



## JUTA'S ADVANCE NOTIFICATION SERVICE

OCTOBER 2011

**Dear South African Law Reports and Criminal Law Reports subscriber**

Below are descriptions of cases we think may be of interest in the October Reports, as well as the tables of cases and flynotes. Do enjoy. Below is also a message from our marketing department. Our apologies for any inconvenience.

### REGISTER ONLINE NOW TO CONTINUE RECEIVING YOUR ADVANCE NOTIFICATION SERVICE

In order to manage our customer communications in line with the requirements of the Consumer Protection Act, subscribers to our Newsletters, Bulletins and other marketing communication will in future be required to create a profile and sign up for these services on the Juta Law Website.

Please create a profile or update your existing profile by following the registration procedure. Please select the tick box for the Law Reports Advance Notification Newsletter topic. Should you also wish to receive information on product updates regarding your specific areas of interest, please select the applicable categories to remain on our marketing update contact list.

Should you require any assistance regarding the creating of your profile or updating of your existing profile please contact Customer Services for assistance on [www.cserv@juta.co.za](mailto:www.cserv@juta.co.za)

### JUDGEMENTS OF INTEREST IN THE OCTOBER EDITIONS OF THE SALR AND THE SACR SOUTH AFRICAN LAW REPORTS

#### **Prescription and the rei vindicatio**

In *Staegemann v Langenhoven and Others* 2011 (5) SA 648 (WCC) the applicant's vehicle is fraudulently sold by the third respondent to a third party who then sells it on to the first respondent. Applicant claims return of the car and first respondent resists, contending that applicant's *rei vindicatio* is a debt within the meaning of s 10 of the Prescription Act 68 of 1969 and that the debt has prescribed. In issue is whether the *rei vindicatio* is indeed a debt for the purposes of s 10.

#### **Breach of a directors duties to a company: secret profits**

In *Dorbyl Ltd v Vorster* 2011 (5) SA 575 (GSJ) the plaintiff company sues its former executive director for his actions in the course of a sale. The defendant, while representing the company during a disposal of assets, also secretly and contrary to his contract with the company acts on behalf of the purchasers. He is rewarded by both sides: the company pays him R4,5 million for representing it; while from the purchasers he obtains cash and shares in the sum of R37 million. When the company becomes aware of the defendant's conduct it dismisses him, and sues him for both sums on the ground of breach of his fiduciary duties to it. The court considers whether the defendant has to disgorge these sums.

**Companies Act 71 of 2008: business rescues**

In *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)* 2011 (5) SA 422 (GNP) creditors opposed a director's application for a business rescue for his financially distressed company. The court examines the requirements for a business rescue and notes that even if met, it retains a discretion to permit such a proceeding, with the interests of creditors being decisive. It then looks at whether on the facts before it, a rescue will place the creditors in a better position than a winding-up.

**Companies Act 71 of 2008: security for costs**

*Haitas and Others v Port Wild Props 12 (Pty) Ltd* 2011 (5) SA 562 (GSJ) concerns a liquidated private company with no realisable assets or cash and with no prospect of being able to pay an adverse costs order were such made against it. The court considers whether the company should furnish security for costs. This where there is no provision in the Companies Act 71 of 2008 similar to the repealed s 13 of the Companies Act 61 of 1973. Section 13 provided that where a company was a plaintiff or applicant, and where there was reason to believe it would be unable to pay the costs of the defendant or respondent, the court might require it to give security for those costs.

**SOUTH AFRICAN CRIMINAL LAW REPORTS****Concurrence of sentences**

In *S v Jeffries* 2011 (2) SACR 350 (FB) the accused is convicted on two counts under the National Road Traffic Act 93 of 1996 and sentenced, on each count, to a fine of R1200 or four month's imprisonment. On review, the Free State High Court considers the correctness of the sentence: whether it is competent for the magistrate to order the two sentences of a fine, each with an alternative of imprisonment, to run concurrently.

**Arrests in terms of s 8(4) of the Domestic Violence Act 116 of 1998: 'imminent harm'**

At issue in *Greenberg v Gouws and Another* 2011 (2) SACR 389 (GSJ)—a claim of damages for unlawful arrest—is whether appellant's arrest in terms the Domestic Violence Act 116 of 1998 is lawful and/or premised on 'imminent harm' to the complainant, as s 8(4)(b) of the Act contemplates. The court considers what reasonable grounds to suspect 'imminent harm' are, and whether they are present.

