



JUTA'S ADVANCE NOTIFICATION SERVICE

MAY 2012

Dear South African Law Reports and Criminal Law Reports subscriber

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

JUDGEMENTS OF INTEREST IN THE MAY EDITIONS OF THE SALR AND THE SACR

SOUTH AFRICAN LAW REPORTS

When unmarried cohabitants break up

Is there a duty of support between unmarried cohabitants? The Supreme Court of Appeal looks into a seven-year relationship that ended, with one party seeking an order declaring that an express joint venture agreement had existed in respect of certain immovable property. *McDonald v Young* 2012 (3) SA 1 (SCA)

Does a voluntary association have the power to discipline a non-member?

A ski boat club had been granted a government licence to manage a boat launch site on the Kei River marine reserve as a public facility. A non-member was found guilty of fishing illegally in a marine reserve and permanently banned from using the launch site. The court had to decide whether the club had the authority to impose disciplinary sanctions on a non-member. *Clur v Keil and Others* 2012 (3) SA 50 (ECG)

Four judgments give guidance on credit agreements

Greeff v FirstRand Bank Ltd 2012 (3) SA 157 (NCK) deals with a situation where a consumer chose registered mail to her *postal address* as method for *delivery* of notices, and her *physical address* for *service* of notices. The issue to decide was whether proper delivery of notice of default had been effected by the posting by registered mail to the consumer's physical address.

The prevention of reckless credit and the duty of the credit provider to assess the consumer's understanding of the proposed agreement is examined in *Absa Bank v Coe Family Trust and Others* 2012 (3) SA 184 (WCC).

Andrews v Nedbank Ltd 2012 (3) SA 82 (ECG) explores the discretion of the court to look at all relevant factors when the matter is referred to a debt counsellor, including the consumer's prospects and future ability to satisfy the obligations under the credit agreement.

Whether a lease agreement was subject to National Credit Act, where the monthly rental was payable in advance, is decided in *Absa Technology Finance Solutions (Pty) Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 (3) SA 149 (GNP).

SOUTH AFRICAN CRIMINAL LAW REPORTS

Tragic childhood no excuse for gruesome murders

The accused never knew his father, his mother had died of an overdose of medication when he was very young, and he had been brought up by his grandparents. For many years he had a serious problem with drug abuse. The court, however, had to ensure that no member of our society ever again fell victim to the accused's murderous tendencies. This consideration overrode all others. *S v Van Loggenberg* 2012 (1) SACR 462 (GSJ)

Do restraint chains affect an accused's chances at trial?

The accused complained that the restraint chains that they had to wear in court would affect their rights to a fair trial. The accused had an interesting history of escaping from custody, and were regarded as serious flight risks. The court looked at all the circumstances and found the restraints to be fair, and that the accused were able to read documents and to gesticulate. Their request to be freed of the chains was denied. *Mvoko and Another v Minister of Correctional Services and Others* 2012 (1) SACR 472 (ECM)

Hearsay evidence remained so because source person not called

A prosecutor led a witness in circumstances where hearsay evidence was led and provisionally allowed because it was to be rendered admissible by the source person's evidence. However, the prosecutor was aware that such witness would not be called. The question was whether this had resulted in inadmissible hearsay being placed before the court, leading to conviction. *S v Carstens* 2012 (1) SACR 485 (WCC)

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Kind Regards

The Juta Law Reports Team

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- Clairison's CC v MEC for Local Government, Environmental Affairs and Dev Planning and Another 2012 (3) SA 128 (WCC)
- Nu-Shelf Investments CC v Bangaar and Another 2012 (3) SA 136 (KZD)

- Vodacom (Pty) Ltd and Another v Nelson Mandela Bay Municipality and Others 2012 (3) SA 139 (ECP)
- Lethimvula Healthcare (Pty) Ltd v Private Label Promotion (Pty) Ltd 2012 (3) SA 143 (GSJ)
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- Greeff v FirstRand Bank Ltd 2012 (3) SA 157 (NCK)
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- Absa Bank v Coe Family Trust and Others 2012 (3) SA 184 (WCC)
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McDONALD v YOUNG (SCA)

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 2011 FEBRUARY 18; MARCH 24
 [2011] ZASCA 31

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Contract—Consensus—Animus contrahendi—Tacit contract—Proof—Evidence and conduct of parties having to justify inference that contract tacitly concluded—Alleged tacit contract cannot be inferred where its terms would conflict with alleged express contract.

