



JUTA'S ADVANCE NOTIFICATION SERVICE

SEPTEMBER 2012

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

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

JUDGEMENTS OF INTEREST IN THE SEPTEMBER EDITIONS OF THE *SALR* AND THE *SACR*

SOUTH AFRICAN LAW REPORTS

Mining rights issues brought to the surface

The effect of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) is discussed in two cases at the Supreme Court of Appeal: *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) and *Xstrata South Africa (Pty) Ltd and Others v SFF Association* 2012 (5) SA 60 (SCA). Issues covered include whether the MPRDA expropriates all mineral rights under the 1991 Minerals Act; the continuation of old-order rights and subsequent conversion into mining rights under the MPRDA; and the effect of the MPRDA on a landowner's right to claim royalties.

Protection for whistle-blowers

An important case for whistle-blowers, as to what amounts to a protected disclosure, is *Radebe and Another v Premier, Free State and Others* 2012 (5) SA 100 (LAC). The court finds that if the employee discloses information in good faith and reasonably believes that it shows past or continuing commission of improprieties, then the disclosure is protected.

Default notice to a consumer: is the section 129 issue finally resolved?

What amounts to delivery, and proof thereof, of the notice to a consumer under the National Credit Act has been heavily debated in the courts. The matter has now reached the Constitutional Court in *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC). The court discusses despatch by registered mail, and the meaning of 'deliver'.

SOUTH AFRICAN CRIMINAL LAW REPORTS

A whiff of suspicion leads to arrest

The mere smell of alcohol is insufficient to give rise to reasonable suspicion by the police that a driver is under influence of intoxicating liquor, and for that reason could not drive a vehicle. *Minister of Safety and Security and Another v Swart* 2012 (2) SACR 226 (SCA) See also *S v Mzimba* 2012 (2) SACR 233 (KZP) where it was held that to satisfy the essential element of the crime of driving while under the influence of liquor, an impairment not only of the accused's state of mind is required, but also an impairment of his driving ability.

Horrific crime committed in desperation

A mother in a desperate situation murdered her two small children to relieve them of their suffering, and because she saw no hope for them. The court looks at how to best sentence the mother, who needed ongoing psychiatric treatment and professional supervision. *S v Mtshali* 2012 (2) SACR 255 (KZD)

Rape victim not to be blamed for fashion choices

Women and girls are entitled to wear what clothes they please, without any suggestion that their fashion invites criminal attention from men. It is therefore a misdirection to regard the so-called seductive clothing of a rape complainant as a substantial and compelling circumstance justifying a lesser sentence than the minimum prescribed. *S v Mabena* 2012 (2) SACR 287 (GNP)

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.

Kind Regards

The Juta Law Reports Team

SOUTH AFRICAN LAW REPORTS

SEPTEMBER 2012

TABLE OF CASES

- Minister of Minerals and Energy v Agri South Africa 2012 (5) SA 1 (SCA)
- Xstrata South Africa (Pty) Ltd and Others v SFF Association 2012 (5) SA 60 (SCA)
- Mouritzen v Greystones Enterprises (Pty) Ltd and Another 2012 (5) SA 74 (KZD)
- Radebe and Another v Premier, Free State and Others 2012 (5) SA 100 (LAC)
- Malinga v Road Accident Fund 2012 (5) SA 120 (GNP)
- South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd 2012 (5) SA 125 (SCA)
- Absa Bank Ltd v Trzebiatowsky and Others 2012 (5) SA 134 (ECP)
- Sebola v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC)
- HBT Construction and Plant Hire CC v Uniplant Hire CC 2012 (5) SA 197 (FB)
- Bonugli and Another v Standard Bank of South Africa Ltd 2012 (5) SA 202 (SCA)
- Joytech SA (Pty) Ltd and Others v Tetraful 1060 CC 2012 (5) SA 215 (ECP)
- Hyprop Investment Ltd v Sophia's Restaurant CC and Another 2012 (5) SA 220 (GSJ)
- Von Beneke v Minister of Defence 2012 (5) SA 225 (GNP)
- Scholtz v Scholtz 2012 (5) SA 230 (SCA)
- Hattingh and Others v Juta 2012 (5) SA 237 (SCA)
- Lekup Prop Co No 4 (Pty) Ltd v Wright 2012 (5) SA 246 (SCA)
- The Gap Inc v Salt of the Earth Creations (Pty) Ltd and Others 2012 (5) SA 259 (SCA)
- Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd (t/a Altech Card Solutions) and Others 2012 (5) SA 267 (GSJ)
- Raath v Nel 2012 (5) SA 273 (SCA)
- Standard Bank of South Africa Ltd v Echo Petroleum CC 2012 (5) SA 283 (SCA)
- Raubenheimer v Raubenheimer and Others 2012 (5) SA 290 (SCA)
- National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others 2012 (5) SA 300 (SCA)
- MEC for Education, KwaZulu-Natal v Shange 2012 (5) SA 313 (SCA)

