



## JUTA'S ADVANCE NOTIFICATION SERVICE

JANUARY 2013

We wish all our readers a peaceful and safe holiday, and a prosperous new year!  
**The Juta Law Reports Team**

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

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

The 2012(2) edition of the Namibian Law Reports will be available at the end of January. For the table of cases and flynotes, see further below.

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

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

##### **Trust accounts and internet scams**

An internet banking swindle involved the transfer of a substantial amount of money into a law firm's trust account, which was then transferred to a third party, without the firm knowing the true source of the funds. The court looked at what legal duty lay on attorneys to properly establish the source of the funds, before paying them out. *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP)

##### **Voluntary and friendly sequestration: the hazards**

The risks of abuse and that the interests of creditors will be undermined are examined in *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP). And in *Plumb on Plumbers v Lauderdale And Another* 2013 (1) SA 60 (KZD) the court found that several of the provisional sequestration applications from the same attorney's office contained allegations of fact that were identical or similar in form and content, and that the affidavits could not have correctly represented, in each case, facts which the deponent believed to be true.

##### **Buyer beware: of the contract**

A customer bought a car from a second-hand car dealer, the deal financed by the bank. Four days later he returned the seriously defective vehicle and demanded a refund of his deposit. The dealer did not refund him, and the bank's attorneys ended up issuing summons against him. The court takes a stern look at the contract, and whether its terms comply with the National Credit Act and the Constitution. *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD)

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

##### **Admission of guilt fine leading to criminal record**

On a charge of disturbing the peace, the notice to appear form did not warn that payment of the fine would lead to a criminal record. The constitutionality of the procedure of the issuing police officer and the wording of the form is examined in the judgment of *S v Parsons* 2013 (1) SACR 38 (WCC).

##### **Domestic violence protection orders: who can apply?**

Two brothers were involved in a business, but their relationship broke down, resulting in one applying for a protection order against the other. The meaning of 'domestic relationship' is examined, and whether the dispute between them was really of a commercial nature and not a matter of domestic violence. *Daffy v Daffy* 2013 (1) SACR 42 (SCA)

#### **Police use of force in effecting an arrest**

A policeman intervened in a shootout in a crowded place, and shot one of the participants who had turned to face the policeman with gun in hand. The court considered whether the policeman's shooting was justified, considering that the man was posing a threat to the policeman and to members of the public in the vicinity. *Ngubane v Chief Executive Director of Emergency Services, Ethekwini Metropolitan Service and Another* 2013 (1) SACR 49 (KZD)

#### **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**

### **JANUARY 2013**

#### **TABLE OF CASES**

- PFE International and Others v Industrial Development Corporation of South Africa Ltd 2013 (1) SA 1 (CC)
- Roestoff v Cliffe Decker Hofmeyr Inc 2013 (1) SA 12 (GNP)
- Swartbooi v Road Accident Fund 2013 (1) SA 30 (WCC)
- Langebaan Ratepayers' and Residents' Association v Dormell Properties 391 (Pty) Ltd and Others 2013 (1) SA 37 (WCC)
- Ex parte Arntzen (Nedbank Ltd as Intervening Creditor) 2013 (1) SA 49 (KZP)
- Plumb on Plumbers v Lauderdale and Another 2013 (1) SA 60 (KZD)
- Siemens Telecommunications (Pty) Ltd v Datagenics (Pty) Ltd 2013 (1) SA 65 (GNP)
- Coetzee v Taxing Master, South Gauteng High Court and Another 2013 (1) SA 74 (GSJ)
- SATAWU and Another v Garvas and Others 2013 (1) SA 83 (CC)
- Bester NO and Others v Schmidt Bou Ontwikkelings CC 2013 (1) SA 125 (SCA)
- Experian South Africa (Pty) Ltd v Haynes and Another 2013 (1) SA 135 (GSJ)
- Ngqula v South African Airways (Pty) Ltd 2013 (1) SA 155 (SCA)
- Hano Trading CC v JR 209 Investments (Pty) Ltd and Another 2013 (1) SA 161 (SCA)
- Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA)
- Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (Nedbank Ltd Intervening) 2013 (1) SA 191 (WCC)
- Fourie v FirstRand Bank Ltd and Another NO 2013 (1) SA 204 (SCA)
- Standard Bank of South Africa Ltd v Dlamini 2013 (1) SA 219 (KZD)
- Gowrie Mews Investments CC v Calicom Trading 54 (Pty) Ltd and Others 2013 (1) SA 239 (KZD)
- Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC)
- Body Corporate Pinewood Park v Dellis (Pty) Ltd 2013 (1) SA 296 (SCA)
- Commissioner, South African Revenue Service v Beginsel NO and Others 2013 (1) SA 307 (WCC)

## FLYNOTES

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

MOGOENG CJ, MOSENEKE DCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, SKWEYIYA J and VAN DER WESTHUIZEN J  
2012 AUGUST 14; SEPTEMBER 27  
[2012] ZACC 21

**Administrative law**—Access to information—Generally—Barring of recourse to PAIA where record sought for purpose of litigation after commencement of proceedings—Effect—Information required for pending court proceedings to be obtained under rule 38 of Uniform Rules, not PAIA—Promotion of Access to Information Act 2 of 2000, s 7(1).

### **ROESTOFF v CLIFFE DEKKER HOFMEYR INC (GNP)**

NOORD GAUTENG HOË HOF, PRETORIA  
DU PLESSIS R  
2011 NOVEMBER 8–11; DESEMBER 15

**Attorney**—Trust account—Deposits—Duty of attorney—Unidentified deposit—Money fraudulently and without attorney's knowledge removed from plaintiff's bank account and deposited into attorney's trust account—Attorney having duty to deal with such funds in manner that would not result in loss to plaintiff—Although attorneys generally obliged to verify source of unidentified deposits before dealing with them, in instant case attorney reasonably misled about source of deposit—Attorney not liable.

**Attorney**—Trust account—Deposits—Duty of attorney—Unidentified deposit —Must be credited to suspense account until source identified.

**Vindication**—Money—Funds fraudulently transferred from plaintiff's bank account into that of innocent third party—To succeed with quasi-vindictory action, plaintiff to show that funds in question still identifiable as credit in third party's account—However, enrichment action more appropriate in such cases.

**Banker**—Internet banking services—Internet fraud—Loss resulting from 'phishing' scam—Money fraudulently withdrawn from plaintiff's bank account—Plaintiff failed to heed bank's warnings regarding Internet fraud—Plaintiff guilty of contributory negligence in respect of loss.