JG v MG (FB)

VAN DER MERWE R, JORDAAN R en KUBUSHI WnR
 2011 AUGUSTUS 15, 25

Husband and wife—Divorce—Proprietary rights—Antenuptial contract—Effect—ANC providing for cession to wife of life interest in husband's unit in retirement village contrary to rules of village—Prohibition on cession not rendering cession provision in ANC void—Provision to be interpreted to mean that husband abandoned his right of occupation for duration of wife's right of occupation—Divorce court ought to have awarded right of occupation to wife because she was entitled to it, and not as part of a discretionary award of maintenance.

KASPER v ANDRÈ KEMP BOERDERY CC (WC)

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Delict—Specific forms—Vicarious liability—Liability of employer for delictual acts of employee—Farmer instructing worker to gather and dump weeds—Worker setting fire to

weeds and fire spreading onto and damaging neighbours' lands—Amounting to improper mode of discharging contract of employment—Farmer liable for his worker's acts.

GAINSFORD AND OTHERS NNO v TIFFSKI PROPERTY INVESTMENTS (PTY) LTD AND OTHERS (SCA)

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CLUR v KEIL AND OTHERS (ECG)

PLASKET J
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Voluntary association—Disciplinary proceedings—Power to discipline nonmember—Voluntary association licensed by state to operate boat launch site in marine reserve as public facility—Licence specifying that association to ensure users of facility comply with environmental legislation—Association cannot act against non-member in absence of specific authority to do so—Association finding member of public guilty of fishing in reserve and banning him from site—Finding and sanction set aside.

Environmental law—Land use and planning—Marine reserve—Protection—Voluntary association licensed by state to operate boat launch site in marine reserve as public facility—Licence specifying that association to ensure public compliance with environmental legislation—Cannot do so in absence of specific authority to act against non-members—Association finding member of public guilty of fishing in reserve and banning him from site—Finding and sanction set aside.

MORGENSTER 1711 (PTY) LTD v DE KOCK NO AND OTHERS (WCC)

ROGERS AJ
2011 NOVEMBER 13; DECEMBER 5

Prescription—Acquisitive prescription—Land—Neighbouring land—Open possession as if owner—Whether established—Owners of farm in south claiming ownership of strip of land above cadastral boundary with farm to north—Fence running east-west along cadastral boundary between southern and northern farms—Fence deviating north of cadastral boundary—Land from cadastral boundary to fence in dispute—Prescription Act 68 of 1969, s 1.

JANSE VAN RENSBURG AND OTHERS NNO v STEYN (SCA)

NAVSA JA, HEHER JA, SNYDERS JA, SHONGWE JA and MEER AJA
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Insolvency—Voidable dispositions—Voidable preference—Setting aside of—Recovery of disposition—Consolidated estate in which liquidators unable to identify entity making disposition—Identity of insolvent 'debtor' in such circumstances—Consolidation order interpreted—Clear that 'debtor' referring to deemed consolidated corporate entity—Court refusing to enter into issue whether permissible to liquidate four estates as consolidated estate—Insolvency Act 24 of 1936, s 29.

Insolvency—Voidable dispositions—Voidable preference—Interest on—Debtor under no obligation to pay money until disposition set aside by order of court—Debtor only liable for interest and in mora when court makes order setting disposition aside—Insolvency Act 24 of 1936, s 29.

Company—Winding-up—Liquidator—Joint liquidators—Actions by and against—Four corporate entities whereby illegal pyramid scheme operated placed in liquidation—Consolidation order authorising joint liquidators to treat entities as one consolidated estate—Action by liquidators for recovery of payments made to investor as constituting voidable preference—Identification of specific ‘debtor’ in such circumstances—Clear from consolidation order that ‘debtor’ referring to deemed consolidated corporate entity—Court refusing to enter into issue whether permissible to liquidate four estates as consolidated estate—Insolvency Act 24 of 1936, s 29.

