



## JUTA'S ADVANCE NOTIFICATION SERVICE

FEBRUARY 2017

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### JUDGMENTS OF INTEREST IN THE FEBRUARY EDITIONS OF THE SALR, THE SACR AND THE NAMIBIAN LAW REPORTS

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

##### **Power cable injuries**

The plaintiff suffered burns when he cycled into a low-hanging live power line under Eskom's control. He instituted a claim for damages against Eskom, relying on delict and product liability under the Consumer Protection Act. But the Act's purpose was to protect consumers, so there had to be a supplier/consumer relationship for strict liability to ensue. *Eskom Holdings Ltd v Halstead-Cleak* 2017 (1) SA 333 (SCA)

##### **Admission as attorney**

In his application for admission as an attorney, applicant disclosed that in 1994 he had committed a robbery, but that it had been for a political aim, and that he had applied for amnesty for it. Concerned about his explanation, the court had requested the applicant to supplement his papers, and had also asked the Cape Law Society to appear to give its view. The society had filed an affidavit endorsing the application but had not participated further in the proceedings. This had caused the court to request the Eastern Cape Society of Advocates to appear in its stead. *Ex parte Mdyogolo* 2017 (1) SA 432 (ECG)

##### **Costs in Road Accident Fund matters**

In a claim against the Road Accident Fund the court was presented with a draft order settling the merits of the action and postponing the issue of quantum sine die. The agreement provided that the RAF would be liable for costs to date, including the costs of counsel and (unidentified) medico-legal experts 'who assessed and filed medico-legal reports on behalf of the plaintiff'. The court condemned the practice of asking for costs before evidence on quantum had been heard. *Mbatha v Road Accident Fund* 2017 (1) SA 442 (GJ)

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

### **Restorative justice**

it is rare that a complainant in a rape case would motivate for a lenient sentence to be imposed on an accused in exchange for financial compensation. The sentence on a rape conviction was suspended on condition that the accused paid the victim R100 000 in instalments. But was restorative justice appropriate in rape cases? *S v Seedat* 2017 (1) SACR 141 (SCA)

### **Incompetent prosecution**

Although the appellant was arrested within a few hours of the rape, the trial only got under way a year later, and then dragged on with numerous prosecutors and defence representatives entering and exiting the case. Some of the postponements were totally unjustified and amounted to an abuse of process. The prosecution was conducted incompetently and amounted to dereliction of duty, leading to the acquittal of the appellant. Numerous aspects were not properly investigated, resulting in many unanswered questions. Those culpable ought to account to their superiors. *S v Steward* 2017 (1) SACR 156 (NCK)

### **Crimen injuria**

The appellant was charged with sexual assault in that he had slapped the buttocks of the female complainant and made sexual remarks to her. He was charged in the alternative with common assault. The magistrate convicted him of crimen injuria, holding that this was a competent verdict, as all the essential elements of the offence were included in the original charge against him. But the state had not given the appellant notice of its intention to rely on crimen injuria, by applying to have the charge-sheet amended. *S v Van Ieperen* 2017 (1) SACR 226 (WCC)

## ***THE NAMIBIAN LAW REPORTS***

### **No more delict for adultery**

The legal convictions of the community no longer found it reasonable to impose delictual liability on adultery. Whilst the changing societal norms were represented by a softening in the attitude towards adultery, the action was incompatible with the constitutional values of equality of men and women in marriage and rights to freedom and security of the person, privacy and freedom of association. *JS v LC and Another* 2016 (4) NR 939 (SC)

### **Cross-border arrest unlawful**

The appellant was arrested by Namibian agents on the territory of Botswana. That arrest amounted to the exercise of a sovereign act by Namibia in the territory of Botswana, and it mattered not that it was sanctioned by the Botswana authorities. The Namibian authorities unlawfully performed a sovereign act of arrest in violation of international law. *S v Munuma and Others* 2016 (4) NR 954 (SC)

