



JUTA'S ADVANCE NOTIFICATION SERVICE

DECEMBER 2012

Dear South African Law Reports and Criminal Law Reports subscriber

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

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

Reported in the December issue of the SALR is a judgment where the Constitutional Court decided whether the National Assembly could regulate its business in a manner that denied its members the opportunity of introducing a Bill:

‘Ours is a constitutional democracy that is designed to ensure that the voiceless are heard, and that even those of us who would, given a choice, have preferred not to entertain the views of the marginalised or the powerless minorities, listen.’

Mogoeng CJ in para [43] of *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC)

SOUTH AFRICAN LAW REPORTS

Loss of support claim from unmarried partner

In a claim against the Road Accident Fund, the deceased had been living with the claimant, but had not yet married her. The high court held that a mere promise to marry did not attract any legal obligation on the deceased's part. What the appeal court had to consider was whether the nature of the relationship between the parties gave rise to a reciprocal duty of support which the law had to protect. *Paixão and Another v Road Accident Fund* 2012 (6) SA 377 (SCA)

Kamp Staalraad copyright and public interest issues

The Springbok rugby team's ordeal at the infamous Kamp Staalraad was recorded on DVD, allegedly for internal 'motivational' purposes. Still pictures taken from the footage were leaked to and published in the media. The court was called upon to decide whether the security company that had been responsible for the camp was entitled to sell the DVD in question to the public. In issue was the ownership of copyright in the DVD, and whether it was in the public interest that the DVD be distributed. *Greeff en Andere v Protection 4U h/a Protect International en Andere* 2012 (6) SA 392 (GNP)

Consent to injury in rugby games

A flagrant contravention of the rules of the game which is aimed at causing serious injury, or which is accompanied by full awareness that serious injury may ensue, will be regarded as wrongful and hence attract legal liability for the resulting harm. *Roux v Hattingh* 2012 (6) SA 428 (SCA)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Growing dagga and the meaning of 'cultivate'

The accused had pleaded guilty to possession of dagga, but not guilty to the main charge of dealing in dagga. To decide whether he was guilty of dealing, the high court examined the meaning of the word 'cultivate' as contained in the definition of 'deal in' in s 1(1) of the Drugs and Drug Trafficking Act 140 of 1992. *S v Mbatha* 2012 (2) SACR 551 (KZP)

Proceeds of crime placed in a trust

It could never have been the intention of the legislature to permit a situation where the proceeds of a crime are placed in the hands of a third party with a separate and distinct legal personality like a trust, and that such proceeds would be out of reach of the authorities for the purposes of a restraint in terms of s 25 of the Prevention of Organised Crime Act 121 of 1998. *National Director of Public Prosecutions v Cunningham and Others* 2012 (2) SACR 591 (WCC)

Right to be informed of minimum sentence

An accused should not only be informed clearly that a certain minimum sentence may be imposed, and will be sought, but also of course that he may face a sentence of life imprisonment. Such knowledge would inevitably impact on decisions regarding the conduct of his or her defence, and might affect his or her right to a fair trial. *S v Peu* 2012 (2) SACR 625 (GNP)

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Kind Regards

The Juta Law Reports Team

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- Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another 2012 (6) SA 537 (SCA)
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- Seyffert and Another v FirstRand Bank Ltd t/a First National Bank 2012 (6) SA 581 (SCA)
- Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC)

- Nyathi and Others v Cloete NO and Others 2012 (6) SA 631 (GSJ)
- Mobile Telephone Networks (Pty) Ltd v SMI Trading CC 2012 (6) SA 638 (SCA)

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HASSAN AND ANOTHER v BERRANGE NO (SCA)

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2006 MAY 16, 31

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Insolvency—Act of insolvency—Attempt to remove property—Semble: Property includes both corporeal and incorporeal property—Insolvency Act 24 of 1936, s 8(d).

S v VILAKAZI (SCA)

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[2008] ZASCA 87

Criminal procedure—Sentence—Prescribed sentences—Minimum sentence—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—No gradation between ten years' imprisonment ordinarily prescribed for rape, and life imprisonment prescribed if any one of eight aggravating features present—This situation posing real risk of incongruous and disproportionate sentences being imposed—Incumbent upon court to assess whether prescribed sentence indeed proportionate to particular offence—Prescribed sentences not to be assumed a priori to be either proportionate to offence or, indeed, constitutionally permissible—Notion that prescribed sentence to be imposed in 'typical' cases, and departed from only in 'atypical' ones, without merit.