FLYNOTES

MINISTER OF MINERALS AND ENERGY v AGRI SOUTH AFRICA (SCA)

NUGENT JA, HEHER JA, MHLANTLA JA, LEACH JA and WALLIS JA

2012 MAY 4, 31

[2012] ZASCA 93

Mines and minerals—Mineral rights—Expropriation—What constitutes—MPRDA not expropriating all mineral rights under 1991 Minerals Act—Minerals Act 50 of 1991; Mineral and Petroleum Resources Development Act 28 of 2002.

Expropriation—Acquisition—Expropriation involving expropriatee being deprived of property and expropriator acquiring property resembling it—Whether there is an acquisition to be decided with regard to form of alleged expropriation, property allegedly expropriated, and rights allegedly acquired by expropriator—Constitution, s 25(2).

XSTRATA SOUTH AFRICA (PTY) LTD AND OTHERS v SFF ASSOCIATION (SCA)

MPATI P, BRAND JA, HEHER JA, MHLANTLA JA and WALLIS JA

2012 MARCH 12, 23

[2012] ZASCA 20

Mines and minerals—Mining rights—Transition to new order under MPRDA—Continuation of old-order rights and subsequent conversion into mining rights under MPRDA—Effect of on landowner's right to claim royalties from holder of mineral lease—Such right incompatible with MPRDA and extinguished by conversion—Right passing to state—Mineral and Petroleum Resources Development Act 28 of 2002, Schedule II item 7(4).

MOURITZEN v GREYSTONES ENTERPRISES (PTY) LTD AND ANOTHER (KZD)

NDLOVU J

2012 MAY 18; JUNE 8

Company—Proceedings by and against—Derivative action on behalf of company—Preliminary demand on company to act—Proper service—What constitutes—Need not be at registered office or principal place of business of company—Any legally recognised manner of service of court process adequate provided court seized with matter satisfied that demand duly served—Companies Act 71 of 2008, ss 165(2), 165(5).

Company—Proceedings by and against—Derivative action on behalf of company—Application for leave to institute or continue derivative action—Conditions for granting—Good faith on part of applicant—What constitutes—Good conscience and sincere belief in existence of reasonable prospects of success in proposed litigation—Personal animosity between parties not conclusive proof of bad faith—Companies Act 71 of 2008, s 165(5)(b)(i).

Company—Proceedings by and against—Derivative action on behalf of company—Application for leave to institute or continue derivative action—Conditions for granting—In best interests of company—Where most effective and expeditious way of resolving issues raised by allegations of mismanagement and abuse of company assets by director—Companies Act 71 of 2008, s 165(5)(b)(iii).

RADEBE AND ANOTHER v PREMIER, FREE STATE AND OTHERS (LAC)

MLAMBO JP, JAPPIE JA and VAN ZYL AJA

2010 SEPTEMBER 22; 2012 JUNE 1

Labour law—Whistle-blowers—Protected disclosure—What amounts to—Protected disclosure to employer—If employee discloses information in good faith and reasonably believes that such showing or tending to show past or continuing commission of improprieties, disclosure protected—No requirement that information be factually accurate or true—Protected Disclosures Act 26 of 2000, s 6.

MALINGA v ROAD ACCIDENT FUND (GNP)

PHATUDI J

2011 OCTOBER 5, 6

Motor vehicle accidents—Compensation—Claim against Road Accident Fund—Prescription—Where summons initially alleging negligence on part of identified driver but later amended to blame unidentified driver/owner—Such amendment introducing new cause of action tantamount to service of new summons—Prescription period in respect of amended cause of action having expired—Claim accordingly prescribed—Road Accident Fund Act 56 of 1996, s 17(1).

