



JUTA'S ADVANCE NOTIFICATION SERVICE

MARCH 2013

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

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

JUDGMENTS OF INTEREST IN THE MARCH EDITIONS OF THE *SALR* AND THE *SACR*

SOUTH AFRICAN LAW REPORTS

The provision of school books

The failure by the department of education to provide textbooks constituted a violation of the right to basic education. The fact that schools in Limpopo lacked textbooks as they approached the halfway mark of the academic year, rendered the matter urgent. The department was also ordered to come up with a catch-up plan for the learners who had been without books. *Section 27 and Others v Minister of Education and Another* 2013 (2) SA 40 (GNP)

Causation and the but-for test

The plaintiff sued, alleging that he contracted tuberculosis in prison, and the question was whether a reasonably adequate prison TB-management system would have eliminated the risk of infection. The but-for test for factual causation is examined. *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC)

Class actions: who can apply?

The applicant sought to bring a class action on behalf of consumers who bought bread and who allegedly suffered damages as a result of unlawful price fixing. Can a party apply to represent a class where constitutional issues are not involved? The requirements to proceed on a class action are set out in *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA).

SOUTH AFRICAN CRIMINAL LAW REPORTS

Leg irons in court unconstitutional?

The court issued a warning that it would impose fines if prisoners were brought to court in leg irons, if this was found to be contemptuous of court. Prima facie, the instruction given to officials that every incarcerated individual should be brought to court in leg-irons was unconstitutional. *S v Khubeka* 2013 (1) SACR 256 (GNP)

Heavy sentence for white collar crime

Although a first offender who had pleaded guilty, the accused was sentenced to fifteen years imprisonment for fraud. The victims were vulnerable, financially ignorant people in rural areas who had invested their savings and pensions in what was promised to be a secure investment with the bank. *S v Kwatsha* 2013 (1) SACR 311 (KZP)

Plea of guilty, but was there intent?

The applicants had pleaded guilty to fraud and theft, but the pre-sentencing reports showed that the applicants had informed the social worker and correctional services officer that they had not had the intention to defraud anyone, but that their loss was due to the collapse of the stock market. On review the convictions and sentences were set aside. *Naidoo and Another v De Freitas and Others* 2013 (1) SACR 284 (KZP)

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Kind Regards

The Juta Law Reports Team

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- General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA)
- Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd 2013 (2) SA 133 (SCA)
- Lee v Minister for Correctional Services 2013 (2) SA 144 (CC)
- Strydom v Engen Petroleum Ltd 2013 (2) SA 187 (SCA)
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- Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA)
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- Dumani v Nair and Another 2013 (2) SA 274 (SCA)
- Apdol v Road Accident Fund 2013 (2) SA 287 (GNP)
- Standard Bank of South Africa Ltd v R-Bay Logistics CC 2013 (2) SA 295 (KZD)
- Steyn NO v Ronald Bobroff & Partners 2013 (2) SA 311 (SCA)

FLYNOTES

NATIONAL CREDIT REGULATOR v OPPERMAN AND OTHERS (CC)

MOGOENG CJ, MOSENEKE DCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, NKABINDE J, SKWEYIYA J and VAN DER WESTHUIZEN J

2012 AUGUST 21; DECEMBER 10

[2012] ZACC 29

Constitutional law—Human rights—Right to property—What constitutes property—Right to restitution of money paid, based on unjustified enrichment, to be recognised as 'property' for purposes of Constitution, s 25(1).

Constitutional law—Legislation—Interpretation—Court under duty to give meaning to statutory provision even if that meaning would result in unconstitutionality.

Constitutional law—Legislation—Validity—National Credit Act 34 of 2005, s 89(5)(c)—Cancelling or forfeiture to state of credit provider's right to recover moneys paid or goods

delivered under unlawful credit agreement—Provision resulting in arbitrary and unconstitutional deprivation of property, and thus invalid—Constitution, s 25(1).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v LABAT AFRICA LTD (SCA)

HARMS AP, LEWIS JA, HEHER JA, MAYA JA and PLASKET AJA

2011 SEPTEMBER 16, 28

[2011] ZASCA 157

Revenue—Income Tax—Deductions—Specific deductions—Expenditure incurred in acquisition of trademark—Issuing of shares as consideration for such acquisition not qualifying as ‘expenditure’—Value of shares not deductible—Income Tax Act 58 of 1962, s 11(gA).