Criminal procedure—Sentence—Prescribed sentences—Minimum sentence—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Rape of girl under the age of 16—Fact that complainant under 16 considered by legislature to warrant imposition of most severe sentence possible—This circumstance, and others set out in Act, indeed aggravating—However, absence of such circumstances also capable of lessening culpability of offender—No suggestion that maximum sentence reserved only for extreme cases—Whether, and to what extent, absence of other aggravating circumstances diminishing offender's culpability depending upon circumstances of case—In casu no extraneous violence, or threat thereof, and no physical injury other than that inherent in offence—Appellant minimising risk of pregnancy and transmission of disease by using condom—Emotional distress and damage accompanying rape might be extensive even if not manifested overtly—No woman, least of all a child, left unscathed by sexual assault; complainant indeed traumatised—However, evidence revealing nothing more specific than that—Life sentence set aside and sentence of 15 years' imprisonment imposed.

Criminal procedure—Sentence—Imposition of—Factors to be taken into account—Rape of girl under the age of 16—Once clear that substantial jail term appropriate, questions of whether or not accused married, or employed, or of how many children he had, largely immaterial—However, these questions remaining relevant in assessing whether accused likely to offend again—Fact that appellant having reached age of 30 without any serious brushes with law, and having stable employment and family life, not indicative of inherently lawless character—Sentence of 15 years sufficient to bring home to appellant gravity of offence and to exact sufficient retribution—Making him pay for his crime with remainder of his life grossly disproportionate.

Criminal procedure—Sentence—Imposition of—Factors to be taken into account—At time of sentencing appellant having been incarcerated for just over two years—Unjust if period of imprisonment awaiting trial not brought into account in any subsequent custodial sentence—Accordingly, ordered that sentence to expire two years earlier than would ordinarily have been case.

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GREEFF EN ANDERE v PROTECTION 4U h/a PROTECT INTERNATIONAL EN ANDERE (GNP)

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Constitutional law—Human rights—Right to dignity—Protection—Application for interdict prohibiting publication of video footage showing Springbok rugby team in humiliating light—Publication would offend against public interest in prestige of team—Publication would also infringe players' right to privacy—Defence of consent dismissed—Interdict granted.

Intellectual property—Copyright—Work created on commission—'Commission' entailing agreement involving obligation to create requested work and corresponding agreement to pay for it—Copyright vesting in commissioner and not author—Copyright Act 98 of 1978, s 21(1)(c).

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Sports and contests—Sports injuries—Delictual liability—Rugby injury—Serious neck injury caused by deliberate implementation of illegal and dangerous manoeuvre during scrumming—Conduct constituting flagrant contravention of rugby rules accompanied by full awareness of seriousness of potential injury—Wrongfulness and hence liability in delict established.

PRINT MEDIA SOUTH AFRICA AND ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER (CC)

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[2012] ZACC 22

Constitutional law—Human rights—Right to freedom of expression—Prior restraints on publication—Such constituting serious interference with right, and only permissible in narrow circumstances—Here Act requiring publications containing sexual content to be submitted to board for classification before distribution—Prior classification scheme unjustifiably limiting right—Constitution, s 16; Films and Publications Act 65 of 1996, s 16(2).

MS v KS (KZP)

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Husband and wife—Divorce—Maintenance for children—Variation of maintenance order—Father seeking reduction in maintenance amount due to reduced salary—Able to save by cutting clothing and entertainment expenses and by temporarily suspending payments on retirement annuity and on family loan—Thus able to sustain maintenance amount—Interests of child paramount—Constitution, s 28(2); Children's Act 38 of 2005, s 9.

Appeal—Evidence on appeal—Further evidence—Best interests of child—Father seeking reduction of maintenance amount—Mother applying to admit further evidence on appeal, regarding father's finances—In casu, on particular merits, further evidence allowed in best interests of child—Supreme Court Act 59 of 1959, s 22(a).

CITY OF CAPE TOWN v HENDRICKS AND ANOTHER (SCA)

NUGENT JA, VAN HEERDEN JA, SNYDERS JA, MHLANTLA JA and SOUTHWOOD AJA
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BASIL READ (PTY) LTD v NEDBANK LTD AND ANOTHER (GSJ)

SALDULKER J
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[2012] ZASCA 150

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GUNGUDOO AND ANOTHER v HANNOVER REINSURANCE GROUP AFRICA (PTY) LTD AND ANOTHER (SCA)

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Insolvency—Compulsory sequestration—Final sequestration—Discretion of court—Disputed claim—Whether debtor disputing claim on reasonable and bona fide grounds—Debtor's explanation of how debt arose implausible—Applicant having shown that debtor engaged in elaborate subterfuge to create impression that transaction giving rise to debt legitimate—In view of this, debtor not disputing debt on bona fide and reasonable grounds—Court a quo having correctly ordered final sequestration.