SOUTH AFRICAN CONGO OIL CO (PTY) LTD v IDENTIGUARD INTERNATIONAL (PTY) LTD (SCA)

MPATI P, CACHALIA JA, LEACH JA, KROON AJA and BORUCHOWITZ AJA
2012 MAY 15, 31
[2012] ZASCA 91

Execution—Garnishee proceedings—Sheriff must attach garnishee's debt by way of rule 45(8)(c)—Uniform Rules of Court, rules 45(8)(c) and 45(12)(a).

ABSA BANK LTD v TRZEBIATOWSKY AND OTHERS (ECP)

REVELAS J
2012 FEBRUARY 16–17, 23

Contract—Consensus—Mistake—Unilateral error—Justus error—Avoidance of liability on grounds of mistake about nature and content of contract—Where signatory of deeds of suretyship claiming to have been unaware of what she was signing—Presumption that signatories to document intended to enter into transaction contained therein still valid principle—Party wishing to avoid liability bearing *onus* to show it had no such intention—In circumstances of present case, where party not misled by nature of document or by misrepresentation, defence of justus error trumped by principle of caveat emptor.

SEBOLA AND ANOTHER v STANDARD BANK OF SOUTH AFRICA LTD AND ANOTHER (CC)

MOGOENG CJ, YACOOB ADCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J, MAYA AJ and ZONDO AJ
2012 FEBRUARY 14; JUNE 7
[2012] ZACC 11

Credit agreement—Consumer credit agreement—Debt enforcement—Proceedings in anticipation of judicial proceedings—Notice of default—Delivery—Requirements—Where posted, proof of registered despatch to consumer's address, together with proof that notice reached appropriate post office for delivery to consumer, in absence of contrary indication, constituting sufficient proof of delivery—National Credit Act 34 of 2005, ss 129(1)(a) and 130.

HBT CONSTRUCTION AND PLANT HIRE CC v UNIPLANT HIRE CC (FB)

ZIETSMAN AJ
2011 DECEMBER 1

Company—Winding-up—Application—Application under new Companies Act—Application in respect of insolvent company: old Act still applying and applicant to prove that company insolvent (may not rely on deeming provisions)—Application in respect of solvent company: new Act applying and applicant to prove that winding-up just and equitable—To succeed, applicant to prove either that company insolvent or that just and equitable to liquidate it—Companies Act 71 of 2008, sch 5, item 9, read with Companies Act 61 of 1973, ch XIV.

Close corporation—Liquidation—Application—Application under new Companies Act—Application in respect of insolvent corporation: old Act still applying and applicant to prove that corporation insolvent (may not rely on deeming provisions)—Application in respect of solvent corporation: new Act applying and applicant to prove that liquidation just and equitable—To succeed, applicant to prove either that corporation insolvent or that just and equitable to liquidate it—Companies Act 71 of 2008, sch 3, item 7, read with Close Corporations Act 69 of 1984, s 66.

BONUGLI AND ANOTHER v STANDARD BANK OF SOUTH AFRICA LTD (SCA)

FARLAM JA, CACHALIA JA, MALAN JA, WALLIS JA and PETSE AJA
2012 FEBRUARY 15; MARCH 30
[2012] ZASCA 48

Jurisdiction—Submission—What constitutes—Peregrine defendant opposing summary judgment on merits without challenging jurisdiction—Defendant sued in representative

capacity on behalf of trust—Co-trustee setting out defence in detail in affidavit sworn with defendant's authority on trust's behalf—Conduct of defendant unequivocally amounting to submission to jurisdiction.

Appeal—To Supreme Court of Appeal—Heads of argument—Deficiencies in—Counsel failing to comply with rule requiring identification of portions of record needed for determination of appeal—Will in future be met with adverse or punitive costs order—Supreme Court of Appeal Rules, rule 10A(a)(ix).

JOYTECH SA (PTY) LTD AND OTHERS v TETRAFUL 1060 CC (ECP)

LOPES J

2011 OCTOBER 18,

Close corporation—Proceedings by and against—Security for costs—Opposed application for provision of security by close corporation—Applicant to show that CC would probably be unable to meet costs order against it—CC to provide basic statement of account showing that prima facie able to meet adverse costs order—Failure by CC to pay earlier costs order prima facie indication of such inability—Close Corporations Act 69 of 1984, s 8.