**Courts' competence to order non-parole periods of imprisonment**

In *S v Pauls* 2011 (2) SACR 417 (ECG), an appeal against a sentence of imprisonment, the appellant challenges the trial court's inclusion of a fixed non-parole period. The court considers the contention that in the absence of exceptional circumstances it is not competent for the magistrate to invoke s 276B of the Criminal Procedure Act 51 of 1977.

**WE WELCOME YOUR FEEDBACK**

Please forward any comments regarding *The South African Law Reports* and *The South African Criminal Law Reports* to [lawreports@juta.co.za](mailto:lawreports@juta.co.za).

Kind Regards

**The Juta Law Reports Team**

# SOUTH AFRICAN LAW REPORTS

OCTOBER 2011

## TABLE OF CASES

- Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (AVUSA Media Ltd and Others as Amici Curiae) 2011 (5) SA 329 (SCA)
- Minister of Safety and Security v Sekhoto and Another 2011 (5) SA 367 (SCA)
- Justice Alliance of South Africa v President of the Republic of South Africa and Others 2011 (5) SA 388 (CC)
- Swart v Beagles Run Investments 025 (Pty) Ltd (Four Creditors Intervening) 2011 (5) SA 422 (GNP)
- Presidency Property Investments (Pty) Ltd and Others v Patel 2011 (5) SA 432 (SCA)
- Thulo v Road Accident Fund 2011 (5) SA 446 (GSJ)
- Netshituka v Netshituka and Others 2011 (5) SA 453 (SCA)
- African National Congress v Harmse and Another: In re Harmse v Vawda (Afriforum and Another Intervening) 2011 (5) SA 460 (GSJ)
- Peterson and Another NNO v Absa Bank Ltd 2011 (5) SA 484 (GNP)
- SH v EH 2011 (5) SA 496 (ECP)
- Future Rustic Construction (Pty) Ltd v Spillers Waterfront (Pty) Ltd and Another 2011 (5) SA 506 (KZD)
- LN v Minister of Safety and Security and Another 2011 (5) SA 512 (KZP)
- Beukes, Ex parte 2011 (5) SA 521 (WCC)
- Minister of Transport and Public Works, Western Cape, and Another v Zanbuild Construction (Pty) Ltd and Another 2011 (5) SA 528 (SCA)
- Firstrand Bank Ltd v Woods and Similar Cases 2011 (5) SA 536 (ECP)
- Transnet Ltd v Newlyn Investments (Pty) Ltd 2011 (5) SA 543 (SCA)
- Haitas and Others v Port Wild Props 012 (Pty) Ltd 2011 (5) SA 562 (GSJ)
- Dlangamandla v Road Accident Fund 2011 (5) SA 565 (FB)
- Dorbyl Ltd v Vorster 2011 (5) SA 575 (GSJ)
- Law Society, Free State v Macheke and Another 2011 (5) SA 591 (FB)
- Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd and Another (Advantage Projects Managers (Pty) Ltd Intervening) 2011 (5) SA 600 (WCC)
- Pansolutions Holdings Ltd v P&G General Dealers & Repairers CC 2011 (5) SA 608 (KZD)
- MV Cleopatra Dream and Another, MV Cleopatra Dream Transnet Ltd t/a National Ports Authority v 2011 (5) SA 613 (SCA)
- Malema v Rampedi and Others 2011 (5) SA 631 (GSJ)
- Premier, Eastern Cape. and Another v Mtshelakana and Others 2011 (5) SA 640 (ECM)
- Staegemann v Langenhoven and Others 2011 (5) SA 648 (WCC)

## FLYNOTES

### **NOW MEDIA 24 LTD AND OTHERS v SA TAXI SECURITISATION (PTY) LTD (AVUSA MEDIA LTD AND OTHERS AS AMICI CURIAE) (SCA)**

BRAND JA, NUGENT JA, MAYA JA, SNYDERS JA and THERON JA  
2011 MAY 5; JULY 5

**Defamation**—Damages—Special damages—Plaintiff seeking to recover special damages resulting from defamatory statement must allege and prove elements of *Aquilian* action.

**Defamation**—Damages—Corporation—General damages—Corporation has claim for general damages in defamation.

## MINISTER OF SAFETY AND SECURITY v SEKHOTO AND ANOTHER (SCA)

HARMS DP, NUGENT JA, LEWIS JA, BOSIELO JA and K PILLAY AJA  
2010 NOVEMBER 2, 19

**Criminal procedure**—Arrest—Without warrant—Legality—Criminal Procedure Act 51 of 1977, s 40(1)(b)—Once required jurisdictional facts present, discretion arising as to whether or not to arrest—Standard for exercise of such discretion not perfection, or even optimum, judged from vantage of hindsight—As long as choice made falling within range of rationality, standard not breached.