### **SWARTBOOI v ROAD ACCIDENT FUND (WCC)**

MANTAME AJ  
2011 DECEMBER 6; 2012 APRIL 17

**Motor vehicle accident**—Compensation—Claim against Road Accident Fund—Claim by third party for emotional shock arising from the death of passenger for reward—Claim not subject to statutory limitations applicable to passenger claims, but to be determined in accordance with Road Accident Fund Act 56 of 1996, s 17(1).

### **LANGEBAAN RATEPAYERS' AND RESIDENTS' ASSOCIATION v DORMELL PROPERTIES 391 (PTY) LTD AND OTHERS (WCC)**

SABA AJ  
2011 NOVEMBER 2; 2012 MAY 8

**Servitude**—Public servitude—Public right of way—Based upon immemorial user—Whether established—Applicable principles restated—Evidence establishing public access to road—Respondent not rebutting presumption that origin of user lawful—Validity of right of way along public road not affected by deproclamation of road as public road—Public right of way declared to exist—Owner of land concerned interdicted from interfering therewith.

### **EX PARTE ARNTZEN (NEDBANK LTD AS INTERVENING CREDITOR) (KZP)**

GORVEN J  
2012 SEPTEMBER 13, 28

**Insolvency**—Voluntary surrender—Disclosure—High level of disclosure required from applicant—Greater risk of abuse and risk that interests of creditors will be undermined in voluntary surrender applications than in ‘friendly’ sequestration applications—Insolvency Act 24 of 1936, s 6(1).

**PLUMB ON PLUMBERS v LAUDERDALE AND ANOTHER (KZD)**

LOPES J

2012 SEPTEMBER 27; OCTOBER 15

**Insolvency**—Compulsory sequestration—Application—‘Friendly sequestration’—Founding affidavits—Allegations of fact in founding affidavits identical or similar in form and content in various applications from the same attorney—Affidavits could not have represented what deponent believed to be true—Rule nisi not confirmed on return date.

**SIEMENS TELECOMMUNICATIONS (PTY) LTD v DATAGENICS (PTY) LTD (GNP)**

FABRICIUS J

2012 SEPTEMBER 3, 11

**Company**—Proceedings by and against—Security for costs—Application for furnishing of—Approach of court—While 1973 Companies Act made provision for furnishing of security for costs, 2008 Act containing no equivalent provision—Court’s inherent power to regulate its own process not allowing it to extend common-law grounds on which security for costs could be granted—Incola company could not be compelled to give security for costs—Uniform Rules, rule 47(1) and Constitution, s 173.

**COETZEE v TAXING MASTER, SOUTH GAUTENG HIGH COURT AND ANOTHER (GSJ)**

SUTHERLAND J

2012 JULY 18, 25; SEPTEMBER 28

**Costs**—Taxation—Discretion of taxing master—Departure from party and party tariff—To be informed by principle and have rational factual basis—Taxing master to apply mind to (i) what is reasonable and fair; and (ii) provisions of rule 70(5)—Rote award of multiple of tariff to arrive at ‘attorney and client’ and ‘attorney and own client’ rates not constituting proper exercise of taxing master’s discretion.

**SATAWU AND ANOTHER v GARVAS AND OTHERS (CC)**

MOGOENG CJ, YACOOB ADCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MAYA AJ, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J and ZONDO AJ

2012 FEBRUARY 9; JUNE 13

[2012] ZACC 13

**Damages**—Riot damage—Liability of organiser of gathering—Defence—Section requiring organiser to continuously take reasonable steps to prevent damage-causing acts or omissions as they become foreseeable, to extent that their occurrence is no longer foreseeable—Where steps are outside of organiser’s power, it must notify third parties under duty to take steps in such circumstances, to do so—Regulation of Gatherings Act 205 of 1993, s 11(2).

**Damages**—Riot damage—Liability of organiser of gathering—Recovery by organiser of contribution from other joint wrongdoer—Such entailing determining organiser’s fault, which, coupled with determination of fault of other joint wrongdoer, allowing for organiser to recover contribution—Apportionment of Damages Act 34 of 1956, s 2(6)(a); Regulation of Gatherings Act 205 of 1993, s 11(2).

**Constitutional law**—Human rights—Right to assemble, demonstrate, picket and petition—Sections limiting right, but such justifiable—Constitution, s 17; Regulation of Gatherings Act 205 of 1993, ss 11(1) and 11(2).

**BESTER NO AND OTHERS v SCHMIDT BOU ONTWIKKELINGS CC (SCA)**

BRAND JA, SNYDERS JA, LEACH JA, THERON JA and WALLIS JA

2012 AUGUST 28; SEPTEMBER 21

[2012] ZASCA 125

**Prescription**—Extinctive prescription—Debt—What constitutes—Not including claim for rectification of deed of transfer—Accordingly, such claim cannot be extinguished by prescription—Prescription Act 68 of 1969, s 10.

**Vindication**—Land—What constitutes—Rectification of deed of transfer—Not altering rights and obligations of parties—Claim for rectification not amounting to claim for delivery of property in form of rei vindicatio.

**EXPERIAN SOUTH AFRICA (PTY) LTD v HAYNES AND ANOTHER (GSJ)**

MBHA J

2012 FEBRUARY 28; MARCH 9; MAY 18

**Labour law**—Contract of employment—Transfer—Upon transfer of business as going concern—Whether new employer may impose restraint of trade where there was none before—Parties affected by such transfer not precluded from concluding fresh agreement regulating their rights and obligations, including restraint of trade agreement, provided employees not subjected to terms and conditions which are ‘on the whole . . . less favourable’ than those under old employer—Labour Relations Act 66 of 1995, s 197(3) (a).

**Labour law**—Contract of employment—Transfer—Upon transfer of business as going concern—Protection of employment—Labour Relations Act protecting employees by ensuring that they are not subjected to terms and conditions which are, ‘on the whole . . . less favourable’ than those under old employer—Subject to this, nothing precluding parties from concluding fresh agreement regulating their rights and obligations, including restraint of trade agreement—Labour Relations Act 66 of 1995, s 197(3) (a).

**Trade and competition**—Restraint of trade agreement—Enforceability—Protectable interest—Confidential information and trade connections—Sufficient if shown that there was confidential information or trade connections to which respondent had access and which could be exploited by new employer.