HYPROP INVESTMENT LTD v SOPHIA'S RESTAURANT CC AND ANOTHER (GSJ)

WEPENER J

2012 SEPTEMBER 1, 2

Landlord and tenant—Rights of tenant—Right of undisturbed use (commodus usus) of leased premises—Landlord's concomitant obligation to give tenant commodus usus may be limited or excluded by agreement—If so, tenant cannot rely on right to commodus usus to claim remission of rent for reduced beneficial use of property.

VON BENEKE v MINISTER OF DEFENCE (GNP)

TUCHTEN J

2011 NOVEMBER 22

Delict—Specific forms—Vicarious liability—Liability of employer for delictual acts of employee—Where defendant's employee supplied parts of assault rifle rendering it usable in robbery during which plaintiff had been shot—Safekeeping of weapons and equipment such employee's core duty and relevant wrongful conduct his failure to do so—Sufficiently close connection between wrongful conduct of employee and business of defendant established—Defendant held vicariously liable.

SCHOLTZ v SCHOLTZ (SCA)

BRAND JA, CLOETE JA, CACHALIA JA, TSHIQI JA and PLASKET AJA

2012 MARCH 1, 14

[2012] ZASCA 9

Donation—Validity—Requirements—Statutory requirements—Terms to be reduced to writing—Immovable property donated encumbered by mortgage bond—No reference to mortgage bond in deed of donation—Absence of term dealing with liability for bond debt not inevitably resulting in invalidity of deed of donation—'Missing term' relating to liability for bond debt may be found in proper interpretation of express terms of agreement, or it may be incorporated by way of tacit term—General Law Amendment Act 50 of 1956, s 5.

HATTINGH AND OTHERS v JUTA (SCA)

NAVSA JA, NUGENT JA and LEACH JA

2012 MAY 18, 30

[2012] ZASCA 84

Land—Land reform—Statutory protection of tenure—Protected occupation of land—Occupier—Rights—To family life in accordance with culture of that family—Meaning of 'culture of that family'—Culture family shares with community—Extension of Security of Tenure Act 62 of 1997, s 6(2)(d).

LEKUP PROP CO NO 4 (PTY) LTD v WRIGHT (SCA)

CLOETE JA, CACHALIA JA, SNYDERS JA, LEACH JA and PETSE AJA
2012 MAY 2, 23
[2012] ZASCA 67

Contract—Terms—Conditions—Doctrine of fictional fulfilment of conditions—Sale of land subject to subdivision by certain date—Buyer failing to prove seller intended to frustrate condition.

Practice—Applications and motions—Affidavits—Status of affidavit filed in motion proceedings after referral to trial—At trial such affidavit of no probative value, save for admissions contained therein.

THE GAP INC v SALT OF THE EARTH CREATIONS (PTY) LTD AND OTHERS (SCA)

CLOETE JA, PONNAN JA, MALAN JA, WALLIS JA and KROON AJA
2012 MAY 4, 23
[2012] ZASCA 68

Intellectual property—Trademark—Removal from register—Non-use—Low threshold for sufficient use—Trade Marks Act 194 of 1993, s 27(1).

PRISM PAYMENT TECHNOLOGIES (PTY) LTD v ALTECH INFORMATION TECHNOLOGIES (PTY) LTD (t/a ALTECH CARD SOLUTIONS) AND OTHERS (GSJ)

LAMONT J
2011 MAY 26; JUNE 7

Practice—Pleadings—Summons—Service—At defendant's place of employment—Whether place of employment necessarily same as where employer carrying on business—Process (summons) served at employer's reception but defendant's de facto place of employment at office some distance away—Defendant's connection with employer's business place sufficiently close to render such place his place of employ—Service complying with rules—Uniform Rules of Court, rule 4(1)(a)(iii).

Practice—Irregular proceedings—Setting aside of—Irregular service—Effective service of summons constituting regular service regardless of manner thereof—Rule 30 not appropriate for setting-aside of irregularity regarding service—Injustice may follow if service set aside as irregularity without applying effectiveness test—Uniform Rules of Court, rule 30(1).

RAATH v NEL (SCA)

FARLAM JA, PONNAN JA, MALAN JA, MAJIEDT JA and KROON AJA
2012 MAY 11, 31
[2012] ZASCA 86

Damages—Bodily injuries—Loss of earnings and earning capacity—Loss suffered by plaintiff's business as a result of plaintiff's incapacity—Plaintiff having transferred business to family trust for estate-planning/tax purposes—Absent proof of loss to personal estate, loss suffered by business after creation of trust no longer that of businessman, even though trust controlled by him.