**Mentally fit to stand trial?**

The accused was charged with murder and referred for a psychiatric enquiry into his mental state. The state challenged the findings of the state psychiatrist who found the accused was not fit to stand trial due to a neurocognitive disorder. After reviewing further psychiatric reports, the court found that he was capable of understanding the proceedings so as to make a proper defence, and also capable of appreciating the wrongfulness of his acts, and acted in accordance with an appreciation of the wrongfulness of his actions. *S v Thomas and Another* 2016 (4) NR 1154 (HC)

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Kind Regards

**The Juta Law Reports Team**

## **SOUTH AFRICAN LAW REPORTS**

### **FEBRUARY 2017**

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### **ESKOM HOLDINGS LTD v HALSTEAD-CLEAK (SCA)**

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2016 AUGUST 12, 31  
[2016] NAHCMD 35

**Labour law**—Remuneration—State-owned enterprise—Salary and increments of CEO must be determined by board of state-owned enterprise subject to minister's concurrence—Requirement of provisions of Vocational Education and Training Act 1 of 2008, s 23(a) and State-owned Enterprises Governance Act 2 of 2006, s 22(3)—Provisions not in conflict with ch 3 of Labour Act 11 of 2007—Absence of minister's concurrence cannot be cured by reliance on estoppel—Appeal upheld.

**S v VAN ZYL AND OTHERS (HC)**

HOFF J and SHIVUTE J  
2015 MAY 18; 2016 SEPTEMBER 5  
[2016] NAHCMD 246

**Criminal procedure**—Evidence—Witness—Evidence of witnesses must be viva voce—Criminal Procedure Act 51 of 1977, s 161(1)—Improper and alien procedure in criminal trials for witnesses handing in document representing his or her evidence—Magistrate allowing documents abrogating her duty.

**School and school board**—Corporal punishment—Infliction of corporal punishment in private schools—Corporal punishment prohibited by s 56(1) of Education Act 16 of 2001—Prohibition applicable to all schools—Legislature intended altering common-law position in respect of corporal punishment administered by teachers in any school—Bodily infringements normally unlawful—Consent to bodily injury contra bonos mores—Education Act 16 of 2001, s 82.

**Statute**—Interpretation—Education Act 16 of 2001, ss 56(1), (2) and 82—Words should be given ordinary grammatical meaning—Section 56(2) enacted to cover conduct of teachers employed by private schools—Wording of s 82 clear and unambiguous—Act applicable to all schools—Different interpretation leading to absurdity that learners enrolled at state schools protected against invasive punishment and those enrolled at private schools not.

**Criminal law**—Assault—Mens rea—Knowledge of unlawfulness—Onus on state of proving teachers knew law forbade corporal punishment and knew such punishment constituted crime—Where accused unaware of unlawfulness of his or her conduct such unawareness excluded required intention.

**TM-S v NAMIBIA ESTATE AGENTS BOARD AND ANOTHER (SC)**

SHIVUTE CJ, DAMASEB DCJ and CHOMBA AJA  
2016 JUNE 15; SEPTEMBER 16

**Labour law**—Costs—Personal civil liability for costs in terms of s 134 of Labour Act 11 of 2007—Party seeking cost order against arbitrator in terms of s 134 required to plead section relied upon, to disclose cause of action giving rise to civil liability, to plead nature of harm or loss and facts showing arbitrator failed to act in good faith.

**MINISTER OF FINANCE v MERLUS SEAFOOD PROCESSORS (PTY) LTD (SC)**

MARITZ JA, MAINGA JA and MTAMBANENGWE AJA  
2013 JUNE 7; 2016 SEPTEMBER 30

**Administrative law**—Administrative action—What constitutes—Minister’s refusal to grant manufacturing status to respondent pursuant to s 5A of Income Tax Act 24 of 1981 constituted administrative action—Minister and not court vested with power to make decision—Review of minister’s decision abandoned—Decision remained live—Declaratory order that respondent conducted manufacturing activities dependant on granting of review relief and could not co-exist—Appeal succeeded.

**WYSS AND ANOTHER NO v HUNGAMO AND OTHERS (HC)**

ANGULA DJP  
2016 JUNE 8; SEPTEMBER 13  
[2016] NAHCMD 264

**Land**—Agricultural land—Close Corporation owner of agricultural land—Association agreement with foreign national member granting him dwelling and hunting rights for indefinite period—Members prohibited in terms of s 58 of Land Reform Act 6 of 1995 from concluding such agreement without prior approval of minister—No prior approval obtained—Association agreement null and void.