SECTION 27 AND OTHERS v MINISTER OF EDUCATION AND ANOTHER (GNP)

KOLLAPEN J

2012 MAY 17; JUNE 18

Education—Right to education—Duties of state—Provision of textbooks—Failure to do so constituting violation of right to basic education—Court would order provision of textbooks where state failed to deliver textbooks by middle of academic year—Constitution, s 29.

GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA v GEACH AND OTHERS (SCA)

MPATI P, NUGENT JA, PONNAN JA, LEACH JA and WALLIS JA

2012 SEPTEMBER 4; NOVEMBER 29

[2012] ZASCA 175

Advocate—Misconduct—Appropriate order—Restitution—Court has inherent power to order advocate with right to practise to repay moneys as condition for further practice—Court has no such power in respect of advocate who has been struck off.

COMMAND PROTECTION SERVICES (GAUTENG) (PTY) LTD t/a MAXI SECURITY v SOUTH AFRICAN POST OFFICE LTD (SCA)

MTHIYANE DP, BRAND JA, CLOETE JA, PILLAY JA and SALDULKER AJA

2012 NOVEMBER 1, 16

[2012] ZASCA 160

Contract—Consensus—Offer and acceptance—Acceptance—Validity—Must be unconditional—Acceptance of government tender expressed to be ‘subject to . . . BEE improvement’ and ‘successful finalisation . . . of a formal contract’—No binding agreement until negotiations concluded and formal contract signed.

Government procurement—Procurement process—Contract—When concluded—Receipt of letter of appointment—Not establishing binding contract if acceptance conditional—Letter of appointment contemplating ‘BEE improvement’ and ‘successful finalisation . . . of a formal contract’—No binding agreement until negotiations concluded and formal contract signed.

LEE v MINISTER FOR CORRECTIONAL SERVICES (CC)

MOGOENG CJ, MOSENEKE DCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, NKABINDE J, SKWEYIYA J and VAN DER WESTHUIZEN J

2012 AUGUST 28; DECEMBER 11

[2012] ZACC 30

Delict—Elements—Causation—Factual causation—Omission—Test—Substituting notional hypothetical lawful conduct for unlawful conduct in application of but-for test for factual causation not inflexible rule—Nothing preventing court from simply asking whether, on facts of each case, omission probably caused harm—In circumstances of present case, where evidence showing appellant’s risk of contracting TB would have been reduced had adequate prison TB-management system been maintained, factual causation established.

Delict—Elements—Causation—Factual causation—Omission—Test—Substituting notional hypothetical lawful conduct for unlawful conduct in application of but-for test—Hypothetical conduct need only be postulated, not proved.

STRYDOM v ENGEN PETROLEUM LTD (SCA)

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Suretyship—Deed of suretyship—Validity—Suretyship entered into by person married in community without consent of spouse—Such invalid if suretyship not entered into in ordinary course of surety's business—Onus on surety must show that suretyship not entered into in ordinary course of business—Creditor seeking to enforce suretyship need not join second spouse—Matrimonial Property Act 88 of 1984, s 15(2)(h) and 15(6).

Marriage—Proprietary rights—Marriage in community of property—Consent of spouse required for performance of certain juristic acts—Exceptions—Act in ordinary course of business of performing spouse—Performing spouse seeking to escape legal consequences of act must show that act not performed in ordinary course of his or her business—Matrimonial Property Act 88 of 1984, s 15(2) and 15(6).

Statute—Construction—Proviso—Not to be construed as independent enacting clause but in relation to principal matter to which it stands as proviso—Does not enlarge scope of principal enactment—Whether provision constituting true restrictive proviso matter of substance, not form.

