel be removed as a director of the company. He later attended a shareholders' meeting of the company where he was informed that the shareholders loans which were due, could not be paid because that would effectively place the company in an insolvent position. Nel thus formed the view that the company was unable to pay its debts as contemplated by s 344(f) of the Companies Act 61 of 1973. He responded by launching an application on to the North Gauteng High Court (Pretoria) seeking an order placing the company under winding up and in the alternative pursuant to s 252 of the Companies Act a declaration that the company's affairs were being conducted in a manner unfairly prejudicial, unjust or inequitable to him as minority shareholder and that the other directors be directed to purchase his shares at a value to be determined by an independent valuer.

In support of this Nel in his affidavit stated that the main business of the company has been disposed of to other companies whose directors and shareholders are common with that of the company, save that he been excluded. He averred that the company had not been compensated for such disposal and this was in violation of his rights in terms of the Companies Act. At various stages the prayer for the alternative relief under s 252 was amended to add to the list of companies Nel felt had appropriated the business of the company.

In a duplicating affidavit on behalf of the appellants Mothupi stated that the other directors consented to an order in terms of this prayer for the alternative relief under s 252 without admitting that the business of the company had been conducted in a manner unfairly prejudicial, unjust or inequitable to Nel.

When this matter was heard before Mavundla J the company had been wound up at the instance of a third party. The judgment ordered the other directors to purchase Nel's shares at a value to be determined by and independent auditor.

The SCA dismissed the appellants' appeal against this order. The court found that the consent by the appellants amounted to an admission and on this basis the appeal stood to be dismissed.

Turning to the cross appeal the SCA held that in order for a court to be empowered to make a decision in terms of s 252 it must first be satisfied that the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of a dissident minority. The conduct of both parties needed to be taken into account. An applicant for relief under s252 cannot contend themselves with a number of vague or general allegations but must establish that a particular act was committed or that the company's affairs were unfairly prejudicial, unjust or inequitable to the minority shareholder. The court's jurisdiction to make such an order does not arise until the specified statutory criteria had been satisfied.

The papers reveal sharp disputes of fact on a number of material issues. The court held that these disputes could only be decided after oral evidence had been heard as the section envisaged a full investigation into circumstances of alleged oppression. It was impossible on the disputed facts to arrive at a conclusion or fair determination under the section. As a referral for oral evidence had not been sought either in this court or the court below this court finds that as a result the various disputes of facts constituted an insuperable obstacle to the s 252 relief sought by Nel.

Both the appeal and cross appeal were dismissed with costs.

### **DELPECH v HOLLOWAY AND OTHERS 2011 (2) SA 194 (GSJ)**

Lien — Parate executie — Lien simply security for debt — Does not afford right to execute — In any event, where amount of debt bona fide in dispute, holder of security cannot execute upon it without proper process for resolving dispute implemented.

Although *parate executie* may not be unconstitutional and a *pactum commissorium* is enforceable in the context of a pledge, what is apparent from the authorities is that due legal process is required where there is a bona fide dispute prior to the exercise of an alleged right to dispose of property. A lien, however, is simply security for a debt and does not afford a right to execute. This distinguishes it from a pledge. Furthermore, where an amount is in dispute, then, certainly in relation to a lien which is no more than security, the holder of the security cannot then execute upon it without more. A proper process for resolving the dispute/s will have to be implemented before any right to dispose of property can be exercised.

### **MOODLIAR NO AND OTHERS v HENDRICKS NO AND OTHERS 2011 (2) SA 199 (WCC)**

Company — Winding-up — Liquidator — Powers — Application by provisional liquidator for certain powers — Opposed — Not for court to determine whether final order would be granted — Question was whether on probabilities, based on the evidence, the powers were necessary for the liquidators to perform their fiduciary mandate — Companies Act 61 of 1973, s 386(5).

The provisional liquidators of a company applied for certain powers under s 386(5) of the Companies Act 61 of 1973. These powers were to: bring or defend legal proceedings, and to instruct and pay attorneys and counsel; to elect or abide by lease agreements; and to elect whether or not to continue with certain agreements. Their application was opposed by the majority shareholder of the company (a trust) and the chief executive officer.

*Held*, that, if the granting of a final order was but a remote possibility, that would weigh heavily against the exercise of a discretion in favour of the applicants. In the present case, however, the financial position of the company was clearly tenuous, to put it at its lowest. The intensity of the litigation mounted by the chief executive officer indicated that the applicants, if they were to perform their powers within the law, and with the confidence necessary to execute their mandate, would require legal advice. The powers sought were therefore necessary. The applicants were authorised to exercise the powers as set out in the order of the court.