Trust and trustee—Trust—Legal personality—Separate identity—Businessman vesting ownership of business in family trust created for estateplanning/ tax reasons—Loss suffered by business no longer axiomatically that of businessman, even though trust controlled by him.

STANDARD BANK OF SOUTH AFRICA LTD v ECHO PETROLEUM CC (SCA)

HEHER JA, SNYDERS JA, MALAN JA, WALLIS JA and BORUCHOWITZ AJA
2012 MARCH 9, 22
[2012] ZASCA 18

Banker—Relationship between banker and client—Rights of bank in respect of credit balance in client's account—Funds transferred into client's account by third party contracting with client—Bank may set off credit so arising against client's existing debts to bank—If third party obtains contractual claim against client, such claim not embracing vindicatory right to funds it paid into bank account.

RAUBENHEIMER v RAUBENHEIMER AND OTHERS (SCA)
MPATI P, NUGENT JA, CACHALIA JA, LEACH JA and WALLIS JA
2012 MAY 11; JUNE 1
[2012] ZASCA 97

Will—Construction—Fideicommissum—Testator bequeathing ‘usufruct’ over home to wife but failing to identify home’s beneficiary—Testator intending to create fideicommissum and beneficiary identifiable from terms of will.

Will—Construction—Failure to attach list of bequests referred to in will—Such not rendering will void for vagueness.

NATIONAL SCRAP METAL (CAPE TOWN) (PTY) LTD AND ANOTHER v MURRAY & ROBERTS LTD AND OTHERS (SCA)

MTHIYANE DP, CLOETE JA, LEACH JA, TSHIQI JA and WALLIS JA
2012 MARCH 7, 29
[2012] ZASCA 47

Practice—Applications and motions—Motion proceedings—When competent—Dispute of fact—Approach of court—Whether disputed allegations such that they may be rejected on papers—Court to accept respondent’s allegations unless clearly untenable—Test stringent—Principles to be observed in disputes involving conduct of businessmen.

MEC FOR EDUCATION, KWAZULU-NATAL v SHANGE (SCA)

FARLAM JA, NAVSA JA, HEHER JA, SNYDERS JA and PETSE AJA
2012 MAY 8; JUNE 1
[2012] ZASCA 98

State—Actions by and against—Actions against—Notice—Failure to give notice—Condonation—Requirement for, that debt not have prescribed—Prescription Act stipulating that prescription running from when debt due and that debt due only when creditor knowing identity of debtor and facts from which debt arising—Rural learner struck in eye by belt teacher was using to punish another learner—Learner acquiring knowledge of facts from which debt arising by end of incident—But only acquiring knowledge of debtor two and a half years later from Public Protector—Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(4); Prescription Act 68 of 1969, ss 12(1) and 12(3).

State—Actions by and against—Actions against—Notice—Failure to give notice—Condonation—Good cause for failure—Rural learner struck in eye by belt teacher using to punish another learner—Learner entirely reliant on others to pursue his claim—Attorney mistakenly sending notice to Minister of Education rather than MEC—Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, s 3(4).

SOUTH AFRICAN CRIMINAL LAW REPORTS

SEPTEMBER 2012

TABLE OF CASES

- S v Rathumbu 2012 (2) SACR 219 (SCA)
- Minister of Safety and Security and Another v Swart 2012 (2) SACR 226 (SCA)
- S v Mzimba 2012 (2) SACR 233 (KZP)
- Khanyile v Minister of Safety and Security and Another 2012 (2) SACR 238 (KZD)
- S v Du Plessis 2012 (2) SACR 247 (GSJ)
- S v Mtshali 2012 (2) SACR 255 (KZD)
- S v Van Deventer and Another 2012 (2) SACR 263 (WCC)
- S v Mabena 2012 (2) SACR 287 (GNP)
- Sayed and Another v Levitt NO and Another 2012 (2) SACR 294 (KZP)
- S v Thole 2012 (2) SACR 306 (FB)

- S v Staggie 2012 (2) SACR 311 (SCA)
- S v SN 2012 (2) SACR 317 (GNP)
- S v Sikutu 2012 (2) SACR 324 (ECB)

FLYNOTES

S v RATHUMBU (SCA)

MTHIYANE DP, CLOETE JA, MHLANTLA JA, LEACH JA and NDITA AJA
2012 FEBRUARY 15; MARCH 30
[2012] ZASCA 51

Evidence—Admissibility—Hearsay evidence—Admissibility of in terms of s 3 of Law of Evidence Amendment Act 45 of 1988—‘Probative value’—Later disavowal of prior written statement—Probative value determined by credibility of witness at time of making statement.