**Criminal procedure**—Arrest—Without warrant—Legality—Criminal Procedure Act 51 of 1977, s 40(1)(b)—Power to arrest to be exercised only for purpose of bringing suspect to justice—Arrest but one step in process—Authority to detain suspect after first appearance within discretion of court—Enquiry to be made by peace officer not how best to bring suspect to trial, but only whether case one in which that decision ought properly to be made by court—Rationality of arrestor's decision on that question depending upon particular facts of case—Clear that in serious crimes, such as those listed in Schedule 1, arrestor could seldom be criticised for arresting suspect in order to bring him or her before court.

**Criminal procedure**—Arrest—Law relating to arrest—'Fifth jurisdictional fact' laid down in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T): that police obliged to consider less invasive means of bringing suspect before court—Nothing in s 40(1)(b) of Criminal Procedure Act 51 of 1977 that could lead to conclusion that its wording containing hidden 'fifth jurisdictional fact'—Since legislation overriding common law, meaning of statute could not be changed by developing common law—None of High Courts applying 'fifth jurisdictional fact' having considered whether or not s 40(1)(b) unconstitutional and, if so, whether reading in 'fifth jurisdictional fact' saving it from unconstitutionality—Arrest under circumstances set out in s 40(1)(b) not amounting to deprivation of freedom which arbitrary or without just cause—Lawful arrest not capable of being arbitrary—Decision in *Louw v Minister of Safety and Security* 2006 (2) SACR 178 (T) criticised.

**Constitutional law**—Fundamental rights—Generally—Onus—Party alleging infringement of constitutional right bearing onus of establishing it—Party attacking exercise of discretion, where necessary jurisdictional facts present, bearing onus of proof—This so whether or not right to freedom compromised—Not tenable to expect defendant to deal with claim in which no averment made, save general one that arrest unreasonable.

## JUSTICE ALLIANCE OF SOUTH AFRICA v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (CC)

MOSENEKE DCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MOGOENG J, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J and YACOOB J  
2011 JULY 18, 29

**Constitutional law**—Separation of powers—Between Executive and Judiciary—Term of office of Constitutional Court judge—Constitution allowing Parliament to extend term—Section 8(a) of Judges' Remuneration Act giving power to President to extend term of Chief Justice—Section 8(a) allowing for unlawful delegation of legislative power—Non-renewable term of office important feature of rule of law, separation of powers and independence of Judiciary—Singling out of single judge for extension of term not permitted—Section 8(a) unconstitutional and violating principle of judicial independence—Judiciary must be seen to be free from external interference—Constitution, s 176(1) and Judges' Remuneration and Conditions of Employment Act 47 of 2001, s 8(a).

## SWART v BEAGLES RUN INVESTMENTS 25 (PTY) LTD (FOUR CREDITORS INTERVENING) (GNP)

MAKGOBA J  
2011 MAY 26, 30

**Company**—Business rescue—Requirements—Guidance to be found in judicial management under old Act—Must be reasonably probable that company viable and capable of ultimate solvency, and that it will, within reasonable time, become successful concern—Whether company will be able to carry on business on solvent basis, and/or whether granting of business rescue will result in creditors achieving better dividend—Interests of creditors to

prevail when weighing up interests of company and creditors—Companies Act 71 of 2008, s 131(4)(a).

### **PRESIDENCY PROPERTY INVESTMENTS (PTY) LTD AND OTHERS v PATEL (SCA)**

MPATI P, NAVSA JA, HEHER JA, BOSIELO JA and MAJIEDT JA  
2011 MAY 6, 25

**Practice**—Pleadings—Generally—Interpretation—Reliance on cause of action not explicitly pleaded and not apparent to opposing party—Semble: Putative claim may be extracted from explicitly pleaded cause of action if such sufficient to support alternative, concealed cause—Party seeking to rely on such cause to show special circumstances sufficient to persuade court to come to its assistance—Court will not do so at cost of (1) prejudice to opposing party or (2) proper investigation into concealed issue.

**Contract**—*Consensus*—Misrepresentation—Whether actionable—Statement to relate to ascertainable fact as opposed to mere expression of opinion—Dishonest opinion as to future event may be actionable insofar as falsely reflecting state of mind of representor—Terms of representation and context in which made decisive.