### **PRINSLOO v NASIONALE VERVOLGINGSGESAG EN ANDERE 2011 (2) SA 214 (GNP)**

**Constitutional law** - Human rights — Right to freedom and security of the person — Public constitutionally protected from arbitrary deprivation of freedom — Cannot permit that this right is dealt with lightly and mindlessly — Person cannot be detained without trial unless it is constitutionally justified in terms of constitutionally valid legislation — Bail a mechanism that is intended to minimalise infringement of right to freedom of person who has not been convicted — Constitution s 12.

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**Criminal procedure** - Arrest — Law relating to arrest — Duty to bring arrested person before court within 48 hours — 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 rule is to avoid arrested person being detained over weekend and to avoid person who has not been convicted being detained longer than necessary — Criminal Procedure Act 51 of 1977, s 50(1)(d).

Section 12 of the Constitution, 1996, protects the public against the arbitrary deprivation of freedom without any cause, and prohibits detention without trial. It cannot be permitted that the right to freedom is dealt with lightly and mindlessly. A person may not be detained without trial, unless it is constitutionally justified in terms of existing legislation which places a limitation on a constitutional right that is justified. Bail is precisely a mechanism that is intended to minimise the infringement of an accused's freedom at a time when he has not been convicted. It is not a right that can be ignored.

### **COETZEE v NATIONAL COMMISSIONER OF POLICE AND OTHERS 2011 (2) SA 227 (GNP)**

**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 C 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 D

s 38 of Constitution and may act as deterrent against public officials acting unlawfully and in bad faith.

Criminal procedure — Arrest — Legality — 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.

Criminal procedure — 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 F 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.

Criminal procedure — Arrest — Unlawful arrest — Application for release G 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.

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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 G 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 H 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.

### **DRAHTSEILWERK SAAR GMBH v INTERNATIONAL TRADE ADMINISTRATION COMMISSION AND OTHERS 2011 (2) SA 261 (GNP)**

Administrative law — Access to information — Access to information held by public body — Request — Refusal — Grounds — Confidentiality — Access sought in terms of public body's governing statute — Body declining request on grounds of confidentiality — Governing statute clearly empowering court to grant appropriate order regarding access to requested information — International Trade Administration Act 71 of 2002, s 35(2) and Uniform Rules of Court, rule 53.

Trade and competition — Trade — International trade — Administration — International Trade Administration Commission — Proceedings — Confidentiality — Company seeking review and setting-aside of decision of statutory commission to impose duties on goods — Commission refusing company's request for access to records of its proceedings on ground of their alleged confidentiality — Request made in terms of commission's governing statute — Statute clearly empowering court to grant appropriate order regarding access to requested information — International Trade Administration E Act 71 of 2002, s 35(2) and Uniform Rules of Court, rule 53.

The applicant company had launched proceedings under the International Trade Administration Act 71 of 2002 (the Act) to have certain decisions made by the International Trade Administration Commission, and the Minister of Trade and Industry, reviewed and set aside. The Commission and the Minister had decided to continue with, and to increase, the antidumping duties imposed on the company's goods. The Commission had refused to supply the company with the record of the proceedings leading to the decision, citing reasons of confidentiality. The company then launched the current interlocutory proceedings, in which it sought an order regulating the use of the confidential material in the main application.

*Held*, that the Act did not provide for an absolute prohibition on access to information that had been declared to be confidential by the Commission. Section 35(2) empowered the court to grant an appropriate order with regard to accessing such information. Further, in terms of rule 53 of the Uniform Rules of Court, if the record was not produced, the applicant was H entitled, as an aggrieved party, to apply to court to compel compliance with a request for the production of the record of the proceedings leading to the decision sought to be expunged.

*Held*, that though s 35(2) was not expressly mentioned in applicant's papers, this did not detract from the fact that the facts alleged pertained to that section. *In limine* points raised by the fourth respondent dismissed.