ANDREWS v NEDBANK LTD (ECG)

ROBERSON J, SMITH J and ZILWA AJ
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Credit agreement—Consumer credit agreement—Over-indebtedness—Judicial relief—Referral of matter to debt counsellor—Discretion of court—Court to consider all relevant factors, including consumer’s prospects and future ability to satisfy obligations under credit agreement, particularly where there was no question of reckless granting of credit—National Credit Act 34 of 2005, s 85.

**ZIAUR v MINISTER OF HOME AFFAIRS AND ANOTHER;
MATIWOS v MINISTER OF HOME AFFAIRS AND ANOTHER (ECP)**

MADLANGA AJ
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BARCLAY v ROAD ACCIDENT FUND (WCC)

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Revenue—Income tax—Income or capital accrual—Award of damages for loss of earnings or earning capacity—Whether income tax which claimant would have had to pay on future earnings to be taken into account in calculating capital value of lost earnings—Income tax to be ignored in calculation of gross notional earnings—While unfair to defendant to use after-tax investment rate at capitalisation stage, also no reason to calculate discount rate on assumption that claimant would invest award in manner that proceeds would be fully taxable—Allowance made for taxation of income derived from utilising award question of evidence.

JG v CG (GSJ)

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Husband and wife—Divorce—Maintenance—Spouse—Maintenance pendente lite—Household expenses—Wife buying household items and these consumed by her, her husband and dependent major child—Whether wife can claim her increased household expenditure—Court holding that she can—Uniform Rules of Court, Rule 43.

HULANE AND ANOTHER v MSUNDUZI MUNICIPALITY (KZP)

STEYN J

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Labour law—Courts—Jurisdiction—High court—Application in high court for declaratory order in respect of employment relationship between municipality and employees—Whether employment relationship between employees and municipality amounting to administrative action—Jurisdiction to be determined on pleadings—Employment and labour relationships generally not giving rise to administrative action—Application remaining one of employee and employer—High court lacking jurisdiction—Labour Relations Act 66 of 1995, s 157.

CLAIRISON'S CC v MEC FOR LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING AND ANOTHER (WCC)

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Practice—Pleadings—Striking out—Second respondent delivering notice of intention to abide and thereafter affidavit supportive of applicant's case—First respondent applying to strike out second respondent's affidavit—Court holding that second respondent entitled to set out its position and to abide court's decision.

NU-SHELF INVESTMENTS CC v BANGAAR AND ANOTHER (KZD)

STEYN J

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Execution—Attachment—Attorney's bill of costs—Validity—Attachment must arise from order or judgment, which is prerequisite for issuing of writ of execution—Taxed bill of costs not constituting court order on which writ may be issued—Uniform Rules of Court, rule 45(1) and (2).

VODACOM (PTY) LTD AND ANOTHER v NELSON MANDELA BAY MUNICIPALITY AND OTHERS (ECP)

GROGAN AJ

2010 JULY 30; AUGUST 5

Administrative law—Administrative action—Review—Discretion of court—Discretion to remit matter to decision-maker for reconsideration—PAJA intending to give reviewing court widest discretion to fashion appropriate remedies—PAJA empowering court to remit matter for reconsideration on basis of fresh facts—Promotion of Administrative Justice Act 3 of 2000, s 8(1) and 8(1)(c)(i).

LETHIMVULA HEALTHCARE (PTY) LTD v PRIVATE LABEL PROMOTION (PTY) LTD (GSJ)

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Practice—Pleadings—Claim in reconvention—Application for leave to counterclaim after plea delivered—Defendant need provide reasonable explanation for lateness and entitlement to counterclaim—Defendant need disclose its cause of action but need not establish prima facie case that it will succeed.

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD v VILJOEN T/A WONDERHOEK ENTERPRISES (GNP)

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Credit agreement—Consumer credit agreement—Whether agreement subject to NCA—Lease agreement—Whether financial institution’s purchasing of goods for leasing to specific lessee, ‘in effect financing lessee’s use of goods’, as such constituting credit agreement—NCA recognising credit agreements with reference to terms, not whether substantially so—Common-law leases not providing for deferral of amount owed not hit by NCA—National Credit Act 34 of 2005, s 8(4) (f).