**NGQULA v SOUTH AFRICAN AIRWAYS (PTY) LTD (SCA)**

HEHER JA, PONNAN JA and WALLIS JA

2012 SEPTEMBER 10, 19

[2012] ZASCA 120

**Appeal**—In what cases—Against order for removal of civil proceedings to another high court—Order not appealable—Semble: For purposes of prescription, institution of proceedings in court not having jurisdiction ineffective to interrupt prescription—Removal to court having jurisdiction may have to be treated as if it were commencement of fresh action constituting effective interruption—Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001, s 3.

**Appeal**—Costs—Order appealed against held to be not appealable—At time of application for leave to appeal, respondent’s legal representative arriving at considered conclusion that objection to application based on non-appealability of order would not succeed—Counsel for respondent not to be criticised for not advising court a quo of its reservations about appealability of order—Appellant ordered to pay costs of appeal.

**HANO TRADING CC v JR 209 INVESTMENTS (PTY) LTD AND ANOTHER (SCA)**

MTHIYANE DP, VAN HEERDEN JA, MHLANTLA JA, BOSIELO JA and ERASMUS AJA

2012 AUGUST 30; SEPTEMBER 21

[2012] ZASCA 127

**Practice**—Applications and motions—Affidavits—Additional affidavits—Permitted only with indulgence of court where good reason for doing so exists—Court having sole discretion whether or not to allow further affidavits—Permitting filing of further affidavits severely prejudicing opposite party—Where no reason placed before court for requesting it to exercise discretion in favour of further affidavits, court correct in ruling that such affidavits inadmissible.

**Contract**—Breach—Remedies—Cancellation—Notice—Cancellation clause providing that party intending to cancel contract required to give written notice to other party to remedy breach complained of within stated time—In order to succeed in claim that contract cancelled, party to show that required notice given to other party and that latter received such notice.

**JUDICIAL SERVICE COMMISSION AND ANOTHER v CAPE BAR COUNCIL AND ANOTHER (SCA)**

BRAND JA, CLOETE JA, SNYDERS JA, MHLANTLA JA and PETSE JA  
2012 AUGUST 16; SEPTEMBER 14  
[2012] ZASCA 115

**Constitutional law**—Administration of justice—Judicial Service Commission—Composition—Not validly constituted in absence of Judge President of Supreme Court of Appeal or Deputy President as designated alternate, unless their attendance impossible—Semble: Any interpretation of s 178 allowing for decisions of JSC to be validly taken with unjustified exclusion of one or more interest groups listed therein, would negate its constitutional design—Constitution, s 178(1)(b) and s 178(7) read together.

**Constitutional law**—Administration of justice—Judicial Service Commission—Validity of decisions—Advising President on appointment of judges constituting exercise of public power reviewable under principle of legality—JSC, if properly called upon to do so, as general rule obliged to give reasons for not recommending particular candidate for judicial appointment.

**Practice**—Parties—Joinder—Non-joinder—Whether non-joinder of candidate recommended for appointment during impugned Judicial Service Commission proceedings, rendering application for setting aside such proceedings invalid—Not all consequences of unlawful administrative acts visited with automatic invalidity—In circumstances of present case, invalidity of proceedings not affecting validity of successful candidate's appointment—His joinder therefore not required as matter of necessity.

**SIBAKHULU CONSTRUCTION (PTY) LTD v WEDGEWOOD VILLAGE GOLF COUNTRY ESTATE (PTY) LTD (NEDBANK LTD INTERVENING) (WCC)**

BINNS-WARD J  
2011 OCTOBER 24; NOVEMBER 16

**Company**—Business rescue—Jurisdiction of court—Only court with jurisdiction being court within whose jurisdiction company's registered office situated—Companies Act 71 of 2008, s 23.

**Company**—Winding-up—Jurisdiction of court—Only court with jurisdiction being court within whose jurisdiction company's registered office situated—Companies Act 71 of 2008, s 23.

**Company**—Registered office—Registered office of company to be place of its principal place of business (ie principal office)—Companies Act 71 of 2008, s 23.

**FOURIE v FIRSTRAND BANK LTD AND ANOTHER NO (SCA)**

BRAND JA, LEWIS JA, BOSIELO JA, SHONGWE JA and THERON JA  
2012 AUGUST 27; SEPTEMBER 18  
[2012] ZASCA 119

**Company**—Directors and officers—Liability for debts of company—Reckless or fraudulent conduct of business of company—Proof of causal link between reckless or fraudulent conduct and company's inability to pay its debts not required—Companies Act 61 of 1973, s 424.

**STANDARD BANK OF SOUTH AFRICA LTD v DLAMINI (KZD)**

D PILLAY J  
2012 AUGUST 6, 14; OCTOBER 23

**Credit agreement**—Consumer credit agreement—Rights of consumer—Right to information in official language that consumer understands—Plain and understandable language—Bank's vehicle-finance agreement skewed in favour of bank by selective disclosure of provisions of NCA—Agreement defeating purposes of NCA and accordingly unlawful—National Credit Act 34 of 2005, ss 3, 63, 64 and 121.

**GOWRIE MEWS INVESTMENTS CC v CALICOM TRADING 54 (PTY) LTD AND OTHERS (KZD)**

GORVEN J  
2012 JUNE 8, 21

**Spoliation**—Mandament van spolie—Possession—Degree of control—Whether unimpeded but not exclusive use of area amounting to possession of type protected by mandament—For 12 years restaurant using open area to set up tables and chairs for its patrons—Boarding up of access to area amounting to deprivation of possession entitling restaurant to mandament.

**DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (CC)**

MOGOENG CJ, YACOOB ADCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MAYA AJ, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J and ZONDO AJ  
2012 MAY 8; OCTOBER 5  
[2012] ZACC 24

**Criminal procedure**—Prosecution—Prosecuting authority—National Director of Public Prosecutions—Appointment—Requirement that appointee be fit and proper—This is an objective jurisdictional fact—National Prosecuting Authority Act 32 of 1998, s 9(1)(b).

**Constitutional law**—State President—Powers—Appointment of National Director of Public Prosecutions—Purpose of power is to ensure appointee has conscientiousness and integrity to be trusted with office—Constitution, s 179(1)(a).

**Constitutional law**—State President—Powers—Appointment of National Director of Public Prosecutions—President's failure to take into account findings of commission of inquiry on candidate for position not rationally related to purpose for which power to appoint conferred, and rendering decision to appoint irrational—Constitution, s 179(1)(a).

**Review**—Grounds—Rationality—Executive decision—Means employed to achieve purpose for which power has been granted must rationally relate to purpose—Means including process and decision.

