



## JUTA'S ADVANCE NOTIFICATION SERVICE

MARCH 2012

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

Herewith the cases of interest in the March reports. Also included below are the table of cases and flynotes.

### JUDGEMENTS OF INTEREST IN THE MARCH EDITIONS OF THE SALR AND THE SACR

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

##### **Temporary shelter for the homeless**

A municipality's housing policy distinguished between persons it evicted from 'bad buildings', and persons that private landowners evicted: providing the former with temporary accommodation, but not the latter. The Constitutional Court found that to the extent that eviction might result in homelessness, it was of little relevance whether removal from one's home was at the instance of a municipality or a private property owner. The policy was accordingly unconstitutional. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC)

##### **The police, the hearsay evidence and the missing money**

The court had to decide whether to allow hearsay statements made by absconded robbers, to determine whether the State could be held liable for losses made up by the full amount stolen during the robbery, or, alternatively, the appropriation of the proceeds of the robbery by the investigating officers. *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA)

##### **Renaming of streets: was there proper process and consultation?**

The council's initial street renaming policy provided for consultation with the addressees, but it later amended this to consultation with ward committees. The Democratic Alliance took issue with the renaming process, alleging that proper public consultation had been lacking, that no proper deliberative process had taken place, and that the council had failed to comply with its own street naming policy. The court examined these contentions, and whether the DA could rely on the Promotion of Administrative Justice. *Democratic Alliance v Ethekwini Municipality* 2012 (2) SA 151 (SCA)

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

##### **What is electricity in law and in science? Can it be stolen?**

The accused had raised the defence that electricity was not capable of being stolen. The court looks at how electrons are driven through the power grid, and examines the nature of electricity, and whether it was possible for such energy to be stolen. *S v Ndebele and Others* 2012 (1) SACR 245 (GSJ)

##### **Offenders not to be punished to point of being broken**

Where the court is dealing with an appropriate sentence for multiple offences, care must be taken that the aggregate penalty is not too severe. The Supreme Court of Appeal provided a

more balanced sentence for an appellant convicted of multiple counts related to housebreaking. *S v Moswathupa* 2012 (1) SACR 259 (SCA)

### **Shocking crimes by youthful offender visited by shocking sentence**

A boy not yet 15 years old committed robbery and rape, and was met with a cumulative sentence of 25 years. On appeal the sentence was reduced, the appeal court holding that the sentence should be individualised, with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society. *S v BF* 2012 (1) SACR 298 (SCA)

### **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**

**MARCH 2012**

### **TABLE OF CASES**

- Premier, Western Cape v Lakay 2012 (2) SA 1 (SCA)
- Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd 2012 (2) SA 16 (SCA)
- Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others 2012 (2) SA 16 (SCA)
- Budge and Others NNO v Midnight Storm Investments 256 (Pty) Ltd and Another 2012 (2) SA 28 (GSJ)
- Booyesen and Others v Booyesen and Others 2012 (2) SA 38 (GSJ)
- Kriel v Bowels 2012 (2) SA 45 (ECP)
- President of the Republic of South Africa and Others v M & G Media Ltd 2012 (2) SA 50 (CC)
- Bio Energy Afrika Free State (Edms) Bpk v Freedom Front Plus 2012 (2) SA 88 (FB)
- Kouga Municipality v Bellingan and Others 2012 (2) SA 95 (SCA)
- City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 039 (Pty) Ltd and Another 2012 (2) SA 104 (CC)
- Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security 2012 (2) SA 137 (SCA)
- Democratic Alliance v Ethekeini Municipality 2012 (2) SA 151 (SCA)
- Ives v Rajah 2012 (2) SA 167 (WCC)
- Equity Aviation Services (Pty) Ltd v SATAWU and Others 2012 (2) SA 177 (SCA)
- Eye of Africa Developments (Pty) Ltd v Shear 2012 (2) SA 186 (SCA)
- Eskom Holdings Ltd v National Union of Mineworkers and Others 2012 (2) SA 197 (SCA)
- C and Others v Department of Health and Social Development, Gauteng, and Others 2012 (2) SA 208 (CC)
- MG v BM and Others 2012 (2) SA 253 (GSJ)
- Industrial Development Corporation of South Africa Ltd v PFE International Inc (BVI) and Others 2012 (2) SA 269 (SCA)
- Body Corporate of Savannah Park v Brainwave Projects 1147 CC and Others 2012 (2) SA 276 (SCA)
- Muller NO and Another v Community Medical Aid Scheme 2012 (2) SA 286 (SCA)
- Central Authority of the Republic of South Africa and Another v B 2012 (2) SA 296 (GSJ)

