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JANUARY 2012

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### JUDGEMENTS OF INTEREST IN THE JANUARY EDITIONS OF THE *SALR* AND THE *SACR*

#### ***SOUTH AFRICAN LAW REPORTS***

**Evidence: the admissibility of statements made at s 417 inquiries in later proceedings**

In *O'Shea NO v Van Zyl NO and Others* 2012 (1) SA 90 (SCA), the liquidators of a company organise an enquiry under s 417 of the Companies Act 61 of 1973, and at it they question O, a trustee of a trust. In response to a question O states that the company made a loan to the trust. The liquidators later apply to sequestrate the trust and their evidence that they are a creditor is O's statement. In issue on appeal is whether the statement made at the enquiry is admissible at the later sequestration proceedings.

**Mineral rights: whether deprivations of unused common-law coal rights are expropriations**

In *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP), a company holds coal rights on certain farms, but has no prospecting permit or mining authorisation under the Minerals Act 50 of 1991. In April 2004 the members resolve to wind it up and then in May 2004 the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act) commences. Later that year the liquidators sell the rights to a third party for R750 000. However, the lawyers of both parties later give opinions that the Act has caused the rights to cease to exist and that the sale is void. So the liquidators return the R750 000 and they apply to the Department of Mineral Resources for compensation, based on the claim that the State has expropriated the rights. At this time the plaintiff identifies the claim as suitable for a test case, pays the liquidators R250 000, and they cede the claim to it. The Department rejects the claim and plaintiff begins proceedings. In issue is whether the Act has deprived the company of its coal rights; if so, whether this is an expropriation; and if so, whether the company has a right to compensation.

### **Trusts: whether it's possible to wind up trusts under the Companies Act 71 of 2008**

In *Melville v Busane and Another* 2012 (1) SA 233 (ECP), an unopposed application for the winding up of a trust under the Companies Act 71 of 2008, the court has to decide whether it is competent for it to do so. Formerly the appropriate remedy had been sequestration, as it had been determined that trusts fell within the definition of a 'debtor' in s 2 of the Insolvency Act. Here, the court considers the argument that since the new Companies Act defines 'juristic person' to include a trust, trusts can now be placed under liquidation.

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

### **Sentencing for theft and attempted theft**

The accused had pre-planned the theft of a motor vehicle, and had obtained a specialised instrument for this purpose. His theft was only thwarted by an alarm and the arrival of the police. In such circumstances there should be no real difference in sentencing for theft and attempted theft. *S v Nxopo* 2012 (1) SACR 13 (ECG)

### **Inadmissible evidence not always grounds for appeal**

Where there are doubts as to the admissibility of evidence, such will not be a live controversy when even without this evidence the balance of the evidence still establishes guilt beyond reasonable doubt. The court should avoid involving itself in abstract, academic or hypothetical questions. *S v Shilakwe* 2012 (1) SACR 16 (SCA)

### **Search warrant: requirements for validity**

The appellant had challenged the validity of a search warrant on several grounds. The Supreme Court of Appeal examines the issues of: an over-broad warrant; the accuracy of the description of the premises; where an affidavit referred to in warrant is not annexed to the warrant when handed over on request; and where the police seize goods not covered by the warrant. *Polonyfis v Provincial Commissioner, South African Police Service, Northern Cape Others NNO* 2012 (1) SACR 57 (SCA)

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**The Juta Law Reports Team**

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MAKGOKA J and MNGQIBISA-THUSI J  
2010 JUNE 1; OCTOBER 21

**Theft**—What constitutes—Mere assumption of control over property not sufficient to constitute theft—Owner of property required to have been effectively excluded from his property—In absence thereof, accused's acts amounting only to acts of execution and constituted attempted theft only—Court to be cautious about applying shoplifting principle when determination to be made between completed theft and attempted theft.

**Sentence**—Imposition of—Factors to be taken into account—Prevalence of offence and interests of community—Still need to maintain healthy and proper balance between interests of society, nature of offence and offender—Aggravating sentences to combat increasing prevalence of particular offence must not to lead to inevitable negation of accused's personal circumstances.

**S v COMBRINK (SCA)**

BRAND JA, PONNAN JA and SHONGWE JA  
2011 MAY 25; JUNE 23  
[2011] ZASCA 116

**Murder**—*Mens rea*—Intention to kill—*Dolus eventualis*—Where appellant firing two shots at unidentified person walking over farmland after person had not responded to his calls, second shot striking and killing such person—Evidence of witness to effect that first shot landing very close to deceased accepted—Appellant, who was good marksman, by aiming second shot in same place as first, must have subjectively foreseen possibility that bullet might ricochet off object and strike such person—Regardless of such foreseeable possibility, appellant went on to shoot—Appellant guilty of murder, form of intention being *dolus eventualis*.

**Sentence**—Imposition of—Factors to be taken into account—Cases which appear to have racial or discriminatory connotations—Public ire with sentences that appear to favour particular group in society requiring judicial sensitivity—Public interest was not in discrimination between white and black but rather between people who perceived each other, with prejudice, as being different or inferior to them—In order to properly combat hate crimes, decision makers in criminal justice system should be attuned to fact that effects went far beyond victims, serving to traumatise whole communities and damaging South African society.