MINISTER OF SAFETY AND SECURITY AND ANOTHER v SWART (SCA)

MTHIYANE DP, BRAND JA, CLOETE JA and BOSIELO JA and NDITA AJA
2012 MARCH 5, 22
[2012] ZASCA 16

Arrest—Without warrant—Criminal Procedure Act 51 of 1977, s 40(1)(b)—Legality of—Section 40(1)(b) of Act requiring arresting peace officer to have reasonable suspicion that suspect having committed sch 1 offence—Reasonableness of suspicion to be approached objectively—Mere smell of alcohol insufficient to give rise to reasonable suspicion on part of second appellant, arresting officer, that respondent was under influence of intoxicating liquor and for that reason could not drive vehicle—Respondent’s arrest and detention unlawful.

S v MZIMBA (KZP)

STEYN J and JAPPIE J
2012 JUNE 7
[2012] ZAZPHC 30

Traffic offences—Driving under influence of liquor—Contravention of s 65(1)(a) of National Road Traffic Act 93 of 1996—Impairment not only of accused’s state of mind, but also of his driving ability, must be proven before accused may be convicted—Where accused pleads guilty, accused must admit that he or she lacked necessary skill and judgment normally required in manipulation of a motor vehicle and that such skill or judgment had been diminished or impaired as result of consumption of alcohol or drugs, before he or she may be convicted of contravening s 65(1)(a).

KHANYILE v MINISTER OF SAFETY AND SECURITY AND ANOTHER (KZD)

MURUGASEN J
2012 JANUARY 27
[2012] ZAKZDHC 12

Domestic violence—Protection order—Breach of—Arrest in terms of s 8(4) of Domestic Violence Act 116 of 1998—Incumbent upon arresting officer, before executing warrant, to satisfy himself of terms of order and of nature of alleged breach before executing warrant—Where order and affidavit not attached to warrant presented to policeman, latter unable to satisfy himself that reasonable grounds existed for arrest.

S v DU PLESSIS (GSJ)

CJ CLAASSEN J and KEKANA AJ
2009 JUNE 3; JUNE 21
[2009] ZAGPJHC 94

Trial—Assessors—Appointment of—For purposes of trial—Murder trial—Section 93ter(1) of Magistrates’ Courts Act 32 of 1944—Court not having discretion to do without assessors in murder trial, unless communication with accused or his legal representative indicates that court relieved of duty to appoint assessors—Failure to comply with s 93ter(1) resulting in

irregularity per se which cannot be waived or condoned by accused or his legal representative—Such irregularity constituting failure of justice.

Trial—Assessors—Appointment of—For purposes of trial—Murder trial—Section 93ter(1) of Magistrates' Courts Act 32 of 1944—Guidelines for magistrates dealing with appointment of assessors in murder trials—Court should ensure that record reflects clearly that s 93ter(1) complied with—Record should also show that when entitlement to assessors waived, magistrate had entered into discussion about it with accused or his legal representative—Such waiver should also be recorded—Any directions by magistrate to assessors as to their duties and/or contribution to trial should also be recorded.

S v MTSALI (KZD)

PENZHORN AJ

2010 SEPTEMBER 27; DECEMBER 13, 14

Sentence—Prescribed sentences—Minimum sentence—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Substantial and compelling circumstances—Severely depressed and emotional mother killing her two minor children—'Altruistic fili-suicidal behaviour'—Mother genuinely believing she acted in interests of children—No danger to society and no likelihood of recurrence—No purpose in sentence of imprisonment—Suspended sentence and correctional supervision imposed.

Murder—Sentence—Severely depressed and emotional mother killing her two minor children—'Altruistic fili-suicidal behaviour'—Mother genuinely believing she acted in interests of children—No danger to society and no likelihood of recurrence—No purpose in sentence of imprisonment—Suspended sentence and correctional supervision imposed.