**Constitutional law**—Legislation—Constitutionality of—Close Corporations Act 26 of 1988, s 35—No violation of deceased’s rights under art 16 of Constitution during his lifetime proved—Deceased estate not legal person and neither it nor executor had constitutional rights under art 16—Section 35 not unconstitutional.

**Administration of estates**—Executor—Estate assets—Vesting of ownership of assets in executor—Sole purpose of vesting—Winding up and distributing estate assets to beneficiaries—Executor’s right in respect of estate’s property merely possessory and temporary and not exclusive as envisaged in art 16 of Constitution—Executor had no obligation or legal right of transferring specific property to ab intestatio heir—Executor had duty of realising estate and of distributing residue to heirs—Intestate heir not vested with dominium of member’s interest in close corporation—Intestate heir acquired a personal right against executor for transfer of right or equivalent value thereof.

**CHINA HARBOUR ENGINEERING CO LTD v ERONGO QUARRY AND CIVIL WORKS (PTY) LTD AND ANOTHER (HC)**

UEITELE J  
2016 JANUARY 20; FEBRUARY 2, 10  
[2015] NAHCMD 18

**Spoilation**—Mandament van spolie—When available—Applicant must prove peaceful and undisturbed de facto possession at time of deprivation of possession—Applicant had right of access and use of quarry site and equipment—Applicant was physically present at quarry and had physical control over equipment on site—Respondent abruptly deprived applicant of such rights—Respondent not at liberty to take law into own hands—Order granted.

**ANHUI FOREIGN ECONOMIC CONSTRUCTION (GROUP) CORP LTD v MINISTER OF WORKS AND TRANSPORT AND OTHERS (HC)**

UEITELE J

2016 FEBRUARY 10; APRIL 21; SEPTEMBER 9

[2016] NAHCMD 265

**Administrative law**—Decisions of functionary—Legality of—Minister of Works and Transport exercising power in terms of s 9(1)(b) of Airports Company Act 25 of 1998—Jurisdictional facts prescribed by s 9(1) and (5) necessary prerequisite for exercising such power—Jurisdictional facts absent—Exercise of power in terms of s 9(1)(b) invalid.

**Administrative law**—Decisions of functionary—Legality of—Minister of Works and Transport vested with discretionary power of giving directions in terms of s 9 of Airports Company Act 25 of 1998—Minister acting on instructions of President—President usurping power of minister—Failure of minister of acting according to law constituting contravention of principle of legality—Minister's decision set aside.

**S v KAMBINDU (HC)**

SIBOLEKA J and USIKU J

2016 AUGUST 5; SEPTEMBER 9

[2016] NAHCMD 256

**Criminal law**—Theft—Sentence—Minimum sentence—Motor Vehicle Theft Act 12 of 1999 as amended—First offender convicted of motor vehicle theft where commission of offence involved violence or threat of violence using firearm—Prescribed minimum imprisonment for period not less than 30 years without option of fine—Four years' imprisonment sentence substituted with 30 years' imprisonment without option of fine.

**HAILULU v DIRECTOR, ANTI-CORRUPTION COMMISSION AND OTHERS (SC)**

MAINGA JA, O'REGAN AJA and MOKGORO AJA

2016 APRIL 4; OCTOBER 6

**Statute**—Interpretation—Anti-Corruption Act 8 of 2003, ss 18(1)(b) and 18(2) —Commission 'must' do as stipulated by peremptory provisions of s 18(1) and 'may' do as stipulated in permissive provisions of s 18(2)—Decision in terms of s 18(1)(b) taken before investigation commenced—Subsection 18(2) not obliging commission to consider all factors listed in section in every case—Test remained whether 'an investigation in relation to the allegation is warranted on reasonable grounds'—Reasonable grounds existed—Appeal dismissed.