**Contract**—*Consensus*—Misrepresentation—Whether actionable—Oral and graphic representations made in course of sales pitch—Statements as to anticipated view from property to be built no more than bona fide opinion concerning uncertain future state of affairs—Understood as such by purchaser—Representations not actionable.

### **THULO v ROAD ACCIDENT FUND (GSJ)**

MORISON AJ  
2010 MAY 19, 20; 2011 MARCH 15

**Attorney**—Rights and duties—Duties—MVA cases—Attorneys to conduct themselves with scrupulous professionalism and strictly to comply with all undertakings given by them during course of litigation.

**Attorney**—Fees—Contingency fees—Nature—Contingency fees may be raised only under Contingency Fees Act—No such thing as ‘common-law’ contingency fee—Contingency Fees Act 66 of 1997.

**Attorney**—Fees—Contingency fees—Statutory limitation—Costs orders aside, fee limited to lesser of either (i) 25% of the amount awarded, or (ii) double attorney’s normal fee—Attorney may not claim 25% of award if such figure exceeds double normal fee (which in itself must not amount to overreaching)—As to costs, attorney not permitted, in event of failure by other side to pay taxed costs due by it, to recover such from own client if effect thereof would be to leave client out of pocket to extent of more than double legal practitioner’s normal fees or resulting in client receiving less than 75% of amount awarded—Contingency Fees Act 66 of 1997, s 2.

### **NETSHITUKA v NETSHITUKA NAD OTHERS (SCA)**

MPATI P, BOSIELO JA, TSHIQI JA, SERITI JA and PETSE AJA  
2011 MAY 10; JULY 20

**Husband and wife**—Marriage—Validity—Civil marriage contracted while spouse partner in customary union with third party—Marriage void.

### **AFRICAN NATIONAL CONGRESS v HARMSE AND ANOTHER : IN RE HARMSE v VAWDA (AFRIFORUM AND ANOTHER INTERVENING) (GSJ)**

HALGRYN AJ  
2010 NOVEMBER 29; 2011 MAY 9

**Constitutional law**—Human rights—Right to freedom of expression—Exclusions—Hate speech—What constitutes—‘Dubula ibhunu’ (shoot the white man/boer)—Advocacy of hatred based on race—Incitement to cause harm—Falling outside right to freedom of expression—Amounting to hate speech—Intention of speaker irrelevant—Not for speaker to dictate to beholder how words should be perceived—Constitution, s 16(2)(c) and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10.

### PETERSON AND ANOTHER NNO v ABSA BANK LTD (GNP)

MAKGOBA J

2011 JUNE 13–14; JULY 27

**Banker**—Duty in respect of management of deposited funds—Duty to prevent loss by adequately monitoring and managing accounts—Whether omission constituting wrongfulness sustaining claim in delict for pure economic loss—Prima facie duty to prevent loss established.

**Banker**—Liability—Liability to third parties—Funds held in trust and deposited by financial institution acting on behalf of investors—Whether bank liable in delict for pure economic loss to investors resulting from failure to adequately monitor and manage accounts in question—Prima facie duty to prevent loss established.

### SH v EH (ECP)

SCHOEMAN J

2010 OCTOBER 14; 2011 JANUARY 24

**Husband and wife**—Divorce—Maintenance—Spouse—Husband may be obliged to pay maintenance to wife who after divorce is involved in relationship with another man.

### FUTURE RUSTIC CONSTRUCTION (PTY) LTD v SPILLERS WATERFRONT (PTY) LTD AND ANOTHER (KZD)

SWAIN J

2011 MAY 6, 27

**Arbitration**—Award—Remittal—Ambit—Court may order remittal for purpose of clarification or finalisation of vague or incomplete award—Furnishing of specified information not amounting to reconsideration of matter and making of ‘fresh’ or ‘further’ award by tribunal—Arbitration Act 42 of 1965, s 32(2).

**Arbitration**—Award—Remittal—Grounds—Vagueness or incompleteness of award—Order that arbitrator furnish missing information—Order not requiring making of ‘further’ or ‘fresh’ award, but merely that arbitrator furnish specified details to render award complete and certain—Arbitration Act 42 of 1965, s 32(2).

### LN v MINISTER OF SAFETY AND SECURITY AND ANOTHER (KZP)

LOPES J

2011 MAY 31; JUNE 8

**Damages**—Bodily injuries—Loss of earning capacity—Calculation—Life expectancy—HIV-positive plaintiff—Thirty-year-old male taking anti-retroviral drugs (ARVs) and likely to continue doing so—Expected to live for 30 or 40 more years—HIV-positive status not having negative effect on his life expectancy and future loss of earnings.