GREEFF v FIRSTRAND BANK LTD (NCK)

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Practice—Summons—Service—Return prima facie proof only of matters therein stated and may be challenged—When challenged, sheriff who served summons having to testify as to service thereof—Supreme Court Act 59 of 1959, s 36(2).

Credit agreement—Consumer credit agreement—Debt enforcement—Proceedings in anticipation of judicial proceedings—Notice of default—Delivery—Requirements—Consumer’s chosen method of delivery—Where consumer having chosen registered mail to her postal address as method for delivery of notices, and her physical address for service of notices ‘in respect of legal proceedings’—Whether proper delivery of notice of default effected by posting it by registered mail to consumer’s physical address as notice ‘in respect of legal proceedings’—Not if, as in casu, notice posted to address where it should have been served, the parties clearly having chosen different addresses for different delivery methods of posting and service—National Credit Act 34 of 2005, ss 65(2)(b) and 129(1)(a).

FIRSTRAND BANK LTD v HUGANEL TRUST (WCC)

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THABO MOFUTSANYANA DISTRICT MUNICIPALITY v STEYN-ENSLIN & PARTNERS AND OTHERS (SCA)

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ABSA BANK v COE FAMILY TRUST AND OTHERS (WCC)

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Credit agreement—Consumer credit agreement—Reckless credit—Prevention—Duty of credit provider to assess consumer’s understanding of proposed agreement—Duties of credit provider set out—Effect of failure to comply—If no assessment undertaken, no defence against allegation of extension of reckless credit—Credit provider then barred from relying on failure of consumer to provide full and truthful information—National Credit Act 34 of 2005, s 81(2) and s 81(4).

MANSINGH v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (GNP)

PHATUDI J

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RANDELL v CAPE LAW SOCIETY (ECG)

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Practice—Stay of proceedings—Grounds—Criminal proceedings arising from same facts pending against defendant—Court having discretion to stay civil proceedings until criminal proceedings finalised—Court to be satisfied that defendant might be prejudiced in criminal proceedings if civil proceedings allowed to continue—Other factors relevant to exercise of discretion listed—No ground for introducing requirement of State compulsion.

Attorney—Misconduct—Disciplinary proceedings—Stay pending finalisation of related criminal proceedings—Whether to be granted—Stay granted where clear that danger existing that attorney will be prejudiced in conduct of his defence in criminal proceedings if striking-off proceedings allowed to continue.

TAYLOR AND OTHERS v TAYLOR AND OTHERS (ECP)

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S v NDEBELE AND OTHERS (GSJ)

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Criminal procedure—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 facts to be led at trial and to make decision at end of trial.

VODACOM (PTY) LTD AND ANOTHER v NELSON MANDELA BAY MUNICIPALITY AND OTHERS (ECP)

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FULTON v ROAD ACCIDENT FUND (GSJ)

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OAKDENE SQUARE PROPERTIES (PTY) LTD AND OTHERS v FARM BOTHASFONTEIN (KYALAMI) (PTY) LTD AND OTHERS (GSJ)

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Company—Business rescue—Requirements—Otherwise just and equitable to do so for financial reasons—Meaning—Court to consider financial reasons of all stakeholders in business rescue provisions, with exception of business rescue practitioner—Companies Act 71 of 2008, s 131(4)(a).

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BELL ESTATES (PTY) LTD v RENASA INSURANCE CO LTD AND ANOTHER (KZD)

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BARNARD NO v VAN DER MERWE (GNP)

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BRIAN KAHN INC v SAMSUDIN (GSJ)

CJ CLAASSEN J, HEATON-NICHOLLS J and VAN EEDEN AJ

2011 MAY 5; SEPTEMBER 2

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Contract—Breach—Remedies—Cancellation—Contract providing that upon breach applicant 'may . . . after due demand, cancel the agreement'—Parties intending thereby that only after applicant had given 'due demand' could applicant cancel agreement by giving clear, unequivocal and unambiguous notice of cancellation to other party—Such notice to be given prior to institution of judicial proceedings—If application intended to constitute such notice, it should be so alleged in application—No such allegations made—Application for order confirming cancellation of agreement dismissed.