**Review**—Grounds—Rationality—Executive decision—Failure to take into account material—Whether failure will render subsequent decision irrational—Three-step enquiry: whether material relevant; whether failure rationally relates to purpose for which power was granted; if failure does not so relate, whether it renders process leading to decision, and decision, irrational.

**BODY CORPORATE PINWOOD PARK v DELLIS (PTY) LTD (SCA)**

MPATI P, BRAND JA, MHLANTLA JA, TSHIQI JA and BORUCHOWITZ AJA  
2012 MAY 9; JUNE 1  
[2012] ZASCA 105

**Sectional title**—Body corporate—Status and nature of rules governing body corporate—Management rules—Arbitration provision of rule 71—Arbitration not compulsory under rule 71 but consensual in nature—Court retaining discretion to stay proceedings or to order continuation of action—Arbitration Act 42 of 1965, s 6.

**COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v BEGINSEL NO AND OTHERS (WCC)**

FOURIE J  
2012 OCTOBER 11, 21

**Company**—Business rescue—Business rescue plan—Development—Required information—Substantial compliance with statutory requirements sufficing—Companies Act 71 of 2008, s 150(2).

**Company**—Business rescue—Business rescue proceedings—Participation by creditors—Creditors' voting interest in decisions—Preferent unsecured creditor under Insolvency Act not enjoying such status for purposes of business rescue—SARS to be treated as unsecured creditor—Companies Act 71 of 2008, s 145(4).

**Company**—Business rescue—Business rescue proceedings—Discontinuation—For lack of prospects of rescue—Discretion of court—Court to opt for continuation if leading to better return for creditors than liquidation would—Companies Act 71 of 2008, s 141(2)(a)(ii).

## SOUTH AFRICAN CRIMINAL LAW REPORTS



## JANUARY 2013

### TABLE OF CASES

- S v Bogaards 2013 (1) SACR 1 (CC)
- S v Parsons 2013 (1) SACR 38 (WCC)
- Daffy v Daffy 2013 (1) SACR 42 (SCA)
- Ngubane v Chief Executive Director of Emergency Services, Ethekwini Metropolitan Service and Another 2013 (1) SACR 49 (KZD)
- S v FM 2013 (1) SACR 57 (GNP)
- S v SQ 2013 (1) SACR 70 (ECG)
- S v Ross 2013 (1) SACR 77 (WCC)
- Bester and Another NNO v National Director of Public Prosecutions 2013 (1) SACR 83 (SCA)
- National Director of Public Prosecutions v Kleinhans and Others 2013 (1) SACR 83 (SCA)
- S v TS 2013 (1) SACR 92 (FB)
- S v Khumalo 2013 (1) SACR 96 (KZP)
- S v Kekana 2013 (1) SACR 101 (SCA)

### FLYNOTES

#### **S v BOGAARDS (CC)**

YACOOB ADCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J and ZONDO AJ  
2012 MAY 3; SEPTEMBER 28  
[2012] ZACC 23

**Prison offences**—Prisoner—Meaning of under Correctional Services Act 111 of 1998—Defective warrant of detention—Warrant serves important protective purpose, but it is court order that provides legal basis for detention, not warrant, and defective warrant not rendering detention unlawful.

**Sentence**—Increase of on appeal—Notice of proposed increase—Right to fair trial and right to appeal necessitating that rule of practice be elevated to legal requirement—Principle applicable even where increase in sentence effected by imposing higher sentence on substituted conviction.

#### **S v PARSONS (WCC)**

DLODLO J and MANTAME AJ  
2012 JUNE 15  
[2012] ZAWCHC 121

**Admission of guilt**—Accused paying admission of guilt fine on written notice in terms of s 57(1)(b) of Criminal Procedure Act 51 of 1977—Accused unaware that she would acquire criminal record—Admission of guilt set aside.

**Admission of guilt**—Notice to appear form prescribed by s 56 of Criminal Procedure Act—Form unfair to unsuspecting members of public, in that no warning that accused will acquire criminal record if he signs admission of guilt.

#### **DAFFY v DAFFY (SCA)**

LEWIS JA, VAN HEERDEN JA, CACHALIA JA, LEACH JA and SOUTHWOOD AJA  
2012 SEPTEMBER 13, 28  
[2012] ZASCA 149

**Domestic violence**—Protection orders—When to be granted—‘Domestic relationship’—Something more than mere sibling relationship required in case of adult brothers who lived in separate households.



**NGUBANE v CHIEF EXECUTIVE DIRECTOR OF EMERGENCY SERVICES, ETHEKWINI METROPOLITAN SERVICE AND ANOTHER (KZD)**

MADONDO J

2011 SEPTEMBER 30; DECEMBER 1

**Arrest**—Use of force in effecting arrest—Self-defence—What constitutes—Policeman shooting plaintiff who at time was involved in shootout in crowded place with other man in dispute over girlfriend—Policeman shouted at two men to stop—Other man dropped his firearm, but plaintiff turned to policeman and pointed firearm at him—Policeman shooting plaintiff three times—Reasonable person in position of policeman would have reason to consider himself to be in danger of serious injury and justified in shooting plaintiff since he was posing threat or danger to his life and members of public at large in crowded area.

**S v FM (GNP)**

TUCHTEN J and MOLOPA J

2012 AUGUST 20

[2012] ZAGPPHC 180

**Juvenile offenders**—Trial—Review—Section 85(1) of Child Justice Act 75 of 2008 providing for automatic review in respect of all children convicted in terms of CJA who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in child and youth care centre providing a programme provided for in s 191(2)(j) of Children's Act 38 of 2005, including children who are so sentenced in a regional court.

**S v SQ (ECG)**

PAKADE ADJP, PICKERING J and MAJIKI J

2012 MAY 7, 9

**Rape**—Sentence—Complainant under age of 16 years—Complainant 7-yearold girl—Severity of rape becoming progressively more serious with younger child—Physical injuries sustained minor, but impact on complainant psychologically is long-term—Signs that rape would have a lasting effect on complainant—Although weighty mitigating circumstances present, sentence of 20 years' imprisonment appropriate.

**S v ROSS (WCC)**

BOZALEK J and OLIVIER AJ

2012 SEPTEMBER 14, 20, 25

**Trial**—Reopening of and remittal for hearing further evidence—Grounds for remittal—Though evidence true and materially relevant, court not granting application where state had mistakenly relied on certificate rather than affidavit or oral evidence.