### **DESERT STAR TRADING 145 (PTY) LTD AND ANOTHER v No 11 FLAMBOYANT EDLEEN CC AND ANOTHER 2011 (2) SA 266 (SCA)**

**Close corporation** — Liquidation — Application — Locus standi of applicant — Non-member — Must be creditor (including contingent or prospective creditor) of corporation — Applicant relying on loan indebtedness to qualify as creditor — Application opposed on ground that loan void ab initio *and constituting reckless credit agreement, and liable to be set aside* — Indebtedness disputed on bona fide and reasonable grounds — Winding-up correctly refused — Companies Act 61 of 1973, s 346(1) (b) ;

**National Credit Act 34 of 2005, ss 40(4), 81, 89(1) (d) and 89(5) (a): loan sharks!!**

The Supreme Court of Appeal (SCA) dismissed appeals by Desert Star Trading 145 (Pty) Ltd (Desert Star) and Bridging Advances (Pty) Ltd (Bridging) against a judgment of the Pretoria High Court refusing to place No 11 Flamboyant Edleen BK (the CC) under winding-up.

Unable to raise a loan from any of the established banking institutions, but being desperately in need of financial assistance, George Ehlers turned to small private lenders although, as he put it, he knew he 'was going to pay a heavy price for the loan'. One such private lender to whom Ehlers turned during 2007 was Desert Star, the first appellant. Not being creditworthy he did not qualify for a loan. The loan application was then revised and re-submitted in the name of his son, Eugene. The amount lent and advanced together with interest and costs by Desert Star to Eugene was the sum of R859 600. On 8 June 2007 Eugene acknowledged his indebtedness in writing to Desert Star and undertook to effect repayment of that sum within twelve months. The agreement provided that in the event of the loan remaining unpaid after 8 June 2008 then the interest would be recalculated with effect from the date of the agreement at the rate of 1.5% per week compounded. As security for the loan, Ehlers in his capacity as the sole member of the first respondent, the CC, bound it as a surety and co-principal debtor in favour of Desert Star in respect of the

indebtedness of Eugene. And as further security a security bond was registered in favour of Desert Star over an immovable property, the sole asset of the CC. Eugene failed to repay the loan and as at 30 May 2008 his indebtedness to Desert Star stood at R1 253 000.

In the meanwhile on 29 January 2008 Ehlers approached another small private lender, the second appellant, Bridging, for a loan. This time the application was made in the name of his wife, Lèone Ehlers. A written agreement was concluded in terms of which Bridging loaned and advanced the sum of R160 053 (being R150 000 plus interest and costs) to Ms Ehlers. Here as well Ehlers bound the CC as a surety and co-principal debtor in favour of Bridging for the indebtedness of Ms Ehlers. And as further security a mortgage bond was registered in favour of Bridging over the Ehlers family home which was registered in the name of Ms Ehlers. Sporadic payments in the total sum of R41 000 were effected by the Ehlers to Bridging, but given the annual interest rate of 42.2% applicable to the loan, the outstanding balance had grown by 6 February 2009 to R205 363.55.

The SCA considered the nature of the debt secured by the CC. In each instance the appellants' relied upon a deed of suretyship. The SCA held for there to be a valid suretyship there had to be a valid principal obligation. It follows that a surety is not liable to a person to whom the principal debtor is not liable. It was common cause that each of the underlying principal agreements was a credit agreement as defined in s 8(4)(f) of the National Credit Act. On behalf of the CC it was contended that when Desert Star contracted with Eugene it was not a registered credit provider as required by the Act and that in consequence the agreement concluded with him was ab initio void.

In addition, it was contended that both Desert Star and Bridging are in common parlance 'loan sharks' and that each of the principal agreements constitutes reckless credit agreements that are liable to be set aside or suspended in terms of the Act. The SCA held that an application for liquidation should not be resorted to in order to enforce a claim which is *bona fide* disputed by a company. Consequently, where it is shown on a balance of probability by a company that its indebtedness to the applicant is disputed on *bona fide* and reasonable grounds, the Court will refuse a winding-up order.

### **ABSA BANK LTD v INTENSIVE AIR (PTY) LTD AND OTHERS 2011 (2) SA 275 (SCA)**

Banker — Relationship between banker and client — Rights of bank in respect of credit balance in client's account — Bank may, by virtue of debtor-creditor relationship between it and client, appropriate such credit balance for set-off against client's debts to it — Bank and client may, however, agree that funds in client's account reserved for, or 'belonging to', third party — Bank would in such circumstances be barred from setting them off against client's indebtedness to it.

The Supreme Court of Appeal overruled a decision of the full court of the Gauteng North (Pretoria) Division. The full court had held that the liquidators of the insolvent company Intensive Air (Pty) Ltd were entitled to claim a sum of R293 656.56 which had stood to the credit of an account held in the name of the company's sole director.