- Gazit Properties v Botha and Others NNO 2012 (2) SA 306 (SCA)
- Van Aardt v Galway 2012 (2) SA 312 (SCA)
- B and Others v G 2012 (2) SA 329 (GSJ)

## FLYNOTES

### **PREMIER, WESTERN CAPE v LAKAY (SCA)**

NAVSA JA, CLOETE JA, MALAN JA, THERON JA and PETSE AJA  
2011 NOVEMBER 14, 30  
[2011] ZASCA 224

**State**—Actions by and against—Actions against—Creditor—Definition—Such including natural guardian—Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 1.

**State**—Actions by and against—Actions against—Creditor—Distinction between creditor in Prescription Act and in Institution of Legal Proceedings against Certain Organs of State Act—Creditor in Prescription Act including minor, but not minor's natural guardian enforcing minor's claim—Creditor under Institution of Legal Proceedings Act including minor's natural guardian enforcing minor's claim—Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, ss 1, 3(3)(a) and 3(2)(a); Prescription Act 68 of 1969, s 12(3).

**State**—Actions by and against—Actions against—Notice—Failure to give notice—Condonation—Court's discretion to condone—Such not narrow discretion—Appellate court may decide question of condonation according to its own view whether section's requirements fulfilled—Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(4).

**State**—Actions by and against—Actions against—Notice—Failure to give notice—Condonation—Good cause for failure—To demonstrate good cause applicant need explain default sufficiently fully to enable court to understand how it occurred and to assess applicant's conduct and motives—Each case depending on its own facts—Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(4).

**State**—Actions by and against—Actions against—Notice—Failure to give notice—Condonation—Costs—Semble: where application for condonation opposed, costs should follow result—Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(4).

### **CHAIRMAN, STATE TENDER BOARD v DIGITAL VOICE PROCESSING (PTY) LTD; CHAIRMAN, STATE TENDER BOARD v SNELLER DIGITAL (PTY) LTD AND OTHERS (SCA)**

NAVSA JA, LEWIS JA, BOSIELO JA, SERITI JA and PLASKET AJA  
2011 NOVEMBER 10, 24  
[2011] ZASCA 202

**Administrative law**—Administrative action—Review—Application—Ripeness—Whether administrative action ripe for challenge determined by decision's impact and not by formal notice to affected party—Promotion of Administrative Justice Act 3 of 2000, s 6.

### **BUDGE AND OTHERS NNO v MIDNIGHT STORM INVESTMENTS 256 (PTY) LTD AND ANOTHER (GSJ)**

MEYER J  
2011 NOVEMBER 7, 15

**Company**—Winding-up—Grounds—Just and equitable to do so—This ground to wind up solvent company not to be read *eiusdem generis* other grounds in section—Companies Act 71 of 2008, s 81(1)(d).

### **BOOYSEN AND OTHERS v BOOYSEN AND OTHERS (GSJ)**

MOSHIDI J  
2010 NOVEMBER 10; 2011 MARCH 25

**Land**—Sale—Contract—Formalities—Contract of sale of land in joint estate by surviving spouse without consent of executor in estate of deceased spouse—Deceased estate not finalised—Executor as representative of estate only person having authority to sell property—Surviving spouse having no legal authority to sell such property—Sale not complying with s 2(1) of Alienation of Land Act 68 of 1981 and therefore void ab initio.

**KRIEL v BOWELS (ECP)**

SMITH J

2010 NOVEMBER 4, 11

**Practice**—Trial—Pre-trial conference—Lack of co-operation from other party—Remedy—Rule 37 of Uniform Rules of Court—Purpose of rule to curtail duration of trial, narrow down issues, cut costs and facilitate settlements—Parties required bona fide to attempt to reach settlement on such issues—But party cannot be compelled to agree to anything during course of rule 37 proceedings—Remedy for party frustrated by lack of cooperation from other party is to request conference to be convened before judge in terms of rule 37(8)—Rule 37(4) contemplating list to be provided by other party before pre-trial conference of enquiries it will direct and which are not included in request for particulars for trial—Rule not envisaging formal request to which there will be formal reply.