FINISHING TOUCH 163 (PTY) LTD v BHP BILLITON ENERGY COAL SOUTH AFRICA LTD AND OTHERS (SCA)

MPATI P, MHLANTLA JA, BOSIELO JA, MAJIEDT JA and PLASKET AJA
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Practice—Applications and motions—Application proceedings—Commencement—Where ordered that application proceedings to be initiated before certain date—Initiated when notice of motion served.

Practice—Applications and motions—Application proceedings—Commencement—Service of documents initiating proceedings—Where interdict proceedings incidental to review proceedings, applicant for review entitled to serve review proceedings on respondent in interdict proceedings—Uniform Rules, rule 4(1)(aA).

CHILDREN'S RESOURCE CENTRE TRUST AND OTHERS v PIONEER FOOD (PTY) LTD AND OTHERS (SCA)

NUGENT JA, PONNAN JA, MALAN JA, TSHIQI JA and WALLIS JA
2012 NOVEMBER 7, 29
[2012] ZASCA 182

Practice—Class action—Availability—Such available in cases not involving constitutional rights.

Practice—Class action—Requirements—Party seeking to represent class must apply to court for it to certify action as class action—Court must be satisfied: (1) of existence of class identifiable by objective criteria; (2) of existence of cause of action raising triable issue; (3) that there are issues of fact, or law, or fact and law, common to members of class; (4) that relief or damages sought flow from cause of action and are ascertainable and capable of determination; (5) that there is an appropriate procedure to allocate damages to class members; (6) that proposed representative suitable to conduct action and to represent class; and (7) that class action most appropriate means to determine class members' claims, in light of composition of class and nature of proposed action.

MUKKADDAM AND OTHERS v PIONEER FOOD (PTY) LTD AND OTHERS (SCA)

NUGENT JA, PONNAN JA, MALAN JA, TSHIQI JA and WALLIS JA
2012 NOVEMBER 6, 29
[2012] ZASCA 183

Practice—Class action—Availability—Opt-in class actions permissible only in exceptional circumstances.

CROOKES BROTHERS LTD v REGIONAL LAND CLAIMS COMMISSION, MPUMALANGA, AND OTHERS (SCA)

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2012 AUGUST 24; SEPTEMBER 21
[2012] ZASCA 128

Interest—A *tempore morae*—Purchaser of land delaying transfer of property and payment of purchase price—Whether awarding *mora* interest proper measure of damages or whether seller, having benefited from continued possession, having to prove overall loss occasioned by delay—Where liability to pay interest attaching to principal obligation by operation of law, courts accepting, without requiring proof, that party deprived of asset for period of time suffered loss to be compensated for by awarding *mora* interest.

Land—Land reform—Restitution—Purchase of land by state for restitution—Where state delaying transfer and payment of purchase price, citing lack of funds—Seller entitled to interest *a tempore morae* in respect of delay—Defending such claim not only ill-advised but also morally unconscionable—Restated that such agreements should be honoured as agreed upon, lest already demanding challenges of land-redistribution process be further exacerbated.

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MPATI P, CLOETE JA, HEHER JA, CACHALIA JA and THERON JA
2012 NOVEMBER 23, 30
[2012] ZASCA 196

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APDOL v ROAD ACCIDENT FUND (GNP)

PRINSLOO J
2012 MARCH 28; AUGUST 3

Motor vehicle accident—Compensation—Claim against Road Accident Fund—Prescription—Claim by minor—Age of majority in Age of Majority Act (21) rather than that in Children's Act (18) applying to claim arising before coming into force of Children's Act and repeal of Age of Majority Act on 1 July 2007, in order to save claim from prescription—Road Accident Fund Act 56 of 1996, s 23; Age of Majority Act 57 of 1972, s 1; Children's Act 38 of 2005, s 17.

STANDARD BANK OF SOUTH AFRICA LTD v R-BAY LOGISTICS CC (KZD)

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2012 OCTOBER 16, 31

Company—Winding-up—'Solvent' and 'insolvent'—Meaning of terms—Such including, respectively, commercial solvency and commercial insolvency—Companies Act 71 of 2008, ss 79–81 and sch 5, item 9.