The account was opened before the company started its air passenger service operations. All moneys earned from ticket sales were paid into the director's

personal account, who devoted the funds to the payment of company and personal expenses. The director was indebted to the bank for the sum of R25m he had borrowed to purchase aircraft in his personal name, which aircraft he leased to the company.

When the company was liquidated, the bank appropriated the money in the director's account by set-off against the debts he owed to the bank taking place. The full court was of the view that the money, having been earned by the company, should accrue to the company as it represented a company asset.

On appeal this finding was overruled. The general rule of banking law provides that money paid into a client's account becomes the property of the bank, subject to the client's claim to any credit in the account. Normally only the account holder is entitled to claim money in an account held in his or her personal capacity. A third party is only entitled to such funds if a special arrangement has been made with the bank that the money will be held on behalf of such third party; or in cases where the third party is able to show that money credited to another's account 'belongs' to the third party, for instance in cases where stolen funds can be traced to a credit in another's bank account. In the present instance no special arrangements had been made with the bank and there was no suggestion that the director's arrangements in respect of the company finances were in any way untoward. There was no evidence that the director's agreement with the bank was anything other than an ordinary banker-client relationship, with the result that the liquidator's claim had to be dismissed.

## **EXDEV (PTY) LTD AND ANOTHER v PEKUDEI INVESTMENTS (PTY) LTD 2011 (2) SA 282 (SCA)**

Land — Sale — Contract — Formalities — Description of res vendita — Whether description sufficient — Agreement fixing size of unit in building, with shape and situation to be determined by seller — Description adequate — Agreement also containing option to purchase further office space — Purchase and option separate, divisible and independent contracts — Alienation of Land Act 68 of 1981, s 2(1). Judge — Duties and functions — Judgments — Expeditious delivery — Duty to litigants and public at large — Failure to give judgments expeditiously would allow administration of justice to fall into disrepute.

In June 2005 the appellants and the respondent concluded a written agreement of sale in terms of which the appellants undertook to sell an office unit in a building they were developing to the respondent at an agreed prior price of R2,178m. In the same document the first appellant granted the respondent an option to purchase a further 140 m<sup>2</sup> of the property when the new building was completed.

Despite this agreement, the appellants refused to sell and transfer an office unit in the new building to the respondent. This led to the respondent instituting action in which it contended that the sale had been breached by the causing it to suffer damages. The appellants pleaded that the sale of the office unit was invalid and unenforceable. To this the respondent took exception. The exception was upheld. The appellants' appealed to the SCA contending that the sale was invalid as it did not comply s 2(1) of the Alienation of Land Act 68 of 1981.

The appellants argued, firstly, that the option and the sale were a unitary contract and that the option price was too vague to be enforceable thereby rendering the sale unenforceable. The SCA concluded, however, that the option and the sale were two separate and distinct contracts.

Although the appellants argued that the *res vendita* of the sale had not been adequately described, the court concluded that it was a sale in which seller was to determine the shape and precise location of the unit in the new building, subject to the parties' agreement in regard to the size of the property. The court therefore concluded that requirements of s 2(1) had been met; that the sale was indeed valid; and that the exception had therefore been correctly upheld.

The appeal was dismissed with costs.

### **HARRIS AND OTHERS v REES AND OTHERS 2011 (2) SA 294 (GSJ)**

Practice — Parties — Locus standi — Fugitive from justice — Even if litigant a fugitive, it not following as matter of course that doors of court closed to him — Court hearing application, and, having regard to facts concerning litigant's flight or absence from its jurisdiction, entitled, in exercise of its inherent jurisdiction, to hear litigant, notwithstanding his absence from court's jurisdiction.

In *Mulligan v Mulligan* 1925 WLD 164 it was held that a fugitive from justice, or a person who had deliberately placed himself beyond the jurisdiction of the court, had no locus standi to litigate. As a general statement of law, the comments in *Mulligan* cannot be faulted. However, when a court has to consider the right of a person to approach the court for relief, in circumstances where such a person can either be categorised as a fugitive from justice, or a person who has deliberately placed himself beyond the jurisdiction of the court, in having regard to the principles enunciated in *Mulligan*, it will have to deal with each case on its own facts. Even should a litigant fall within the category of a fugitive from justice, it does not follow as a matter of course that the doors of the court will be closed to him. The court hearing the application, and having regard to all the relevant factors concerning the litigant's flight or absence from the jurisdiction of the court, will be, in the exercise of its inherent jurisdiction, entitled to hear the litigant, notwithstanding his absence from the court's jurisdiction.