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v M & G MEDIA LTD (CC)**

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

2011 MAY 17; NOVEMBER 29

[2011] ZACC 32

**Administrative law**—Access to information—Access to information held by public body—Request—Refusal—Burden of establishing that refusal complies with Act—Party claiming information falls within exemption to put forward sufficient evidence for court to conclude on probabilities that it falls within exemption—Recitation of statutory language of exemption insufficient, as is mere *ipse dixit* affidavit—Where party claims personal knowledge of facts that place record within exemption, it need indicate how knowledge was acquired, in order for court to determine weight to be given to evidence—Promotion of Access to Information Act 2 of 2000, s 81(3).

**Administrative law**—Access to information—Access to information held by public body—Request—Refusal—Disclosure of record to court—Court to use section to examine record if in interests of justice for it to do so—Promotion of Access to Information Act 2 of 2000, s 80.

**BIO ENERGY AFRIKA FREE STATE (EDMS) BPK v FREEDOM FRONT PLUS (FB)**

MUSI JP, VAN ZYL J and DAFFUE AJ

2011 AUGUST 11; SEPTEMBER 1

**Practice**—Parties—Locus standi—Political party—Application to set aside transfer of municipal land—Acting in public interest and in interest of its supporters who were residents and ratepayers—Challenging conduct of an organ of State—Having locus standi—Constitution, s 38.

**KOUGA MUNICIPALITY v BELLINGAN AND OTHERS (SCA)**

BRAND JA, CLOETE JA, HEHER JA, THERON JA and WALLIS JA

2011 NOVEMBER 10, 30

[2011] ZASCA 222

**Statutes**—Validity—Challenge to validity—Collateral challenge—Person charged with contravening legislation may collaterally challenge its validity in civil proceedings for declaratory order—Quaere: whether, where person liable to prosecution but not yet charged, person may challenge legislation in such civil proceedings.

**CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY v BLUE MOONLIGHT PROPERTIES 39 (PTY) LTD AND ANOTHER (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 AUGUST 11; DECEMBER 1  
[2011] ZACC 33

**Local authority**—Powers and duties—To shelter persons evicted by private landowners—Municipality's policy to provide accommodation to persons it evicted from 'bad buildings', but not to persons evicted by private landowners—Policy not taking into account individual situations of those at risk nor reasons for eviction—Policy accordingly unconstitutional.

**Constitutional law**—Duties of State—Housing—Local authorities—Shelter for persons evicted by private landowners—Municipality's policy to provide accommodation to persons it evicted from 'bad buildings', but not to persons evicted by private landowners—Policy not taking into account individual situations of those at risk nor reasons for eviction—Policy accordingly unconstitutional.

**GIESECKE & DEVRIENT SOUTHERN AFRICA (PTY) LTD v MINISTER OF SAFETY AND SECURITY (SCA)**

BRAND JA, LEWIS JA, CACHALIA JA, MHLANTLA JA and SHONGWE JA  
2011 NOVEMBER 9, 30  
[2011] ZASCA 220

**Evidence**—Hearsay—Court's ruling on admissibility—When required—To be made at end of plaintiff's case.

**Evidence**—Hearsay—When admissible—Inadmissibility under other law (or common law) not ruling out admission in interests of justice under Hearsay Act—Act creating alternative, highly flexible avenue for admission of hearsay evidence—Law of Evidence Amendment Act 45 of 1988 (Hearsay Act).

**State**—Liability for acts of police—Liability for criminal acts committed by police officer—Police officers investigating robbery failing to account for money recovered—State vicariously liable for resulting losses sustained by third party.