**MAKANDO v DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS AND OTHERS (SC)**

CHOMBA AJA, O'REGAN AJA and MOKGORO AJA

2016 APRIL 7; OCTOBER 6

**Constitutional law**—Constitution—Purpose of art 18—Providing protection to public—Aggrieved person has recourse to court—Statutory functions performed in public interest—Disciplinary Committee established by s 34 of Legal Practitioners Act 15 of 1995—Administrative body within meaning of art 18—Ensuring fair and transparent process for investigating and determining complaints against legal practitioners—Committee's functions disciplinary and attracting duty of acting fairly, reasonably and lawfully.

**Legal practitioner**—Misconduct—Disciplinary procedure—Institutional bias—Section 35 procedure enhancing public confidence in profession by providing fair procedure for handling of complaints against legal practitioners—Procedure taking care of protecting interests of both public and legal practitioner—Informed observer would not entertain reasonable apprehension of bias in relation to proceedings of Disciplinary Committee—Legal Practitioners Act 15 of 1995, s 35.

**Legal practitioner**—Misconduct—Disciplinary procedure—Court's jurisdiction—High Court and Supreme Court have inherent jurisdiction of supervising legal profession in public interest—Court's authority for making appropriate order in terms of its inherent jurisdiction not dependent on standing of applicant in court a quo.

**S v THOMAS AND ANOTHER (HC)**

LIEBENBERG J

2016 JULY 28–29; AUGUST 29; OCTOBER 3, 19

[2016] NAHCMD 320

**Criminal procedure**—Mental state of accused—Enquiry in terms of s 77(1) and s 78(2) of Criminal Procedure Act 51 of 1977—Section 79(1)(b) invoked—No prescribed procedure in Act for manner or duration of enquiry—Manner and duration of enquiry within discretion of psychiatrist—Psychiatrist opinion based on own observations assisted by psychologist report and that of supporting staff—Objection to admissibility of psychologist report dismissed—Report relevant to psychiatrist's evidence.

**Criminal procedure**—Mental state of accused—Criminal capacity—Law presumed accused of sound mental health—Onus on accused of showing otherwise—Accused failing to adduce evidence or invoking provisions of s 79(1)(b)(iii) of Criminal Procedure Act 51 of 1977—Accused fit to stand trial, capable of appreciating wrongfulness of his actions and of acting in accordance with appreciation of wrongfulness thereof.

**MEGA POWER CENTRE CC t/a TALISMAN PLANT AND TOOL HIRE v TALISMAN FRANCHISE OPERATIONS (PTY) LTD AND OTHERS (HC)**

UEITELE J

2016 MARCH 14; OCTOBER 28

[2016] NAHCMD 329

**Intellectual property**—Passing-off—What constitutes—Reputation associated with name 'Talisman'—Applicant had onus of proving 'Talisman' distinctive of applicant's goods and services, that descriptive word 'Talisman' was associated by public with applicant's business only and that respondent's use of 'Talisman' was calculated to deceive public—Words 'Talisman' and 'Hire' not fancy or inventive—Words commonly used in English language—Applicant failing to adduce evidence to discharge onus—Application dismissed.

**WESTCOAST FISHING PROPERTIES v GENDEV FISH PROCESSORS LTD AND ANOTHER (SC)**

DAMASEB DCJ, HOFF AJA and O'REGAN AJA

2015 NOVEMBER 3; 2016 NOVEMBER 4

**Arbitration**—Arbitration agreement—Private arbitration—Misrepresentation by person representing appellant—Person not admitted legal practitioner—Fundamental distinction between court and private arbitration proceedings—Private arbitration consensual private process—Appellant represented by duly admitted advocates in arbitration—Proceedings fair—Appellant not prejudiced by charlatan's conduct—Arbitration agreement, proceedings and award not null and void—Appeal dismissed.

**KJ v CJ (HC)**

VAN WYK AJ

2016 JULY 8; OCTOBER 28

[2016] NAHCMD 331

**Marriage**—Divorce—Foreign divorce order—Order determining status of parties—Foreign divorce order not required to be made order of court in Namibia—Order would serve no purpose.

**Marriage**—Divorce—Proprietary rights—Foreign divorce order obtained in America inclusive of award of specific matrimonial assets situated in America—Division of matrimonial estate linked to dissolution of marriage—Selection of property claimed on dissolution—Proprietary claims res judicata—Party could not subsequently claim division of joint estate—Exceptions upheld.