### **MSOMI v BIYELA AND OTHERS 2011 (2) SA 311 (KZD)**

Execution — Sale in execution — Immovable property — Liability of judgment debtor for arrear service charges paid by purchaser — Conditions of sale providing that purchaser liable for all arrear rates, electricity and water charges owed by judgment debtor — Judgment debtor may be liable to purchaser for debt arising out of payment of outstanding charges.

Where the purchaser of immovable property at a sale in execution has paid arrear rates, electricity and water charges owed by the judgment debtor in accordance with the conditions of sale of the property, to enable him to obtain transfer of the property, the judgment debtor may be liable to the purchaser for the debt arising out of the payment of the outstanding rates, electricity and water charges.

### **STANDER v ERASMUS AND OTHERS 2011 (2) SA 320 (GNP)**

Magistrates' court — Civil proceedings — Administration order — Administrator — Appointment — Practice, of establishing juristic persons to administer files, of concern — Interests of debtors and creditors of paramount importance — These interests compromised if payments received by persons not appointed by court — Magistrates' Courts Act 32 of 1944, s 74E.

Under s 74E of the Magistrates' Courts Act 32 of 1944 the appointment of an administrator of an estate is to be done by the court, and the court may also relieve an administrator of his appointment, on good cause shown. The practice, of establishing juristic persons to administer such files, raises concern because the juristic persons have not been appointed by the court. The interests of the debtors and creditors are of paramount importance, and if payments are received by persons not appointed by the court, these interests will be compromised.

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

### **MINISTER OF SAFETY AND SECURITY AND ANOTHER v VAN DER MERWE AND OTHERS 2011 (1) SACR 211 (SCA)**

**Search and seizure** — Search warrant — Validity of — Warrants issued in terms of s 21 of Criminal Procedure Act 51 of 1977 — Appeal against setting-aside of three warrants — Cross-appeal against refusal to set aside fourth warrant — Court to determine whether information before officer who issued warrant sufficiently disclosing reasonable suspicion that offence committed; and whether warrant authorising no more than what strictly permitted by statute in terms of which warrant issued — If warrant vague, not possible to demonstrate that it went no further than what statute permitted — However, even if warrant clear in its terms, if acts it permitted going beyond what statute authorising, warrant overbroad and thus invalid.

Three search and seizure warrants were issued by a Cape Town magistrate, and a fourth by a Bellville magistrate. All four authorised the search for and seizure of documents from premises connected with the respondents. On application by the respondents the three Cape Town warrants were set aside by the High Court on the grounds, essentially, that they did not specify the offences to which the documents were related. Since the Bellville warrant did specify the offences, the application for its setting-aside was dismissed. With the leave of the High Court, the appellants appealed against the setting-aside of the Cape Town warrants, while the respondents cross-appealed against the dismissal of their application for the setting-aside of the Bellville warrant, arguing that its scope was vague and overbroad.

Appeal dismissed with costs. Cross-appeal dismissed with costs.

### **S v BHENGU 2011 (1) SACR 224 (KZP)**

**Housebreaking** — Housebreaking with intent to steal and theft — Insufficient evidence to show that appellant and co-accused actually carrying out housebreaking — No evidence of displacement — Appearing that they entered through door left open by complainant — Accordingly, housebreaking conviction altered on appeal to one of 'attempted housebreaking with intent to steal' — Sentence unchanged.

**Sentence** — Imposition of — Factors to be taken into account — Appellant having spent 18 months in custody awaiting trial — Effective sentence of 15 years' imprisonment for attempted housebreaking with intent to steal and attempted murder confirmed, but period of 18 months ordered to be deducted in calculation of expiry date of sentence.

### **GROENEWALD v MINISTER OF CORRECTIONAL SERVICES AND OTHERS 2011 (1) SACR 231 (GNP)**

**Sentence** — Release on parole — Prisoner applying for review of parole board E decision — 'Policy directive' from Commissioner of Correctional Services instructing parole boards not to grant certain categories of offender parole until having served designated minimum of sentences — No statutory basis for Commissioner's attempt to limit discretion of parole board — Policy directive contrary to legal provisions applicable to parole for offenders before 1 October 2004, and accordingly ultra vires and of no force and effect.