**DEMOCRATIC ALLIANCE v ETHEKWINI MUNICIPALITY (SCA)**

NAVSA JA, BRAND JA, HEHER JA, MAYA JA and CACHALIA JA  
2011 NOVEMBER 4, 30  
[2011] ZASCA 221

**Administrative law**—Administrative action—What constitutes—Decision by local authority to change street names—Decisions not constituting administrative action as intended in PAJA and not reviewable thereunder—May, however, be reviewed under constitutional principle of legality if arbitrary, irrational or suffering from procedural deficiency—Promotion of Administrative Justice Act 3 of 2000, s 1 sv 'administrative action'.

**Constitutional law**—Constitution—Foundational values—Rule of law—Judicial control of exercise of public power—All exercise of public power (legislative, executive or administrative) subject to judicial review—Must satisfy legal and procedural requirements and not be arbitrary or irrational.

**Road**—Public road—Renaming—Public participation—Municipality intending to rename its roads to act reasonably in ensuring public participation according to requirements of its street naming policy—Non-complying decisions subject to judicial review.

**IVES v RAJAH (WCC)**

ZONDI J and ROGERS AJ  
2011 SEPTEMBER 16, 23

**Execution**—Sale in execution—Mortgaged immovable property—Eviction of unlawful occupiers from property sold—Occupation of six months or more at time proceedings to evict initiated—Court's discretion to evict under PIE—'Except' clause applying only to first 'including' phrase in empowering section, so that question of alternative land excluded from court's consideration but rights of elderly and so on still to be taken into account—Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(7).

**Execution**—Sale in execution—Mortgaged immovable property—Eviction of unlawful occupiers from property sold—Occupation of six months or more at time proceedings to evict initiated—Disabled occupiers—Court's discretion to evict under PIE—Empowering section requiring courts to consider rights of disabled, but excluding consideration of whether alternative land available—With eviction of disabled persons, relevant factor inevitably whether suitable place to go to—But policy of legislature to be respected and accordingly question of alternative accommodation not to receive same weight as in case where disabled person an unlawful occupier in circumstances other than sale in execution pursuant to mortgage—Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(7).

**EQUITY AVIATION SERVICES (PTY) LTD v SATAWU AND OTHERS (SCA)**

BRAND JA, LEWIS JA, MALAN JA, SHONGWE JA and PLASKET AJA  
2011 NOVEMBER 17, 30  
[2011] ZASCA 232

**Labour law**—Strike—Notice—Who must give notice—Whether, where employees X refer dispute, which is not resolved, and X later issue strike notice, and strike, and in which strike employees Y join without first giving requisite notice, Y required to give notice, so that strike by Y lawful—Labour Relations Act 66 of 1995, s 64(1)(b).

**EYE OF AFRICA DEVELOPMENTS (PTY) LTD v SHEAR (SCA)**

HEHER JA, MHLANTLA JA and SERITI JA  
2011 NOVEMBER 3, 30  
[2011] ZASCA 226

**Environmental law**—Protection of environment—Protection of water resources—Underground water—Amendment of existing authorisation by competent authority to allow property developer temporary use of borehole water instead of grey water—Regulatory requirements not complied with—Amendment void—Regulations 42, 44 and 45 of Environmental Impact Assessment Regulations promulgated under National Environmental Management Act 107 of 1998.

**Administrative law**—Administrative action—Review—Duty to exhaust internal remedies before instituting legal proceedings—Applying only to administrative action—Letter by head of competent authority not administrative action since not exercise of public power—No need to exhaust internal remedies—Promotion of Administrative Justice Act 3 of 2000, s 7.

**Administrative law**—Review—When competent—Void administrative action—Application for declaratory relief, not review procedure, appropriate—Supreme Court Act 59 of 1959, s 19(1)(a)(iii).

**ESKOM HOLDINGS LTD v NATIONAL UNION OF MINeworkERS AND OTHERS (SCA)**

BRAND JA, VAN HEERDEN JA, CACHALIA JA, LEACH JA and SERITI JA  
2011 NOVEMBER 14, 30  
[2011] ZASCA 229

**Labour law**—Strike—Right to strike—Limitation—Essential services—Minimum services agreement—Dispute arising from failure to agree on terms of—Whether CCMA having jurisdiction—Answer in negative—Such disputes to be determined by essential services committee under s 73 of LRA—Labour Relations Act 66 of 1995, ss 72–74.