### EXPARTE BEUKES (WCC)

BINNS-WARD J

2011 JUNE 7–8, 17

**Curator**—Curator bonis—Master with jurisdiction over property of person to be placed under curatorship—Greater part of property of person to be placed under curatorship in jurisdiction of High Court A, while person resident in jurisdiction of High Court B—Section 4(2)(a) providing that with person ordinarily resident within jurisdiction of a High Court, Master of that area having jurisdiction over person’s property—Section 4(2)(b) providing that where person is not so resident, Master of area where greater portion of person’s property situated, having jurisdiction—Whether s 4(2)(b) giving Master of court A jurisdiction over person’s property—Section 4(2)(b) not providing such jurisdiction—Section 4(2)(a) giving jurisdiction over person’s property to Master of court B—Administration of Estates Act 66 of 1965, ss 4(2)(a) and 4(2)(b).

**Curator**—Curator bonis—Appointment—High Court with jurisdiction to appoint—Greater part of property of person to be placed under curatorship in jurisdiction of High Court A, while person resident in jurisdiction of High Court B—*Semble*: Court A might have concurrent jurisdiction with court B to appoint curator bonis.

**MINISTER OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE, AND ANOTHER v ZANBUILD CONSTRUCTION (PTY) LTD AND ANOTHER (SCA)**

BRAND JA, NUGENT JA, LEWIS JA, MAYA JA and BOSIELO JA  
2011 FEBRUARY 17; MARCH 11

**Engineering and construction law**—Building contract—Construction guarantee—Interpretation—Whether guarantee akin to suretyship and bound with construction contract or akin to letter of credit and independent of construction contract—Language of guarantee examined—Provision reserving right of bank to withdraw from guarantee after 30 days' notice—Bank's liability akin to suretyship.

**FIRSTRAND BANK LTD v WOODS AND SIMILAR CASES (ECP)**

DAMBUZA J  
2011 MAY 17, 31

**Execution**—Sale in execution—Mortgaged immovable property—Sale of residential property for recovery of outstanding bond repayments—Default execution judgment by registrar—Rescission of in wake of Gundwana judgment—Execution creditor (bank) seeking to obstruct granting of rescission orders by obtaining orders 'confirming' (i) registrar's default judgment and (ii) subsequent attachment of debtor's property—Bank not entitled to orders sought—Judgment debtors cannot be prevented from seeking rescission of default judgments granted against them by registrar.

**TRANSNET LTD v NEWLYN INVESTMENTS (PTY) LTD (SCA)**

MPATI P, CLOETE JA, HEHER JA, SHONGWE JA and PETSE AJA  
2011 MARCH 14, 29

**Evidence**—Documentary evidence—Objections—Appeal court will not entertain technical objections to documentary evidence not taken in court below.

**Evidence**—Documentary evidence—Admissibility—Secondary evidence as to documents—Party may adduce secondary evidence of document in possession of opposite party if latter has failed to produce it after having been given written notice to do so—Notice not required where nature of proceedings such as to inform opposite party by necessary implication that production of document will be required.

**Evidence**—Documentary evidence—Admissibility—Best evidence rule—No longer requirement that best secondary evidence of document has to be produced—Photocopy more reliable than oral evidence as to content of document, but this going to weight, not admissibility.

**Evidence**—Witnesses—Calling, examination and refutation—Cross-examination—Misuse of cross-examination to introduce argument under guise of questions.

**HAITAS AND OTHERS v PORT WILD PROPS 12 (PTY) LTD (GSJ)**

TSOKA J  
2011 JUNE 23

**Company**—Proceedings by and against—Security for costs—Application for furnishing of—Approach of court—While 1973 Companies Act made provision for furnishing of security for costs, 2008 Act containing no equivalent provision—Lacuna cannot defeat court's inherent power to regulate its own process by guarding against unnecessary or vexatious litigation by impecunious plaintiffs—Courts to insist on furnishing of security where interests of justice demand it—Companies Act 61 of 1973, s 13 and Companies Act 71 of 2008.

**DLANGAMANDLA v ROAD ACCIDENT FUND (FB)**

RAMPAI J  
2011 MAY 25; JULY 14

**Delict**—Elements—Negligence—What constitutes—Pedestrian crossing road—Pedestrian in inner lane waiting for motor vehicle to pass before crossing outer lane—Motorist changing lanes and running down pedestrian—No contributory negligence found on part of pedestrian.