**BESTER AND ANOTHER NNO v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS; NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v KLEINHANS AND OTHERS (SCA)**

BRAND JA, MAYA JA and SERITI JA

2011 NOVEMBER 21, 30

[2011] ZASCA 234

**Prevention of crime**—Restraint order—Effect of winding-up application brought before restraint order granted—Section 36(2) of Prevention of Organised Crime Act 121 of 1998 excluding assets of company from ambit of restraint order.

**S v TS (FB)**

MOLEMELA J and LEKALE J

2012 JUNE 14

**Juvenile offenders**—Trial—Review—In what cases—Minor child sentenced in terms of s 76(1) of Child Justice Act 75 of 2008—Not automatically reviewable where accused legally represented—Automatic review regime limited, in its application, to cases where accused not legally represented—Does not call for court's inherent powers of review.

**S v KHUMALO (KZP)**

CN PATEL DJP, D PILLAY J and LOPES J  
2011 JANUARY 26; MARCH 4

**Plea**—Plea of guilty—Written statement in terms of s 112(2) of Criminal Procedure Act 51 of 1977—Statement setting out facts admitted and on which plea of guilty based—State bound by facts stated in statement if it accepts the plea.

**S v KEKANA (SCA)**

PONNAN JA, TSHIQI JA and KROON AJA  
2012 MAY 21, 25  
[2012] ZASCA 75

**Appeal**—Powers of court on appeal—Power to interfere with conviction—In absence of demonstrable and material misdirection by the trial court, its findings of fact presumed to be correct and would only be disregarded if recorded evidence showed them to be clearly wrong.

## THE NAMIBIAN LAW REPORTS

### 2012 (2)

#### TABLE OF CASES

- Gawanas v Government of the Republic of Namibia 2012 (2) NR 401 (SC)
- S v Kondo 2012 (2) NR 415 (NLD)
- Mobile Telecommunications Ltd v Namibia Telecommunications Commission and Others 2012 (2) NR 421 (HC)
- Kavekatora v Transnamib Holdings Ltd and Another 2012 (2) NR 443 (LC)
- EH v D 2012 (2) NR 451 (HC)
- Strauss and Another v Labuschagne 2012 (2) NR 460 (SC)
- Disciplinary Committee for Legal Practitioners v Murorua and Another 2012 (2) NR 481 (HC)
- Di Savino v Nedbank Namibia Ltd 2012 (2) NR 507 (SC)
- Council of the Municipality of Keetmanshoop v Rooi and Others 2012 (2) NR 523 (HC)
- LM and Others v Government of the Republic of Namibia 2012 (2) NR 527 (HC)
- S v Nengongo 2012 (2) NR 553 (HC)
- Frans v Paschke and Others 2012 (2) NR 560 (HC)
- Minister of Health and Social Services and Others v Medical Association of Namibia Ltd and Another 2012 (2) NR 566 (SC)
- Taapopi v Ndafediva 2012 (2) NR 599 (HC)
- Minister of Basic Education, Sport and Culture v Vivier NO and Another 2012 (2) NR 613 (SC)
- ZC and Another v LM and Another: In re SM 2012 (2) NR 636 (HC)
- Du Preez v Minister of Finance 2012 (2) NR 643 (SC)
- Simataa v Magistrate of Windhoek and Others 2012 (2) NR 658 (HC)
- Aussenkehr Farms (Pty) Ltd v Namibia Development Corporation Ltd 2012 (2) NR 671 (SC)
- FN v SM 2012 (2) NR 709 (HC)
- Africa Personnel Services (Pty) Ltd v Shipunda and Others 2012 (2) NR 718 (LC)
- Minister of Justice v Magistrates' Commission and Another 2012 (2) NR 743 (SC)
- Amunyela v Arovin Property Developers (Pty) Ltd 2012 (2) NR 757 (HC)
- Wilderness Air Namibia (Pty) Ltd v Janse van Rensburg 2012 (2) NR 764 (LC)
- Da Cunha Do Rego v Beerwinkel t/a JC Builders 2012 (2) NR 769 (SC)
- Minister of Mines and Energy and Others v Petroneft International Ltd and Others 2012 (2) NR 781 (SC)

#### FLYNOTES

## **GAWANAS v GOVERNMENT OF THE REPUBLIC OF NAMIBIA (SC)**

STRYDOM AJA, LANGA AJA and O'REGAN AJA

2011 JULY 11 2012 APRIL 3

**Constitutional law**—Human rights—Right to personal liberty and dignity—Appellant detained in terms of s 77(6) of Criminal Procedure Act read with ch 3 of Mental Health Act—Article 7 of Constitution which protected individual liberty had to be broadly interpreted—Detention as President's patient depriving person of liberty and dignity—Constitution, arts 7 and 8, Criminal Procedure Act 51 of 1977, s 77(6) and Mental Health Act 18 of 1973, ch 3.

**Delict**—Elements—Unlawfulness or wrongfulness—Breach of legal duty—Breach by officials in ministry of justice of their statutory duties, resulting in unlawful detention—Respondent's defence that appellant's detention was in terms of court order, could not be correct because it meant that person could be detained for as long as order subsisted—Mental Health Act provided in detail steps to be taken to obtain release of person detained in terms of order by magistrate, and once person so detained was fit for release, decision left to health authorities and court, steps prescribed by Mental Health Act had to be complied with reasonably—Mental Health Act 18 of 1973, ch 3.

**Delict**—Elements—Negligence—Delay in releasing appellant from mental facility—Wrongful detention—Statutory duty upon hospital board and its personnel and Minister of Justice and his personnel to act reasonably—Reasonable person, in these circumstances, would have foreseen possibility of his conduct causing loss to another person and would have taken reasonable steps to avoid such possibility—There was no reasonable explanation for delay to act in order to discharge appellant as a President's patient, which was a necessary step in the process before a judge could order release of appellant—Courtholding that delay unreasonable—Respondent liable to compensate appellant for damages under Lex Aquilia.

## **S v KONDO (NLD)**

LIEBENBERG J and TOMMASI J

2012 MARCH 23, 30

**Criminal procedure**—Plea—Plea of guilty—Statement must contain all elements of offence and facts which accused admits—Statement should not be mere regurgitation of charge-sheet—Court must satisfy itself that accused admits all elements of offence—Legal practitioners must acquaint themselves fully with all admitted facts and elements of offence—Criminal Procedure Act 51 of 1977, s 112(2).

## **MOBILE TELECOMMUNICATIONS LTD v NAMIBIA TELECOMMUNICATIONS COMMISSION AND OTHERS (HC)**

SMUTS J

2012 MARCH 20; APRIL 3

**Administrative law**—Administrative bodies—Decisions of functionary—Statutory body has duty to keep proper records—Such record keeping especially important for bodies which have perpetual succession.