The applicant was sentenced in March 2003 to 20 years' imprisonment for murder, and to 10 years' imprisonment for attempted murder, the sentences to run concurrently. In terms of s 65(4) of the Correctional Services Act 8 of 1959, which was applicable at the time the applicant was sentenced, a prisoner could not be considered for placement on parole before having served half his sentence. However, provision was made for certain credits for positive behaviour, which could be earned at the rate of one day for every two days served. Accordingly, a prisoner could become eligible for consideration for parole after serving one-third of his sentence. The applicant had also benefited from a six-month amnesty, with the result that he had become eligible for parole in September 2009. However, on appearing before the parole board in October 2009, the applicant was informed that, due to the seriousness of his offences and the fact that he had served only one-third of his time, as well as the fact that certain reports were outstanding, he would remain incarcerated until a further parole hearing a year later. The applicant thereupon applied urgently for an order setting aside the parole board's decision and placing him on parole. As part of his application, he referred to a 'policy directive' issued by the Commissioner for Correctional Services, purportedly instructing parole boards not to consider 'aggressive and sexual' offenders for parole until they had served a designated minimum of their sentences. Despite proper service on the respondents and on the State Attorney, there was no appearance on their behalf at the hearing.

*Held*, that there was no statutory basis for the Commissioner's attempt, via the policy directive, to limit the discretion of the parole board. The policy directive was contrary to the legal provisions applicable to parole for offenders before 1 October 2004, and, accordingly, it was *ultra vires* and of no force and effect.

*Held*, further, that the applicant had not been afforded a fair hearing, and that the attempt to postpone his parole hearing by a year was a clear and flagrant infringement of the applicant's right to freedom, his right not to be detained unnecessarily, and his right to fair administrative action. As for a referral back to the parole board, no faith could be placed in the possibility that the respondents would place the required reports before the board, thus enabling it to afford the applicant a fair hearing. Such a referral would simply prolong the unfair treatment of the applicant and constitute a further infringement of his rights. This was an exceptional case in which the court should interfere and grant relief.

*Semble*: The attitude of the respondents was deplorable, reprehensible and completely unacceptable. There had been no explanation for the absence of the necessary reports before the parole board, and neither had it been explained why the applicant should have to remain incarcerated due the respondents' failure to do their work properly. The situation had been exacerbated by the respondents' lack of respect towards the court and its procedures — the court had not even been afforded the decency of an appearance before it to explain what the approach of the respondents would be to the matter. There appeared to be an utter disregard by the respondents and the State Attorney for procedures set out in statutory provisions, for the rights of prisoners, and for the authority, status and powers of the court. Application granted. Respondents' refusal to place applicant on parole set aside and respondents ordered to place applicant on parole within 30 days of order.

### **S v VAN DE VENTER 2011 (1) SACR 238 (SCA)**

**Sentence** — Imposition of — Factors to be taken into account — 28-year sentence for murder — Trial court ignoring psychiatric evidence of diminished moral responsibility — Sad, lonely and depressed youngster, product of broken home, having attempted suicide three times, lacking friends or meaningful relationships — Sentence overemphasising public interest and general deterrence — Overlooking personal deterrence, rehabilitation and reformation — Duty on trial court to call for such evidence as necessary to enable it to exercise proper sentencing discretion — On appeal, sentence reduced to 18 years' imprisonment.

### **S v DAYILE 2011 (1) SACR 245 (ECG)**

**Sentence** — Prescribed sentences — Minimum sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Rape of 7 year-old girl by boy of 17 — Trial court imposing 25-year sentence — Trial court not according sufficient weight to appellant's age — No evidence regarding extent of psychological harm — No grave physical harm — Appropriate sentence 15 years' imprisonment, five conditionally suspended.

### **S v MZANDI 2011 (1) SACR 253 (WCC)**

**Housebreaking** — Housebreaking with intent to steal and theft — What constitutes — Goods gathered together by thief, but nothing removed from premises — No act depriving owner of his control over items — Only attempted theft having occurred — On review, conviction altered, from housebreaking with intent to steal and theft, to housebreaking with intent to steal and attempted theft.

Conviction set aside and a conviction of housebreaking with intent to steal and attempted theft substituted therefor. Matter remitted to the regional court for the imposition of sentence.

### **S v ACTING REGIONAL MAGISTRATE, BOKSBURG, AND ANOTHER 2011 (1) SACR 256 (GSJ)**

**Sexual offences** — Repeal of common-law sexual offences by Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 — Rape allegedly committed before commencement of Act — Provisions of s 69(1) and (2) having effect that, where no investigation, prosecution or other legal proceedings relating to common-law crime referred to in s 68(1) (b) of Act had been initiated before date of commencement of Act, no criminal proceedings, investigation or prosecution can be instituted, continued or concluded, despite fact that alleged conduct plainly constituted common-law crime of rape — Clear that such state of affairs could never have been contemplated by legislature — Constitution, 1996, ss 12(1), 12(2), 28(1) (d), and Act 32 of 2007, preamble — Severance of offending words in s 69(1) and (2) curing defect, and doing so consistent with Constitution, and not interfering with intention of legislature in terms of Act.