**C AND OTHERS v DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, GAUTENG, AND OTHERS (CC)**

MOGOENG CJ, MOSENEKE DCJ, FRONEMAN J, JAFTA J, KHAMPEPE J, NKABINDE J, SKWEYIYA J, YACOOB J and VAN DER WESTHUIZEN J  
2011 AUGUST 16; 2012 JANUARY  
[2012] ZACC 1

**Minor**—Custody—Removal of child to temporary safe care—Constitutionality—Sections of Children's Act infringing rights of child and parents by failing to provide for automatic judicial review of removal—Court remedying by reading in such review before Children's Courts—Children's Act 38 of 2005, ss 151 and 152.



## **MG v BM AND OTHERS (GSJ)**

MOSHIDI J

2011 AUGUST 2; NOVEMBER 22

**Customary law**—Customary marriage—Validity—Proof—Certificate of registration—Valid customary marriage concluded but not registered within statutory time frame—Failure to register not affecting validity of marriage—Department of Home Affairs ordered to register marriage—Recognition of Customary Marriages Act 120 of 1998, s 4.

**Customary law**—Customary marriage—Validity—Further marriage—Husband wishing to enter into further marriage required to apply to court for approval of written contract regulating future matrimonial property system of his marriages—Failure to comply—Effect—Further marriage validly concluded prior to commencement of Customary Marriages Act—Husband's failure to apply for approval of contract should not render otherwise valid further marriage void—Recognition of Customary Marriages Act 120 of 1998, s 7(6).

**Customary law**—Customary marriage—Validity—Further marriage—Husband wishing to enter into further marriage required to apply to court for approval of written contract regulating future matrimonial property system of his marriages—Failure to comply—Effect—*Seemingly*: It could not have been intention of legislature in such cases to invalidate otherwise valid marriage—Absence of penalty provision causing uncertainty—Matter requiring attention of legislature—Recognition of Customary Marriages Act 120 of 1998, s 7(6).

## **INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD v PFE INTERNATIONAL INC (BVI) AND OTHERS (SCA)**

LEWIS JA, SNYDERS JA and THERON JA

2011 NOVEMBER 22; DECEMBER 1

[2011] ZASCA 245

**Administrative law**—Access to information—Generally—Barring of recourse to PAIA where record sought for purpose of litigation after commencement of proceedings—Bar operating if access to record 'provided for in any other law'—Effect—Operation of rules of court preserved in relation to pending litigation—Once proceedings instituted, parties' conduct governed by rules of court—Promotion of Access to Information Act 2 of 2000, s 7(1).

**Discovery and inspection**—Production of documents—Applicability of PAIA—Party may not utilise PAIA after commencement of proceedings if access to document 'provided for in any other law'—Procedure for production of documents by witness governed by rule 38 of Uniform Rules—Parties not entitled to use PAIA for this purpose.

## **BODY CORPORATE OF SAVANNAH PARK v BRAINWAVE PROJECTS 1147 CC AND OTHERS (SCA)**

MTHIYANE JA, CACHALIA JA, MHLANTLA JA, LEACH JA and MAJIEDT JA

2011 NOVEMBER 18; DECEMBER 1

[2011] ZASCA 239

**Sectional title**—Extension of schemes—Right of extension—Content—Limited real right not including usufruct—Sectional Titles Act 95 of 1986, ss 25(1) and (4).

## **MULLER NO AND ANOTHER v COMMUNITY MEDICAL AID SCHEME (SCA)**

HEHER JA, MALAN JA and WALLIS JA

2011 NOVEMBER 22, 30

[2011] ZASCA 228

**Medicine**—Medical aid—Medical aid scheme—Liquidation—Transfer of members to other medical-aid scheme—Whether members' contributions falling into liquidated scheme's estate—No indication that contributions to be kept in separate, earmarked account for payment to other medical scheme—Scheme having personal right *vis-à-vis* its bank in respect of contributions paid into its account—Neither other medical scheme nor anyone else having better claim to it—Such entitlement constituting asset in scheme's estate—On liquidation of scheme available for satisfaction of creditors' claims—Medical Schemes Act 131 of 1998, s 63.