**Administrative law**—Review—Right to fair administrative justice—Review of administrative decisions—Function of court to determine whether decision made by specialist body was fair and whether proper procedures had been followed—Reasons provided by commission within context of its decision-making demonstrated that reasonable choice was made by commission, exercising one of reasonable options open to it—Application dismissed—Commission held liable for 25% of costs, due to slovenly manner in which it had gone about litigation process—Constitution, art 18.

## **KAVEKOTORA v TRANSNAMIB HOLDINGS LTD AND ANOTHER (LC)**

SMUTS J

2012 JANUARY 20; FEBRUARY 3

**Labour law**—Unfair dismissal—What constitutes—Appellant applying for unpaid leave to run for political office—First respondent alerting him to policy which deems employees to have

resigned when running for political office—Appellant unsuccessful in election—First respondent refusing reinstatement—Arbitrator dismissing complaint of unfair dismissal—Appellant contending that policy not applicable to him—Court on appeal holding that appellant had elected to resign when fully aware of company policy—Appeal against arbitrator's award dismissed.

**EH v D (HC)**

DAMASEB JP

2012 JANUARY 20, 25, 27

**Practice**—Applications and motions—Urgent applications—Urgent application for interim custody of minor—Court in such applications would not take pedantic approach requiring applicant seeking urgent relief to meticulously explain reason for every delayed action in coming to court—Considerations in such applications different from urgent applications of commercial nature.

**Husband and wife**—Custody of minor child—Interim custody pending application for variation of custody order—Respondent, custodian parent, moving minor to boarding school—Applicant seeking interim custody—Minor obviously resentful of move—Court satisfied that respondent acting in best interests of minor and not with ulterior motive—Application dismissed.

**STRAUSS AND ANOTHER v LABUSCHAGNE (SC)**

SHIVUTE CJ, MARITZ JA and O'REGAN AJA

2011 JULY 13; 2012 JUNE 21

**Land**—Sale—Agricultural land—Land Reform Act providing that agricultural land first to be offered to state—Land only to be sold if state issues waiver—Act further providing that foreigners only to purchase land with minister's consent—First appellant, foreigner, and respondent, owner of farms, entering into agreements of loan and lease of respondent's farms—Respondent agreeing to bequeath land to first appellant—Agreements not constituting alienation in terms of Act—Act defining 'alienation' to include sale, exchange, donation or disposal—Agreements between parties not ineluctably leading to first appellant becoming owner of farms—Agreements between parties thus not constituting 'alienation' in terms of Act—Land Reform Act 6 of 1995.

**Land**—Sale—Agricultural land—First appellant and respondent entering into several agreements regarding respondent's farms—First agreement providing that first appellant to lend money to respondent—Payment of loan in tranches over several years—Second agreement providing for lease by first appellant of respondent's farms at nominal rental—Third agreement, that respondent would bequeath farms to first appellant—Court on appeal holding that agreements 'anomalous'—Purpose of agreements clearly to circumvent peremptory provisions of Act—Agreements held to be in fraudem legis and void ab initio—Land Reform Act 6 of 1995.

**DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS v MURORUA AND ANOTHER (HC)**

VAN NIEKERK J, PARKER J and SIBOLEKA J

2010 NOVEMBER 25, 26; 2012 JUNE 25

**Legal practitioner**—Misconduct—Unprofessional conduct—What constitutes—First respondent, a legal practitioner, failing to mention to court undertaking he had given to colleague—Applicant finding first respondent guilty of unprofessional conduct and seeking order striking him off the roll—Court holding that misleading court and lying to colleagues, constituting unprofessional conduct—However, majority of court not satisfied that first respondent wilfully misleading court—First respondent's conduct close to warranting striking off roll, but that in present case it would be unfair to do so—Court ordering first respondent's suspension for one year.

**DI SAVINO v NEDBANK NAMIBIA LTD (SC)**

SHIVUTE CJ, MAINGA JA and NGCOBO AJA

2012 MARCH 29; JUNE 21

**Practice**—Judgments and orders—Summary judgment—Bona fide defence—Defendant must satisfy court that had bona fide defence—Defendant must depose to facts which, if true, would establish defence—Defendant must disclose facts upon which defence was based—Court must be satisfied that defendant had good defence in law—Defendant must make full disclosure so that court apprised of all relevant facts.

**Practice**—Judgments and orders—Summary judgment—Defence—Appellant in present case raising new points on appeal—Court disinclined to allowing raising of new points on appeal—Court having discretion to allow raising of new points—Court must be satisfied that new points covered by pleadings, that it would not result in unfairness, that other party would have conducted case differently if points raised from the start—However, since summary judgment drastic remedy, courts more inclined to allow raising of new points on appeal.

#### **COUNCIL OF THE MUNICIPALITY OF KEETMANSHOOP v ROOI AND OTHERS (HC)**

MILLER AJ

2012 JUNE 11; JULY 18

**Estoppel**—Application of—Doctrine of estoppel finds no application in circumstances where effect would be that there is contravention of statutory provision.

#### **LM AND OTHERS v GOVERNMENT OF THE REPUBLIC OF NAMIBIA (HC)**

HOFF J

2010 JUNE 1–3; SEPTEMBER 1–3, 6–8, 10; 2011 JANUARY 18–20, 27

2012 JULY 30

**Medicine**—Medical treatment—Consent to treatment—Plaintiffs, all HIV positive, all sterilised during caesarean section—Plaintiffs claiming unlawful sterilisation—Plaintiffs signing consent forms—Defendant pleading *volenti non fit iniuria*—Question whether consent constituting informed consent—Evidence establishing that plaintiffs not fully informed of consequences of sterilisation—Court not satisfied that plaintiffs fully informed of consequences and alternative contraceptive methods—Court holding defendant liable for unlawful sterilisations.

#### **S v NENGONGO (HC)**

SMUTS J and GEIER J

2012 JUNE 22, 27

**Firearms**—Safekeeping—Offences under Arms and Ammunition Act 7 of 1996—Failure to ensure safekeeping of firearm in contravention of s 38(1)(j)—Appellant leaving firearm on car seat in bag with small safe—Act and regulations containing specific prescriptions for safekeeping of firearms, including fitting of a safe in vehicle—Appellant failing to ensure safety of firearm—Legislature clearly intending to safeguard firearms and prevent them from landing in the wrong hands—Court *a quo* correctly convicting appellant for failure to ensure safekeeping of firearm.