### **DORBYL LTD v VORSTER (GSJ)**

MOSHIDI J

2011 FEBRUARY 24; MARCH 4; JULY 28

**Fiduciary duty**—Breach—Secret profits—Director having, during process of ‘unbundling’ of company, secretly made profits in course of deals negotiated with purchasers of company’s assets—Having failed to reveal interest he had in such purchasers—Director ordered to disgorge such profits to company—Furthermore ordered to repay remuneration by company under management-participation scheme introduced by company to remunerate directors for work done in disposal of company assets.

**Company**—Directors and officers—Directors—Fiduciary duty—Breach—Exploitation of corporate opportunity—Secret profits—Director having, during process of ‘unbundling’ of company, secretly made millions in course of deals negotiated with purchasers of company’s assets—Having failed to reveal interest he had in such purchasers—Director ordered to disgorge such profits to company—Furthermore ordered to repay remuneration by company under management-participation scheme introduced to remunerate directors for work done in disposal of company assets.

### **LAW SOCIETY, FREE STATE v MACHEKA AND ANOTHER (FB)**

EBRAHIM J and LEKALE AJ

2011 FEBRUARY 24; JUNE 23

**Attorney**—Unauthorised practice as attorney—Provision of legal services for reward—Attorneys struck from roll but continuing to provide certain legal services through close corporation—Constitutional right to freedom of trade, occupation and profession infringed by broad ban on legal services for reward—Law society entitled to reserve certain work for profession—Close corporation members found to be performing work reserved for attorneys—Constitution of the Republic of South Africa, s 22, and Attorneys Act 53 of 1979, ss 58 and 83.

### **CAPE POINT VINEYARDS (PTY) LTD v PINNACLE POINT GROUP LTD AND ANOTHER (ADVANTAGE PROJECTS MANAGERS (PTY) LTD INTERVENING) (WCC)**

ROGERS AJ

2011 AUGUST 11

**Company**—Business rescue—Costs—Court having power to make costs order in court-ordered business rescue proceedings—Companies Act 71 of 2008, s 131.

**Company**—Business rescue—Notice of application—Quaere: As to legality of reg 124’s requirement that copy of court application be delivered to each affected person known to applicant—Companies Act 71 of 2008, s 131(2) and reg 124.

**Company**—Business rescue—Delivery of documents—Substituted service—With listed company where applicant wanting to use publication in addition to or as substitute for personal notification, preferable that publication be via Securities Exchange News Service and in national newspaper—Companies Act 71 of 2008, reg 7.

**Company**—Business rescue—Participation in hearing of application—Affected persons need not apply for leave to intervene in, such persons having right to participate—Companies Act 71 of 2008, s 131(3).

### **PANSOLUTIONS HOLDINGS LTD v P&G GENERAL DEALERS & REPAIRERS CC (KZD)**

SWAIN J

2011 FEBRUARY 7, 16

**Practice**—Judgments and orders—Default judgment—Rescission—Reconsideration by court of default judgment granted by registrar—‘Good cause’ criteria applicable—Uniform Rules of Court, rules 31(2) (b) and 31(5) (d).



### **MV CLEOPATRA DREAM**

#### **TRANSNET LTD t/a NATIONAL PORTS AUTHORITY v MV CLEOPATRA DREAM AND ANOTHER (SCA)**

BRAND JA, LEWIS JA, HEHER JA, MALAN JA and SERITI JA  
2011 FEBRUARY 22; MARCH 11

**Shipping**—General maritime law—Salvage—Right to recover—Salvage operations undertaken within scope of statutory or common-law duty—Issue of voluntariness—Salvage of vessel in distress by ports authority within limits of port—Right to claim salvage—Effect of International Convention on Salvage, 1989, arts 5 and 17.

### **MALEMA v RAMPEDI AND OTHERS (GSJ)**

LAMONT J  
2011 JULY 23

**Defamation**—Defences—Justification—Media defendants—Public figure—Interdict sought by applicant restraining newspaper from publishing certain allegations—Allegations contained in series of questions put to applicant—Applicant being in position to answer questions yet not doing so—Evidence of newspaper's source as well as evidence of reliability of source—Sustainable foundation for averments—Aspects of public figure's private life being in public interest—Application for interdict dismissed.

### **PREMIER, EASTERN CAPE, AND ANOTHER v MTSHELAKANA AND OTHERS (ECM)**

GRIFFITHS J  
2011 JUNE 14, 23

**Land**—Unlawful occupation—Eviction—Statutory eviction—Procedure—Joinder of municipality—Whether municipality to be joined in every application for eviction under PIE—Municipality lacking required direct and substantial interest when court dealing with affluent tenants able to source alternative accommodation—But where court dealing with poor, landless people, municipality having direct and substantial interest due to its obligation to ensure adequate accommodation for persons in dire need of adequate shelter—Court may accordingly in such cases decide to join local municipality—Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(2).