**Medicine**—Medical aid—Medical aid scheme—Liquidation—Transfer of members to other medical-aid scheme—Whether members' contributions falling into liquidated scheme's estate—

If so, whether thereafter vesting in other medical scheme by operation of law—Upon confirmation of transfer by Council for Medical Schemes, contributions vesting in other medical scheme by operation of law and no longer forming part of medical scheme's estate—Medical Schemes Act 131 of 1998, ss 8(h) and 63.

**CENTRAL AUTHORITY OF THE REPUBLIC OF SOUTH AFRICA AND ANOTHER v B (GSJ)**

MEYER J

2011 DECEMBER 5, 7

**Minor**—Abduction—International abduction—Application for return of unlawfully removed or retained child—Refusal—Grounds—Child objecting to return—This an independent ground not to be read with art 13(b)—Hague Convention on Civil Aspects of International Child Abduction (1980), art 13.

**Minor**—Abduction—International abduction—Application for return of unlawfully removed or retained child—Refusal—Grounds—Child objecting to return—Factors court has to take into account in exercise of its discretion—Comity—Convenience—That in best interests of child that its court of habitual residence decide its welfare—Child's reasons for objection, and their strength and independence—Child's understanding of purpose of order of return—Delay in resolution of proceedings—Hague Convention on Civil Aspects of International Child Abduction (1980), art 13.

**GAZIT PROPERTIES v BOTHA AND OTHERS NNO (SCA)**

HARMS AP, HEHER JA, SNYDERS JA, SHONGWE JA and MAJIEDT JA

2011 NOVEMBER 7, 23

[2011] ZASCA 199

**Insolvency**—Unlawful alienations and preferences—Voidable preferences—What constitute—Whether disposition made 'in ordinary course of business'—Disposition to be scrutinised against background of its underlying cause—Payment made under valid underlying contract by due date not affected by general illegality of insolvent's business—Insolvency Act 24 of 1936, s 29(1).

**VAN AARDT v GALWAY (SCA)**

PONNAN JA, SHONGWE JA and WALLIS JA

2011 NOVEMBER 3, 24

[2011] ZASCA 201

**Land**—Sale—Contract—Formalities—Description of *res vendita*—Whether description sufficient—Lease agreement containing option to purchase 'the farm property'—Farm identifiable from rest of lease agreement read with title deed—Property adequately described—Alienation of Land Act 68 of 1981, s 2(1).

**Land**—Sale—Option to purchase leased property—Lease agreement stipulating that option to be exercised by delivery of signed agreement of sale in terms prescribed by option—No fresh process of negotiation around terms of sale envisaged—Deed of sale would reflect terms of sale set out in option—Option not constituting unenforceable agreement to agree in future—Valid option validly exercised resulting in binding agreement of sale.

**Appeal**—Costs—Appeal record burdened by substantial number of irrelevant documents—Failure by legal representatives of parties to act in terms of rules of court—Counsel's practice note to provide list reflecting those parts of record that in opinion of counsel are necessary for determination of appeal—Costs of preparation, perusal and copying of record limited to two-thirds of costs incurred in those tasks—Supreme Court of Appeal Rules, rule 10A.

**B AND OTHERS v G (GSJ)**

MEYER J

2011 SEPTEMBER 27; OCTOBER 4, 11, 18, 21

**Minor**—Abduction—International abduction—Application for return of unlawfully removed or retained child—Legal representation of child—With very young children representative akin to *curator ad litem*; while with older children, representative to take instructions from child, act



in accordance with those instructions, and represent views of child—Children's Act 38 of 2005, s 279.

## SOUTH AFRICAN CRIMINAL LAW REPORTS

MARCH 2012

### TABLE OF CASES

- S v Selebi 2012 (1) SACR 209 (SCA)
- S v Ndebele and Others 2012 (1) SACR 245 (GSJ)
- S v Moswathupa 2012 (1) SACR 259 (SCA)
- Falk and Another v National Director of Public Prosecutions 2012 (1) SACR 265 (CC)
- S v Masoanganye and Another 2012 (1) SACR 292 (SCA)
- S v BF 2012 (1) SACR 298 (SCA)
- Botha v Minister of Safety and Security and Others 2012 (1) SACR 305 (ECP)
- January v Minister of Safety and Security and Others 2012 (1) SACR 305 (ECP)

### FLYNOTES

#### **S v SELEBI (SCA)**

MTHIYANE DP, SNYDERS JA, BOSIELO JA, LEACH JA and THERON JA  
2011 NOVEMBER 1, 2; DECEMBER 2  
[2011] ZASCA 249

**Corruption**—Public officer—Quid pro quo for gratification received—Intention—Presumption in s 24 of PCCA Act not required where abundance of evidence present as to corrupt intention—Prevention and Combating of Corrupt Activities Act 12 of 2004, ss 4(1)(a) and 24.