S v VAN DEVENTER AND ANOTHER (WCC)

BLIGNAULT J and SALDANHA J

2011 MAY 6; NOVEMBER 2

Search and seizure—Search warrant—Validity of—Warrant issued in terms of s 74D of Income Tax Act 58 of 1962—Documents seized used to secure convictions of fraud and contraventions of Value-Added Tax Act 89 of 1991—Validity of warrant attacked on ground that it was issued in terms of wrong statute—But documents seized constituting valuable evidence of existence and extent of income tax evasions—As such, documents falling within ambit of warrant.

Search and seizure—Search warrant—Validity of—Warrant issued in terms of s 74D of Income Tax Act 58 of 1962—Documents seized used to secure convictions of fraud and contraventions of Value-Added Tax Act 89 of 1991—Validity of warrant attacked on ground that persons convicted, nor their business, were mentioned in warrant as possible offenders—Official who found and seized documents having reasonable belief that documents afforded evidence of non-compliance by business of its obligations in terms of Income Tax Act—Documents complying with provisions of s 74D(6) of Income Tax Act and therefore authorised in terms of warrant.

Evidence—Admissibility—Evidence unlawfully obtained—Invalid search warrant issued in terms of s 74D of Income Tax Act 58 of 1962—Evidence nevertheless admissible in terms of s 35(5) of Constitution as being neither unfair to appellants nor otherwise detrimental to administration of justice—Factors taken into account—Evidence obtained without any compelled participation by or conscription of appellants—Violation of appellants' right technical and not flagrant—Officers executing warrant acting bona fide—If evidence would in any event have been discovered by lawful means, exclusion thereof generally detrimental to administration of justice ('no difference principle').

Sentence—Appeal—Powers of court on appeal—Long time (eight years) between date of sentence and hearing of appeal—Such delay serious reflection on administration of justice—Appellants also severely prejudiced by delay—Delay significant factor to be taken into account in favour of appellants—Sentences of imprisonment in terms of s 276(1)(i) of Criminal Procedure Act 51 of 1977 reduced by ordering conditional suspension of sentences.

S v MABENA (GNP)

WEBSTER J, ISMAIL J and TUCHTEN J

2011 NOVEMBER 4

Sentence—Prescribed sentences—Minimum sentences—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Rape—‘Substantial and compelling circumstances’—So-called seductive clothing worn by complainant—Women and girls entitled to wear what clothes they please—Clothing may be worn free of any suggestion that their dress preferences invite criminal attentions of those with whom they interact—To regard such clothing as substantial and compelling circumstance justifying lesser sentence amounting to misdirection.

SAYED AND ANOTHER v LEVITT NO AND ANOTHER (KZD)

STEYN J and NKOSI J
2012 MAY 31; JUNE 25
[2012] ZAKZPHC 38

Trial—Interpreter—Interpreter not sworn in and magistrate failed to conduct inquiry into interpreter’s proficiency—Record indicating that interpreter uncertain of what she needed to interpret—Advisable that interpreter understand legal process.

S v THOLE (FB)

MOLEMELA J and VAN ROOYEN AJ
2011 AUGUST 22, 30

Rape—Sentence—Life imprisonment—Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997—Infliction of grievous bodily harm after rape had been concluded—Bodily harm not involved in rape, and life imprisonment therefore not applying.

S v STAGGIE (SCA)

HARMS DP, MALAN JA and THERON JA
2011 MAY 24, 27
[2011] ZASCA 88

Evidence—Video evidence—When court should order—To be ordered if facilities available and any one of five requirements in s 158(3) of Criminal Procedure Act 51 of 1977 present.

S v SN (GNP)

LEGODI J and MOTHLE J
2011 DECEMBER 14

Evidence—Witnesses—Children—Appointment of intermediary in terms of s 170A(1) of Criminal Procedure Act 51 of 1977—Person appointed not qualified to be appointed as intermediary—Effect on trial—Subsections (5) and (6) of s 170A make it unnecessary to refer issue of unqualified intermediary for special review.

S v SIKUTU (ECB)

HARTLE J and DHLODHLO J
2012 MARCH 28

Trial—Mental state of accused—Enquiry in terms of s 78(2) of Criminal Procedure Act 51 of 1977—Necessity for court to be guided by expert evidence—Magistrate ignoring finding of experts that accused criminally responsible and acquitting accused by reason of mental illness—Magistrate not at liberty to ignore report of four experts.