### **STAEGEMANN v LANGENHOVEN AND OTHERS (WCC)**

BLIGNAULT J  
2011 JULY 1

**Prescription**—Extinctive prescription—Debt—What constitutes—Not including rei vindicatio—Prescription Act 68 of 1969, s 10

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

**OCTOBER 2011**

### **TABLE OF CASES**

- Media 24 Ltd and Others v National Prosecuting Authority and Others (Media Monitoring Africa as Amicus Curiae): In re S v Mahlangu and Another 2011 (2) SACR 321 (GNP)
- Maimela and Another v Makhado Municipality and Another 2011 (2) SACR 339 (SCA)
- S v Jeffries 2011 (2) SACR 350 (FB)
- Pakule v Minister of Safety and Security and Another 2011 (2) SACR 358 (SCA)
- Tafeni v Minister of Safety and Security and Another 2011 (2) SACR 358 (SCA)
- Erasmus v MEC for Transport, Eastern Cape 2011 (2) SACR 367 (ECM)
- S v Qhinga and Others 2011 (2) SACR 378 (CC)

- Greenberg v Gouws and Another 2011 (2) SACR 389 (GSJ)
- S v Pillay 2011 (2) SACR 409 (SCA)
- S v Pauls 2011 (2) SACR 417 (ECG)

## FLYNOTES

### **MEDIA 24 LTD AND OTHERS v NATIONAL PROSECUTING AUTHORITY AND OTHERS (MEDIA MONITORING AFRICA AS AMICUS CURIAE): IN RE S v MAHLANGU AND ANOTHER (GNP)**

RAULINGA J

2010 NOVEMBER 22; DECEMBER 2; 2011 APRIL 29

**Trial**—Minor accused—In camera hearing—Rights of children—Child accused in criminal trials—Presiding officer's discretion in terms of s 63(5) of Child Justice Act 75 of 2008 to allow public and/or media at trial—Fair-trial standard for child accused requiring more sensitive courtroom environment for children—Underlying principle of Act that in criminal proceedings involving accused under 18 years, courtroom be closed to public, presiding officer only permitting entry in very exceptional circumstances—Whether such exceptional circumstances present to be established on case-by-case basis—Discretion having to be exercised with reference to constitutional values implicated, striking balance between child accused's 'fair trial interest' and public's interest in free flow of information and freedom of expression—Minor accused's rights under s 28(2) of Constitution, 1996, open to limitation under s 36 thereof—Fundamental principle of 'best interest of child' not automatically trumping 'public's interest' irrespective of circumstances—*In casu*, circumstances justifying that trial be heard in public domain, but not to extent of media or public being allowed entrance to courtroom; only to extent of viewing trial.

### **MAIMELA AND ANOTHER v MAKHADO MUNICIPALITY AND ANOTHER (SCA)**

MPATI P, CACHALIA JA and MAJIEDT JA

2011 FEBRUARY 23; MAY 20

**General principles of liability**—Unlawfulness—Necessity—Requirements for defence of necessity—Where innocent victim killed in circumstances of necessity—Whether means used in averting danger objectively reasonable in circumstances—Proportionality between means used and danger averted forming part of this enquiry—*In casu*, defendant shooting into crowd of striking workers, some of whom had been engaging in lifethreatening attack on him, wounding one and killing another—There could be no greater harm than threat to one's life—While due regard having to be had to victim's right to life, denying person right to act, in circumstances of necessity, to protect his or her life by killing, would be to deny such person's right to life.

### **S v JEFFRIES (FB)**

HANCKE AJP, KRUGER J and MUSI J

2009 MAY 18; JUNE 25

**Sentence**—Concurrence of sentences—When competent—Order of concurrent running of sentences only allowed where imprisonment imposed as only punishment, Criminal Procedure Act 51 of 1972, s 280(2) as amended—Accordingly, orders such as *in casu*, that two sentences of fines, each with alternative of imprisonment, were to run concurrently, were not competent.

### **PAKULE v MINISTER OF SAFETY AND SECURITY AND ANOTHER; TTAFENI v MINISTER OF SAFETY AND SECURITY AND ANOTHER (SCA)**

NUGENT JA, LEWIS JA and MEER AJA

2011 MAY 23; JUNE 1

**Search and seizure**—Seizure by police in terms of ss 20 and 22 of Criminal Procedure Act 51 of 1977—Items initially unlawfully seized may, upon subsequent discovery of grounds rendering seizure compliant with s 20, be lawfully seized while still in possession of police without first having to be returned to person from whom it had been seized.