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BRAND JA, BOSIELO JA, SHONGWE JA, SOUTHWOOD AJA and SALDULKER AJA
2012 NOVEMBER 8, 29
[2012] ZASCA 184

Attorney—Rights and duties—Duties—Duty to execute mandate with required standard of diligence, skill and care—Absent evidence of what reasonable attorney in position of respondent would have done, no breach of mandate established.

Contract—Breach—Damages—Interest—Where interest at 15.5% claimed for period that payment of damages awarded by Road Accident Fund delayed as result of attorney's alleged breach of mandate—Where, as in present case, interest not claimed in respect of principal

obligation but as component in calculation of damages, rates prescribed in Prescribed Rate of Interest Act 55 of 1975 not applicable—In such cases proof of actual interest rate that would have been earned required.

Interest—A tempore *mora*—Interest contemplated in Prescribed Rate of Interest Act 55 of 1975 *mora* interest ‘ancillary or accessory to principal obligation’—Where interest not claimed in respect of principal obligation but as component in calculation of damages, rates prescribed in Prescribed Rate of Interest Act 55 of 1975 not applicable.

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LEE v MINISTER FOR CORRECTIONAL SERVICES (CC)

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[2012] ZACC 30

Prisons—Prisoner—Health—Prisoner contracting tuberculosis—Delictual liability of minister where prisoner contracting tuberculosis allegedly as result of prison authorities not taking reasonable steps to prevent its spread in prison—Whether factual causation established—In circumstances of present case, where evidence showing appellant’s risk of contracting TB would have been reduced had adequate prison TB-management been maintained, factual causation established.

S v KHUBEKA (GNP)

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Trial—The accused—Appearance of—Physical restraints—Court issuing warning that it would impose fines if prisoners brought to court in leg-irons, if contemptuous of court.

S v PRETORIUS (WCC)

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Sexual offences—What constitutes—Compelling or causing person to witness act of self-masturbation—Employer masturbating in room where domestic servant working—Employee's failure to object or leave not removing element of compulsion—Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 8(3).

S v McLAGGAN (ECG)

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[2012] ZAECGHC 78

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S v NGHONDZWENI (FB)

MOCUMIE J and MURRAY AJ

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[2012] ZAFSHC 133

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S v NGQABUKO (ECG)

PICKERING J and ROBERSON J

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Traffic offences—Driving with an excessive concentration of alcohol in the blood—Contravention of s 65(2)(a) of National Road Traffic Act 93 of 1996—Sentence—Suspension of driver's licence—Evidence must be led before court able to order that provisions of s 35(1) and (2) should not take effect.

LE ROUX v PIETERSE NO AND OTHERS (ECG)

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NAIDOO AND ANOTHER v DE FREITAS AND OTHERS (KZP)

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2012 OCTOBER 3, 9

Plea—Plea of guilty—Alteration of to one of not guilty in terms of s 113 of Criminal Procedure Act 51 of 1977—On appeal—Discrepancy between plea and statements made by accused in pre-sentencing reports indicating lack of intent—'Lighter test' required in amended s 113(1).

S v DLADLA AND ANOTHER (GSJ)

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2011 NOVEMBER 30

Rape—Sentence—Life imprisonment—Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997—'Substantial and compelling circumstances'—Young first

offenders involved in kidnapping and gang rape by eight men—Two appellants not assisting in bringing co-perpetrators to book—Sentence imposed appropriate.

S v SITHOLE (GNP)

FABRICIUS J and BAM AJ

2012 AUGUST 30; SEPTEMBER 21

Evidence—Certificate in terms of s 212(4) and (8) of Criminal Procedure Act 51 of 1977—Challenge to prima facie proof—Requirements—Not necessary for accused to state in detail basis for challenge—Sufficient for him to say he suspects samples have been tampered with.

S v KWATSHA (KZP)

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2012 JUNE 21; JULY 24

Fraud—Sentence—Accused, financial adviser at bank, convicted of 37 counts of fraud involving R6 million—Victims all vulnerable, poor people—Although first offender who pleaded guilty, accused sentenced to 15 years' imprisonment, as no substantial and compelling circumstances found to exist.