**Appeal** - In what cases — Against order upholding objection to charge — Such order having final effect and appealable.

The absurd limiting effect of the words 'which were instituted prior to the commencement of this Act' in s 69(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and the words 'which was initiated before the commencement of this Act' in s 69(2), is that, where as in the present case, no investigation or prosecution or other legal proceedings relating to a common-law crime referred to in s 68(1) (b) of that Act had been initiated before the date of commencement of the Act, i.e. 16 December 2007, no criminal proceedings, investigation or prosecution can be concluded, instituted or continued, despite the fact that the alleged conduct plainly constituted the common-law crime of rape at the time of the commission thereof. It is clear from the preamble to the Act, as well as the provisions of s 12(1) and (2) and s 28(1) (d) of the Constitution of the Republic of South Africa, 1996, that such a state of affairs could never have been intended by the legislature. Severance of the quoted words in s 69(1) and (2) above will render it possible for A the required criminal proceedings, investigations or prosecutions or other legal proceedings in respect of common-law crimes committed prior to the commencement of the Act, but only reported thereafter, to proceed in terms of the law; such severance is consistent with the Constitution and its fundamental values, and that the result achieved will not interfere with the intention of the legislature in terms of the Act.

The upholding of the objection against the charge-sheet is an order which has final effect and is therefore appealable.

### **S v MAAKE 2011 (1) SACR 263 (SCA)**

**Sentence** — Prescribed sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Imposition of maximum allowable sentence — No indication on record of

magistrate's intention to impose maximum sentence — Accused's legal representative therefore unable to make submissions in this regard — As necessary in relation to maximum sentences as to minimum sentences, that court identify on record factors taking case out of ordinary — Otherwise, open to presiding officers to impose their views on sentence in disregard of legislation's purpose of reasonably consistent and standardised approach to sentence.

**Trial** — Record — Judgment — Reasons for — Not only salutary practice, but obligatory, for judicial officers to provide reasons to substantiate their conclusions — Court of appeal having interest in knowing why judicial officer making given order — In interests of open and proper administration of justice, and important for maintenance of public confidence, that courts state publicly reasons for their decisions.

The appellant, a first offender, stood trial in a regional court on one count of rape and one of robbery. He was convicted on both and sentenced to 15 years' imprisonment on the first count and to five years' imprisonment on the second. His appeal to the Pretoria High Court failed regarding conviction, and was only partially successful regarding sentence. He then approached the Supreme Court of Appeal. The court dismissed the appeal against both convictions before proceeding to consider sentence.

Appeal against convictions dismissed. Appeal against sentences partially upheld. Fifteen-year sentence for rape set aside and substituted with sentence of ten years' imprisonment. Sentence of five years' imprisonment for robbery confirmed, of which four years ordered to run concurrently with sentence for rape.

### **S v MTHEMBU 2011 (1) SACR 272 (KZP)**

**Sentence** — Prescribed sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Imposition of sentence higher than prescribed minimum — Legislature intending to limit courts' discretion only in one direction, namely imposition of sentences below prescribed minimum — Courts' discretion in other direction not limited — No need for presiding officer to identify specific circumstances that impelled him or her to impose sentence greater than prescribed minimum — Fact that trial judge not informing defence that higher sentence than minimum being contemplated not constituting defect in proceedings. Appeal dismissed.

### **S v MN 2011 (1) SACR 286 (ECG)**

**Sentence** — Prescribed sentences — Minimum sentence — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Rape of minor — 10-year-old girl — While all rape cases serious, some more serious than others — Different degrees of seriousness requiring different sentences — Recent decisions considered — Present case not falling into category of rape cases warranting ultimate sentence — Sentence of life imprisonment set aside and 15-year sentence imposed.

### **NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v MANSOOR AND ANOTHER 2011 (1) SACR 292 (ECP)**

**Search and seizure** — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Application for — Consideration of — Duty on applicant to present coherent, persuasive case that there was evidence on which court might convict defendants and on which that court might also grant confiscation order — When various allegations and admissions considered, together with lack of basic detail in relation to certain counts, not possible to make informed assessment as to whether court convicting defendants might also make confiscation order — Furthermore, difficult to determine on which counts defendants could be convicted — Evidence in respect of most charges inconclusive — In respect of numerous other charges, relevant documentary evidence could not be found — Even limited evidence that required to be placed before court in application for restraint must at least make out relatively clear and consistent case — Evidence in casu not satisfying this requirement — Application dismissed — POCA, ss 25 and 26.