**Corruption**—Public officer—Agreement between corruptor and corruptee or quid pro quo from corruptee not required where abuse of position of authority and breach of trust clearly shown by evidence—Prevention and Combating of Corrupt Activities Act 12 of 2004, s 4(1)(a)(ii).

#### **S v NDEBELE AND OTHERS (GSJ)**

LAMONT J  
2011 FEBRUARY 21

**Indictment and charge**—Objection to charge—Application for quashing of charge in nature of exception in civil practice—If facts founding exception (and application for quashing) in dispute, proper for court to allow evidence as to those to be led at trial and to make decision at end of trial.

**Theft**—What constitutes—*Contrectatio*—Theft of electricity—Whether requirement that goods be handled or possessed by accused after commission of theft excluding electricity as subject of charge of theft—Case law recognising theft of incorporeals and that unlawful appropriation of characteristic of thing may constitute theft—Energy characteristic unlawfully appropriated when electricity stolen.

#### **S v MOSWATHUPA (SCA)**

PONNAN JA, THERON JA and SERITI JA  
2011 SEPTEMBER 8, 29  
[2011] ZASCA 172

**Sentence**—Imposition of—Multiple offences—Court having to seek appropriate sentence for all offences taken together—But court not to lose sight of fact that aggregate penalty must not be too severe.

**Housebreaking**—Housebreaking with intent to rob and robbery—Sentence—In view of prevalence of offence of housebreaking, is in general public interest that sentences should act

as deterrent—Message needs to go out that these offences will be dealt with severely—But offender not to be punished to point of being broken.

**FALK AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (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 MARCH 8; AUGUST 16  
[2011] ZACC 26

**Prevention of crime**—Restraint order in terms of Prevention of Organised Crime Act 121 of 1998—Ancillary orders in terms of s 26(8)—Words ‘shall at the same time’ in s 26(8) not meaning that ancillary orders can never be made after s 26(1) restraint order made—Word ‘shall’ in such phrase to be interpreted as ‘may’—Court making restraint order in terms of s 26(1) thus empowered to grant ancillary relief at same time, but not prohibited from doing so at later stage.

**Prevention of crime**—Restraint order—Foreign restraint order—Registration of in terms of s 24 of International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA)—Ancillary orders in terms of s 26(8) of Prevention of Organised Crime Act 121 of 1998—Which court having power to grant ancillary order to registered foreign order—As s 25 of ICCMA providing that registration gives order effect of domestic order, court where foreign order registered necessarily the court that may grant ancillary relief.

**Prevention of crime**—Restraint order—Foreign restraint order—Registration of in terms of s 24 of International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA)—Ancillary orders in terms of s 26(8) of Prevention of Organised Crime Act 121 of 1998 (POCA)—Statutes must promote values underlying open and democratic society based on human dignity, equality and freedom and may not allow for arbitrary deprivation of property—Constitution, 1996, ss 39(2) and 25(1)—Court’s interpretation of Acts representing meaningful and workable way of giving effect to these Acts within context of objects of those Acts—Nor does such interpretation offend against spirit, purport and objects of Bill of Rights—International co-operation in combating crime to protect society a legitimate constitutional objective—Registration of foreign restraint order in terms of ICCMA and consequent interdictory relief under POCA not constituting arbitrary deprivation of property.

**Prevention of crime**—Restraint order—Foreign restraint order—Registration of in terms of s 24 of International Co-operation in Criminal Matters Act 75 of 1996 (ICCMA)—Setting-aside of in terms of s 26(1) of Act—Real possibility that assets subject to restraint order might be disposed of—Ample reason, in interests of justice in terms of s 26(1)(d) of ICCMA, for restraint order to remain in place pending outcome of appeal proceedings in foreign country—Otherwise very purpose of restraint order might be defeated.