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S v MOKELA (SCA)

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[2011] ZASCA 166

Trial—Judgment—Reasons for judgment—Importance of giving reasons for decision reiterated—Important for engendering public confidence in judicial system so that public knows decisions based on rational grounds—Only fair to accused to know reasons for particular decision, particularly where it is adverse to him—Giving of reasons more critical, if not obligatory, where one judicial officer interferes with order made by another judicial officer—Unjudicial for judicial officer to interfere with order made by another court, particularly where order based on exercise of discretion, without giving reasons therefor.

Sentence—Prescribed sentences—Minimum sentence—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Robbery with aggravating circumstances—Minimum sentence of 20 years' imprisonment for second offender in terms of s 51(2)(a)(ii) of Act—Both first and second offence have to be that of robbery with aggravating circumstances to trigger s 51(2)(a)(ii) of Act—Not sufficient that previous conviction one of robbery only—Robbery and robbery with aggravating circumstances two different offences calling for different sentences—Where first offence one of robbery only, court should treat offender on conviction of robbery with aggravating circumstances as first offender in terms of s 51(2)(a)(i) of Act.

Sentence—Concurrence of sentences—Court having discretion in terms of s 280(2) of Criminal Procedure Act 51 of 1977 to order sentences to run concurrently—Court of appeal can only interfere with exercise of such discretion where it is satisfied that sentencing court misdirected itself or did not exercise its discretion properly or judicially—Absent such proof, appeal court having no right to interfere with such exercise of discretion.

Sentence—Imposition of—Right of accused and state to address court on appropriate sentence—Although s 274 of Criminal Procedure Act 51 of 1977 uses word ‘may’ in this regard, salutary judicial practice has developed in terms whereof courts have accepted it to be a right to address court on sentence—Duty of court extending to point where sentencing court may be obliged in interests of justice to enquire into circumstances, both mitigating and aggravating, which may influence sentence to be imposed—Thus irregular for court not to offer accused (and state) opportunity to address it on sentence or in case of appeal to address it on any variation of sentence.

S v SAVOI (SCA)

HEHER JA, SNYDERS JA and WALLIS JA
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Bail—Conditions—Amendment of—Accused granted bail on conditions which permitted him to travel abroad for business purposes—Prosecuting authorities deliberately frustrating accused’s attempts to travel abroad—Accused entitled to amendment of bail conditions to prevent such obstruction—Criminal Procedure Act 51 of 1977, s 63.

S v MOTHA (KZP)

GORVEN J and NKOSI AJ
2011 MAY 26, 31

Indictment and charge—Amendment of—Rape—Accused charged with rape, instead of a contravention of s 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007—Common law relating to offence of rape repealed and substituted by s 3 of the Act—Whether charge could be substituted on appeal—Charge-sheet contained averments which constituted the offence of rape as defined in s 3 read with the definition of sexual penetration in s 1(1)—This meant that the appellant was not charged for a non-existent offence—Charge could be substituted.

S v VEKENI (ECG)

NEPGEN J and ROBERSON J
2011 SEPTEMBER 21

Traffic offences—Sentence—Disqualification from obtaining driver’s licence—National Road Traffic Act 93 of 1996, s 34(1)(c)—Magistrate failing to explain provisions of s 35(2) and (3) of Act—Proceedings not in accordance with justice—Fact that amendment to s 35(3), relating to requirement to give evidence under oath, came into effect after commission of offence not affecting application to offences committed before coming into operation of amendment.

S v VAN LOGGENBERG (GSJ)

WILLIS J
2001 FEBRUARY 7

Murder—Sentence—Life imprisonment—Accused a recidivist, convicted of two gruesome murders—Accused 27 years old and had a tragic childhood and upbringing—Despite court’s sympathy for accused’s circumstances it would be failing in its duty if it did not impose a life sentence—Criminal Law Amendment Act 105 of 1997, s 51.