**Criminal procedure**—Sentence—Imposition of—Factors to be taken into account—Sentence for offences under Arms and Ammunition Act 7 of 1996—Appellant failing to ensure safekeeping of firearm—Magistrate cautioning and discharging accused—On appeal, court holding that magistrate failed to appreciate seriousness of offence—Court substituting sentence with fine of N\$3000 or three months' imprisonment.

#### **FRANS v PASCHKE AND OTHERS (HC)**

DAMASEB JP

2012 JUNE 14, 25

**Enrichment**—Unjust enrichment—Date for determining quantum of enrichment—Value to be determined as at date when court reserved judgment and not from date of summons.

#### **MINISTER OF HEALTH AND SOCIAL SERVICES AND OTHERS v MEDICAL ASSOCIATION OF NAMIBIA LTD AND ANOTHER (SC)**

MAINGA JA, STRYDOM AJA and LANGA AJA

2011 MARCH 3; 2012 JUNE 21

**Statute**—Regulations made in terms of statute—Medicines and Related Substances Control Act 13 of 2003 (Medicines Act)—Reference to ‘Minister’ in art 140 of Constitution—Article containing provisions to ensure smooth transfer of power from former administration to government of Namibia—Reference to ‘Minister’ in art 140 means minister of government of Namibia—Reference in art 140(5) of Constitution to ‘Administrator-General’ meaning President of Namibia—Section 4(3) of Medicines and Related Substances Control Act 101 of 1965 interpreted as reference to present Minister of Health and Social Services—Minister did not act ultra vires his powers when he published names of members of 1965 Council in Official Gazette—Court a quo should therefore not have declared all regulations, enacted in terms of s 44 of Medicines Act, to be null and void, since 1965 Council had been validly appointed by President of Namibia.

**Statute**—Interpretation of—Medicines and Related Substances Control Act 101 of 1965—Section 12(3) of Interpretation Proclamation—Reference to ‘law’ in section not meaning that it has force of law—Regulations under Medicines Act 13 of 2003 published before Act came into force—Publication necessary so that proper consultation could take place—Final regulations published together with notice of commencement of Act—This was necessary, since implementation of Act was dependent upon regulations—Court a quo’s reliance on s 12(3) when declaring all regulations under Medicines Act invalid, accordingly set aside.

**Medicine**—Medicines and Related Substances Control Act 13 of 2003 (Medicines Act)—Dispensing of medicine—Regulation 34(3) of regulations in terms of Medicines Act—Validity of—Regulation providing for issuing of licences to medical practitioners to dispense medicine—Purpose of medicine was for healing and treatment of illness—Minister not empowered to restrict freedom of choice when purchasing medicine—Act not empowering minister to drastically change policy regarding dispensing of medicine by medical practitioners—Court setting aside reg 34(3) (a), (c), (d) and (e) of regulations in terms of Medicines Act.

#### **TAAPOPI v NDAFEDIVA (HC)**

GEIER J

2012 JUNE 4, 6 and 22

**Donation**—What constitutes—Law generally regards it improbable that person will gratuitously part with money as a gesture of liberality—Defendant alleging donation bearing onus to prove such donation.

**Evidence**—Witnesses—Calling, examination and refutation—Two mutually destructive versions—Onus on plaintiff—Probabilities favoured plaintiff.

#### **MINISTER OF BASIC EDUCATION, SPORT AND CULTURE v VIVIER NO AND ANOTHER (SC)**

MARITZ JA, STRYDOM AJA and MTAMBANENGWE AJA

2008 APRIL 7; 2012 JUNE 29

**Evidence**—Witnesses—Single witness—Young children—Cautionary rules—Reason for rules being evidential risk—Children having inchoate social and other skills—Children also prone to suggestibility and imaginativeness—Children may not fully comprehend importance of truthfulness—The younger the child, the greater the care needed—However, cautionary rules not applied in formalistic way—Rules intrinsic part of broader logical and reasoned inquiry into substance of evidence.

**Evidence**—Witnesses—Expert evidence—Where expert in no better position than court to express opinion, evidence would be supererogatory, irrelevant and inadmissible—At other end of spectrum are matters on which court not in position to form opinion unassisted—Between two extremes was whole spectrum of incremental relevance or irrelevance—Depending on degree of assistance to be derived by court from opinions expressed on issue at hand—In present case court satisfied that court a quo correctly evaluating expert evidence.

**Damages**—Bodily injuries—Psychiatric injury—Quantum of damages for emotional shock—Court a quo awarding N\$25 000—Court on appeal reducing quantum to N\$10 000—Reason for reduction that though court satisfied that second respondent suffered emotional shock, no psychiatric evidence and evidence of second respondent limited.

#### **ZC AND ANOTHER v LM AND ANOTHER: IN RE SM (HC)**

GEIER J

2012 APRIL 13, 19, 26; MAY 31; JUNE 4

**Curator**—Appointment of—Curator personae—Such appointment only in exceptional circumstances, since it could amount to encroachment on person's liberty—Court in present case appointing curator personae—Patient suffering from dementia, unable to move or communicate, with poor prognosis.

**DU PREEZ v MINISTER OF FINANCE (SC)**

MAINGA JA, STRYDOM AJA and O'REGAN AJA  
2011 NOVEMBER 4; 2012 JUNE 21

**Statute**—Interpretation of—Presumption against legislature not altering common law more than necessary—Such presumption rebuttable—Section 79(4) of Income Tax Act providing that interest could exceed principal debt—Court satisfied that language of section clear and unambiguous—Appellant relying on in duplum rule to challenge amount of interest charged—Section 79(4) clearly intending to alter common-law in duplum rule—Appellant accordingly not entitled to rely on in duplum rule, given clear language of section—Fact that s 79(4) amended subsequent to litigation, also not assisting appellant—Income Tax Act 24 of 1981, s 79(4).

**SIMATAA v MAGISTRATE OF WINDHOEK AND OTHERS (HC)**

TOMMASI J  
2012 JULY 23

**Criminal law**—Corruption—Public officer—Search and seizure in terms of Anti-Corruption Act 8 of 2003—Before Anti-Corruption Commission approaches judicial officer for search warrant, investigators must have reasonable grounds for such officer to form opinion before issuing warrant—Mere suspicion or speculation not sufficient to justify issuing of warrant.