**Prevention of crime**—Restraint order in terms of Prevention of Organised Crime Act 121 of 1998—Ancillary orders in terms of s 26(8)—Setting-aside of in terms of s 26(10)—Where order was granted as ancillary order to foreign restraint order registered in terms of s 24 of International Cooperation in Criminal Matters Act 75 of 1996 (ICCMA), setting-aside of registration of foreign order would have to be procured—Where application for setting aside of foreign order failing, application for setting aside of ancillary order also failing.

**S v MASOANGANYE AND ANOTHER (SCA)**

HARMS AP, BRAND JA and MAYA JA  
2011 JULY 5, 7  
[2011] ZASCA 119

**Bail**—Pending appeal—Refusal of—Appeal against—Important to bear in mind that decision whether or not to grant bail one entrusted to trial judge—Trial judge best equipped to deal with issue—Court on appeal having to defer to exercise of trial court’s discretion unless latter court failed to bring unbiased judgment to bear on issue, did not act for substantial reasons, or exercised discretion capriciously or upon wrong principle.

**Bail**—Pending appeal—Refusal of—Appeal against—Convicted person having automatic right of appeal against refusal of bail pending appeal—Supreme Court of Appeal having complained for more than two decades about such situation—Executive not having acted thereon.

**Bail**—Pending appeal—Application for—Factors to be taken into account—Whether applicant a flight risk—Applicant’s assets not only factor to be considered, but also personal circumstances of applicant.

**S v BF (SCA)**

MTHIYANE JA, BOSIELO JA and SHONGWE JA  
2011 SEPTEMBER 15, 29  
[2011] ZASCA 177

**Sentence**—Prescribed sentences—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—In imposing such sentence on offender aged 14 years and 10 months, trial court overlooking s 51(6) of Act providing that s 51 of Act not applying to person who was under age of 16 years at time of commission of offence—Such constituting material misdirection—Nor can such case be regarded as ‘borderline case’.

**Juvenile offenders**—Sentence—Seriousness of offence, its impact on victims and interests of broader society to be taken into consideration—While s 28(1)(g) of Constitution provides that child ‘may be detained only for the shortest appropriate period of time’, word ‘may’ therein suggesting that where circumstances demand incarceration of child as only appropriate sentence, it can be imposed—But incarceration should only be imposed as measure of last resort—Sentence should also be individualised with emphasis on preparing child for return to society.

**Juvenile offenders**—Sentence—For robbery with aggravating circumstances and rape—Cumulative sentence of 25 years shockingly and disturbingly inappropriate for juvenile aged 14 years and 10 months at time of commission of offence—In altering sentence on appeal, court imposing shortened sentence to give effect to s 28(1)(g) of Constitution—Sentence reduced to 10 years for robbery and 12 years for rape, ordered to run concurrently, and antedated to date of sentence in trial court.

**BOTHA v MINISTER OF SAFETY AND SECURITY AND OTHERS;  
JANUARY v MINISTER OF SAFETY AND SECURITY AND OTHERS (ECP)**

TSHIKI J  
2010 NOVEMBER 11–24; 2011 APRIL 1

**Arrest**—Without warrant—Further detention of accused—Obligatory for police to establish justification for such further detention—Constitution, 1996, ss 7, 8, 10 and 12—Information relating thereto to be relayed to public prosecutor—Prosecutor, after applying mind to matter, to be in informed position whether or not to apply for further detention of accused—Police officer investigating case should be in position to inform prosecutor about strength or otherwise of case—Failure of police officer so to apply his mind could result in further detention being contrary to applicable constitutional provision and being declared unlawful.

**Prosecution**—Prosecutor—Powers and duties of—Prosecutors to carry out public functions independently and in interests of public—Must act in accordance with requirements of Constitution, 1996—Must also have regard to rights of accused, including right to bail and not to be detained arbitrarily and without just cause—Information to be supplied to court in bail proceedings can but come from prosecutor—Latter having duty to place before court any information relevant to court’s exercising of discretion with regard to grant or refusal of bail.