S v PHILLIPS (WCC)

HLOPHE JP and SABA AJ
2011 MAY 20; JUNE 3

Trial—Irregularity in—What constitutes—Accused's counsel not given an opportunity of addressing court on probation officer's and correctional officer's reports—Such constituting a gross irregularity that led to setting aside of sentence.

MVOKO AND ANOTHER v MINISTER OF CORRECTIONAL SERVICES AND OTHERS (ECM)

GRIFFITHS J
2011 NOVEMBER 22; DECEMBER 2

Trial—Accused—Physical restraints—Accused a prisoner in high-security prison—Application by prisoner to give evidence in civilian clothes and not handcuffed—Belly chains not amounting to handcuffs and not unduly restricting movement of accused—Able to gesticulate and to read documents—Prison dress toned down for purposes of court proceedings—Rights accorded an accused in a criminal trial in this regard were not absolute and were subject to reasonable limitations—Application dismissed.

S v CARSTENS (WCC)

DLODLO J and FORTUIN J
2011 APRIL 26

Prosecution—Prosecutor—Powers and duties of—Prosecutor leading witness in circumstances where hearsay evidence was led and provisionally allowed because it was to be rendered admissible by 'source person's' evidence—Prosecutor aware, however, that such witness would not be called—Inadmissible hearsay placed before court leading to conviction—Prosecutor should have alerted presiding officer that he was not going to call such source person.

MINISTER OF CORRECTIONAL SERVICES v LEE (SCA)

MPATI P, NAVSA JA, NUGENT JA, SNYDERS JA and NDITA AJA
2012 FEBRUARY 23; MARCH 23
[2012] ZASCA 23

Prisons—Prisoner—Health—Prisoner contracting tuberculosis—Prison TB-management system—Whether authorities' failure to maintain adequate system was cause of plaintiff's TB—No proof that reasonably adequate system would eliminate risk of infection.

S v FILANI (ECG)

REVELAS J and PICKERING J
2011 DECEMBER 7, 8

Arms and ammunition—Unlawful possession of firearm and ammunition in contravention of ss 3 and 90 of Firearms Control Act 60 of 2000—Proof of—Expert evidence required that weapon was a firearm, as intended by the Act, given the increased technical nature of the various definitions of 'firearm' in the Act.

S v MTHEMBU (SCA)

PONNAN JA, SNYDERS JA, MALAN JA, BOSIELO JA and PETSE AJA
2011 SEPTEMBER 16, 29
[2011] ZASCA 179

Sentence—Prescribed sentences—Minimum sentence—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Imposition of sentence higher than prescribed minimum—Failure to apprise defence that court contemplating imposition of such higher sentence not, without more, constituting defect in proceedings and not resulting in failure of justice—Section 51 of Act.

EX PARTE DEPARTMENT OF CORRECTIONAL SERVICES: IN RE S v MTSHABE (ECM)

GRIFFITHS J
2011 JANUARY 21; FEBRUARY 10

Sentence—Reconsideration of in terms of s 276A(3) of Criminal Procedure Act 51 of 1977—In order for detainee to be placed under correctional supervision—Nature of reconsideration—Circumstances existing at time of trial when sentence imposed continuing to be significant, but also necessary to take into account new circumstances that have since arisen—Circumstances emerging during trial proceedings not to be played down and new factors not to be over-emphasised lest miscarriage of justice occurs.

Sentence—Reconsideration of in terms of s 276A(3) of Criminal Procedure Act 51 of 1977—In order for detainee to be placed under correctional supervision—Application for—Judicial officer before whom such application to be brought—Judicial officer most suited to carry out such function is judicial officer who presided at trial and imposed sentence.

Sentence—Reconsideration of in terms of s 276A(3) of Criminal Procedure Act 51 of 1977—In order for detainee to be placed under correctional supervision—Application for—Judicial officer before whom such application to be brought—Where judicial officer at trial 'not available', another judicial officer of same court may deal with application—Section 276A(3)(c)(i) of Act—Whether judicial officer 'not available' for purposes of section to be decided on consideration of all relevant factors, including interests of detainee—Measure of flexibility required in making such decision.