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FABRICIUS J

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Delict—Elements—Unlawfulness or wrongfulness—Liability for omission—Pure economic loss claimed—Travel agent issuing car rental vouchers to 'customers' who then stole cars from rental company—Alleged failure by travel agent to take reasonable steps to ensure that customers genuine—Legal convictions of community would assume adequate security checks by rental company before it released cars—Would not require that travel agent be held liable for any omission—Liability not established.

Delict—Pleading—Term 'duty of care' to be avoided—If delict constituting cause of action, then pleader should plead why act or omission wrongful and in which respect defendant negligent.

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Debtor and creditor—Discharge of debt—Debt extinguishing agreement—Such invalid where both parties aware stolen money to be used to discharge debt—But such valid where creditor in good faith and unaware funds stolen.

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CLOETE JA, MALAN JA, LEACH JA, WALLIS JA and NDITA AJA

2012 MAY 21, 30

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Credit agreement—Consumer credit agreement—Over-indebtedness—Judicial relief—Declaration of over-indebtedness and referral to debt counsellor—Court should be slow to exercise discretion under s 85 where matter has been dealt with by debt counsellor, or debt review has justifiably been terminated, and where no material change in circumstances has been demonstrated—National Credit Act 34 of 2005, ss 85, 86(10) and 87.

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[2012] ZACC 27

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Company—Winding-up—Enquiry into affairs of company—Examination—Whether by oral or written interrogation—Written interrogatories appropriate where information sought is formal in nature, and also, in certain circumstances, as precursor to oral examination—Oral examination appropriate where liquidation *prima facie* caused by mismanagement, fraud or theft—Companies Act 61 of 1973, s 417(2)(a).

MOBILE TELEPHONE NETWORKS (PTY) LTD v SMI TRADING CC (SCA)

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2012 SEPTEMBER 7, 28

[2012] ZASCA 138

Posts and telecommunications—Telecommunications—Mobile cellular telecommunication services—Electronic communications network service licensee—Right of entry upon and construction of lines across land and waterways—Consent of landowner not required—Authorised actions, however, constituting administrative action requiring it to be lawful, reasonable and procedurally fair—Also constituting exercise of public power, requiring it not to be arbitrary—*Semle*: While no requirement to pay compensation for deprivation of property, compensation, or offering it, may well take action complained of out of realm of arbitrariness—Electronic Communications Act 36 of 2005, ss 22(1) and 22(2).

Constitutional law—Legislation—Validity—Electronic Communications Act 36 of 2005, s 22—Authorised actions constituting administrative action, requiring lawfulness, reasonableness and procedural fairness to be validly exercised—Section therefore insulated against constitutional invalidity on grounds of allowing arbitrary deprivation of property.

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[2011] ZASCA 151

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S v MOLEFE (GNP)

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Child—Concealment of birth—Contravention of s 113(1) of General Law Amendment Act 46 of 1935—Essence of offence 'disposal' or 'attempted disposal' of body of child—What constitutes 'disposal' for purposes of Act—Body to be disposed of must be put or placed in some place where it is intended by party placing or putting it there that it should remain—Accused placing body in bucket at her house not disposal for purposes of Act.

Child—Concealment of birth—Contravention of s 113(1) of General Law Amendment Act 46 of 1935—What constitutes 'child' for purposes of Act—Foetus must have arrived at that stage of maturity at time of birth that it might have been born living child—No evidence regarding duration of pregnancy nor of viability of child—Conviction set aside.

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or 116 of Criminal Procedure Act 51 of 1977 (CPA)—Regional magistrate found in both instances sentences prescribed in both statutes within jurisdiction of magistrates' court—Reliance on these provisions accordingly misplaced—Matter ought not to have been referred for sentence—Order set aside and matter remitted to magistrates' court for sentencing—Referral for sentencing procedural, thus presiding officer making referral not functus officio.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v CUNNINGHAM AND OTHERS (WCC)

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S v PEU (GNP)

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Rape—Sentence—Life imprisonment—Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997—'Substantial and compelling circumstances'—Rape of 8-year-old girl—Appellant having spent 22 months in custody—No evidence that child traumatised or would suffer permanent problem—Life sentence reduced to 15 years' imprisonment.

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S v ROWLES (ECG)

BESHE J and KAHLA AJ

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outcome of trial—Appellant convicted of rape alleging that his case incompetently presented at trial and that complainant had perjured herself at trial by testifying that he had raped her when such intercourse had been consensual—Allegation of incompetent presentation of appellant's case not supported by record, nor clear in what respects complainant alleged to have perjured herself—Appellant failing to disclose identity of witness who would allegedly testify that complainant had had no injuries morning after incident and to explain extensive bruising suffered by complainant—Appellant failing to make out satisfactory case to adduce further evidence on appeal.