**AUSSENKEHR FARMS (PTY) LTD v NAMIBIA DEVELOPMENT CORPORATION LTD (SC)**

MARITZ JA, MAINGA JA and NGCOBO AJA  
2012 MARCH 28; AUGUST 13

**Court**—Abuse of court process—Court having inherent power to protect itself from abuse—Such protection in public interest and for preservation of rule of law—Court must not interfere with free access to courts by summary dismissal of action without hearing evidence, on basis of vexatious proceedings—Court only to do so where claim unfounded or dismissal of action was foregone conclusion—Lack of merit to be demonstrated with clarity—In present case plaintiff causing delay by late filing of pleadings—Court not satisfied that conduct amounting to abuse of process.

**Practice**—Withdrawal and dismissal of proceedings—Delay in prosecution of case—Dilatory abuse—Prejudice to other party not only consideration—Court must be satisfied that party causing delay using process for ulterior motives—Considerations of fairness and public confidence in judicial system another factor—Inactivity of defendant also playing role—Court not condoning delay by plaintiff but not satisfied that such delay amounting to dilatory abuse.

**Practice**—Irregular proceedings—What constitutes—Two stage enquiry—Court must first decide whether step irregular—If step irregular, court to determine whether party prejudiced—Steps taken in breach of rules, irregular—In present case plaintiff's delay constituting irregular step—However, court not satisfied that defendant suffered prejudice as result of irregular step.

**FN v SM (HC)**

SMUTS J  
2012 AUGUST 2, 8

**Criminal procedure**—Domestic violence—Domestic violence protection order—Court compelled to combat evil of domestic violence if satisfied that respondent had committed domestic violence towards complainant—Domestic Violence Act 4 of 2003.

**AFRICA PERSONNEL SERVICES (PTY) LTD v SHIPUNDA AND OTHERS (LC)**

SMUTS J  
2012 JUNE 29; JULY 31



**Labour court**—Rules of court—Filing of record in appeals—Duty to file record resting on labour commissioner—Rule 17(25) providing that appeal lapses within 90 days—Rule in present form operating harshly against appellants—Failure to file record timeously cannot be laid at door of appellant—Rule 17 needing to be revised accordingly.

**Constitutional law**—Human rights—Right to assemble—Such right foundational to exercise of democratic rights especially in case of workers—However, such rights not unfettered—Right subject to limitation in terms of art 21(2) of Constitution—One such limitation being right to property—Section 65 of Labour Act 11 of 2007 regulating right to assembly and meetings of trade union—Section providing that employer cannot unreasonably withhold such right.

**MINISTER OF JUSTICE v MAGISTRATES' COMMISSION AND ANOTHER (SC)**

STRYDOM AJA, LANGA AJA and O'REGAN AJA  
2011 APRIL 6; 2012 JUNE 21

**Constitutional law**—Separation of powers—Independence of judiciary—Namibia constitutional state upholding rule of law and separation of powers—Separation of powers especially important for independence of judiciary—Establishment of Magistrates' Commission serving to guarantee independence of magistracy as part of judiciary.

**Magistrate**—Misconduct—Magistrates' Commission—Commission recommending dismissal of magistrate found guilty of misconduct—Minister refusing to dismiss magistrate and conducting fresh investigation—Court a quo granting order compelling minister to dismiss magistrate—Court on appeal holding that minister has no power to refuse dismissal of magistrate—Magistrates Act couched in peremptory terms—Fact that minister has discretion to appoint magistrates, not implying power to refuse to dismiss them—Power to dismiss magistrates residing in commission—Aggrieved magistrate having right to approach high court—Magistrates Act 3 of 2003.

**AMUNYELA v AROVIN PROPERTY DEVELOPERS (PTY) LTD (HC)**

CORBETT AJ  
2011 OCTOBER 19; 2012 APRIL 5

**Practice**—Judgments and orders—Summary judgment—Furnishing of security by defendant at hearing—Furnishing of security lent weight to contention that defendant had bona fide defence—Where security not complying with rule 32(3)(a), court had discretion to take cognisance that tender had been made.

**WILDERNESS AIR NAMIBIA (PTY) LTD v JANSE VAN RENSBURG (LC)**

MILLER AJ  
2012 FEBRUARY 17; MARCH 2; APRIL 4

**Labour law**—Unfair labour practice—Factors to be considered—First, whether measures taken were fair and reasonable; second, whether fair procedures were followed; third, whether measures implemented were in themselves fair.

**DA CUNHA DO REGO v BEERWINKEL t/a JC BUILDERS (SC)**

SHIVUTE CJ, MAINGA JA and O'REGAN AJA  
2012 JULY 5; AUGUST 22

**Practice**—Applications and motions—Application for postponement—Court will not grant postponement merely because legal practitioner not available—Court must protect interests of both parties—This rule also protecting general public—Importance of efficient and speedy litigation.

**Arbitration**—The award—Application to have award made order of court—Validity of award—Arbitration in absence of one party—Section 15(2) of Arbitration Act 42 of 1965 making provision for hearing in absence of one party under certain circumstances.

**MINISTER OF MINES AND ENERGY AND OTHERS v PETRONEFT INTERNATIONAL LTD AND OTHERS (SC)**

SHIVUTE CJ, MARITZ JA and O'REGAN AJA  
2011 NOVEMBER 3; 2012 JUNE 21

**Constitutional law**—Executive authority—Role of cabinet—Cabinet revoking mandate of parastatal to import petroleum products—Article 40 of Constitution providing inter alia that cabinet responsible for supervising and co-ordinating activities of parastatal—Power including issuing of policy directives—Parastatal in question facing financial difficulties—Decision to revoke mandate falling within cabinet’s function in terms of art 40—Allowing parastatal to become insolvent having serious fiscal, economic and security implications—Decision accordingly not unlawful.

**Administrative law**—Administrative act—What constitutes—Cabinet revoking mandate of parastatal to import petroleum products—Reference to function rather than functionary determining whether or not act administrative—Court assuming for present purposes, that cabinet decision to revoke mandate of parastatal to import petroleum products, constituting administrative act and falling within purview of art 18 of Constitution.

**Administrative law**—Administrative act—Fairness of—Cabinet revoking mandate of parastatal to import petroleum products—Duty to act fairly not rigid principle imposing specific obligations upon administrative bodies and officials in inflexible, invariable way—Requiring cabinet to consult every party to contract, especially where such contract provided for termination under certain circumstances, would make task of cabinet burdensome.

**Administrative law**—Administrative action—Validity—Procedural fairness—Legitimate expectation doctrine—Legitimate expectation of consultation ordinarily only arising where established practice of consultation or where promise or representation made that consultation would occur—Respondents not pointing to such practice—Cabinet accordingly not under obligation to consult—Existence of legitimate expectation accordingly not established.