**Traffic offences**—Possession, without lawful cause, of vehicle bearing falsified engine or chassis number prohibited, s 68(6)(b) of National Road Traffic Act 93 of 1996—Vehicle seized by police not to be returned to persons from whom it was seized where vehicle having any features referred to in s 68(6)—Doing so would defeat provisions of Act.

### **ERASMUS v MEC FOR TRANSPORT, EASTERN CAPE (ECM)**

ROBERSON J

2010 DECEMBER 7, 8; 2011 FEBRUARY 3

**Arrest**—Without warrant—Legality of—Criminal Procedure Act 51 of 1977, s 40(1)(b)—Power to arrest to be exercised only for purpose of bringing suspect to justice—*In casu*, plaintiff motorist arrested at roadblock with purpose of educating her about consequences of not being in possession of driver's licence—Teaching arrestee lesson not purpose contemplated by s 40(1)(b) of Act—Arrest not bona fide but *in fraudem legis*—Arrest and detention illegal.

**Arrest**—Without warrant—Legality of—Criminal Procedure Act 51 of 1977, s 40(1)—Whether arresting officer properly exercised discretion to arrest—Where motorist arrested at roadblock for not being in possession of driver's licence and, despite indication that her driver's licence would be brought to roadblock, subsequently detained at police station—Such constituting failure to exercise discretion whether or not to arrest—Evidence showing that even if arrestee's licence were brought to roadblock, traffic officer nonetheless determined to arrest—Arrestor not having discharged onus of establishing that arrestee's arrest and detention were justified.

### **S v QHINGA AND OTHERS (CC)**

NGCOBO CJ, MOSENEKE DCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MOGOENG J, MTHIYANE AJ, NKABINDE J, VAN DER WESTHUIZEN J and YACOOB J

2011 FEBRUARY 17; MAY 25

**Appeal**—Leave to appeal—Refusal of by Supreme Court of Appeal—Where record of High Court proceedings not before SCA when considering applicants' petition for leave to appeal—SCA thus unable to assess whether High Court rulings were reasonably open to challenge on appeal—Applicants not having had benefit of adequate reappraisal of their case or informed decision on it as contemplated by s 35(3)(o) of Constitution, 1996—Refusal of petition by SCA set aside and petition remitted to SCA for reconsideration.

### **GREENBERG v GOUWS AND ANOTHER (GSJ)**

TSOKA J, VICTOR J and MAYAT J

2010 OCTOBER 7, 26

Domestic violence—Protection order—Breach of—Arrest in terms of s 8(4) of Domestic Violence Act 116 of 1998—Only lawfully effected if arresting officer had reasonable grounds for suspecting complainant may suffer imminent harm as result of breaching of protection order—Reasonable suspicion in context of breach of protection order to be interpreted objectively—Grounds of suspicion having to be those that would induce reasonable man to have such suspicion and be objectively sustainable—'Imminent harm' in s 8(4) connoting harm 'about to happen' or 'event which is both certain and about to occur'.

### **S v PILLAY (SCA)**

NAVSA JA, SERITI JA and PETSE AJA

2011 MAY 24; JUNE 1

**Sentence**—Imposition of—Factors to be taken into account—Where convicted person primary caregiver of minor children—Sentencing court having to obtain information set out in recent Constitutional Court decisions so that proper order ensuring continued well-being of children could be made—In obtaining relevant information, all involved to play their part, including State, using such resources as available to it and accused's legal representatives—In present case, where information before trial court inadequate for determining appropriate sentence, sentence set aside and matter remitted to trial court to obtain required information.

### SC v PAULS (ECG)

DAMBUZA J and MAKAULA J  
2010 MAY 19; NOVEMBER 12

**Sentence**—Imprisonment—Term of—Non-parole period—Section 276B of Criminal Procedure Act 51 of 1977—Power to fix non-parole period should be invoked only in exceptional circumstances—No general rule for what constituting exceptional circumstances, individual circumstances of each case having to be considered—While parole not sentenced offender's right, and while Act empowering courts to fix non-parole periods, courts nevertheless duty-bound to judiciously and carefully consider, on case-by case basis, whether doing so proper—Such proper judicial consideration only possible when both State and defence making submissions thereon—Where exceptional circumstances found to exist, they should be set out explicitly in judgment or be apparent there from.