*Held*, that, even if it were to be accepted that the prosecutor had undertaken to rely only on the evidence contained in the application, the State could not be precluded from leading other evidence already in its possession or which it might acquire at a later stage. Such an undertaking was, in any event, not a proper one. As to the applicant's explanation — that the relative lack of evidence was due to the defendants' expressed intention to plead guilty — whatever indications may have been given, regarding the intended plea in the criminal proceedings, did not relieve the applicant of his responsibility to make out a proper case for the relief he sought in the application. It was his duty to present a coherent, persuasive case that there was evidence on which a court might convict the defendants, and on which that court might also grant a confiscation order.

*Held*, further, that there were only two counts in respect of which there was relatively clear evidence implicating the defendants. However, since the accounts concerned had been sold at a discount rate, it was not clear that a proper case had been made out that the defendants had benefited from these two cases. In any event, the amount involved was only a minute fraction of the sum of over R3 million for which the applicant sought a restraint order. Accordingly, the applicant had failed to make out a proper case that there was evidence on which a court faced with an application for confiscation would be reasonably persuaded to grant the application.

Rule nisi discharged with costs.

### **MUDALY v GWALA AND OTHERS 2011 (1) SACR 302 (KZD)**

**Search and seizure** — Search warrant — Validity of — Applicant challenging warrants on basis of risk of prosecution — Whether applicant having standing — Divergent precedents reviewed — Applicant not establishing link to items seized or premises searched — Asserting no right, other than risk of prosecution — Opportunity to challenge admissibility of evidence seized if sought to be used against him at trial — Accordingly, applicant not having standing to challenge validity of warrants.

In the present matter, giving effect to the balance struck in *Zuma 1* suited the facts of the case. The applicant was awaiting trial on various charges, but he had not established any link whatsoever to the items seized or the premises searched. He had asserted no right, other than the risk of prosecution. The warrants had been executed at a preliminary, evidence-gathering, stage and he would have the opportunity to challenge the admissibility of the evidence seized if it were sought to be used against him at trial. Accordingly, the applicant had no standing to challenge the validity of the warrants. Application dismissed with costs.

### **SELLO v GROBLER AND OTHERS 2011 (1) SACR 310 (SCA)**

**Search and seizure** — Seizure without search warrant in terms of s 22 of Criminal Procedure Act 51 of 1977 — Police advancing no grounds for believing that application for warrant would defeat object of search — In addition, members of Medicines Regulatory Affairs Inspectorate not having authority to conduct searches — Accordingly, search and seizure unlawful — However, applicant not entitled to return of items he was not lawfully entitled to possess.

**Search and seizure** — Unlawful seizure — Return of items unlawfully seized — Applicant not entitled to return of items he was not lawfully entitled to possess — In casu, *pharmacist* not showing lawful entitlement to expired medicine and allegedly stolen items unlawfully seized.

Acting on information received, the first respondent, together with other police officers and members of the Medicines Regulatory Affairs Inspectorate (MRAI) conducted a search of a pharmacy belonging to the appellant, followed by a search of his motor car and his home. Various items were seized — including allegedly stolen items and expired medication, some without proper identifying details. It was common cause that the police had acted without a warrant for any of the searches. The appellant applied unsuccessfully in the High Court for

an order declaring the searches and seizures unlawful, and for the return of the seized items. Thereafter, he approached the Supreme Court of Appeal.

The SCA upheld the appeal by the appellant, a pharmacist, against an order of the South Gauteng High Court dismissing an application to declare a search and seizure operation conducted at his pharmacy and home in Benoni, Gauteng, unlawful.

The search and seizure exercise was a joint operation between members of the Organised Crime Unit of the South African Police Service and the members of the Medical Regulatory Affairs Inspectorate. The items seized during the search included items allegedly stolen, expired medicines and other medicines which had no proper identifying details.

The respondents conceded during argument that the search was unlawful. The only issue the SCA had to decide was which items the appellant was lawfully entitled to have returned to him.

The SCA held that, since the appellant did not set out in his founding affidavit the items he was entitled to have returned to him, the court could order the return, to him, of only those items he was lawfully entitled to possess.

Appeal upheld with costs. Searches declared unlawful. Respondents ordered to return all seized items that appellant lawfully entitled to possess.