



JUTA'S ADVANCE NOTIFICATION SERVICE

AUGUST 2020

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JUDGMENTS OF INTEREST IN THE AUGUST 2020 EDITIONS OF THE SALR, SACR AND THE NAMIBIAN LAW REPORTS 2020(2).

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SOUTH AFRICAN LAW REPORTS

Bodies corporate: Review of decisions with effect on external parties

A decision of a body corporate that has a direct effect on an external third party constitutes administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 and is reviewable as such. So ruled Bozalek J in a judgment dealing with a body corporate's decision to direct a unit-owner to find a new letting agent for his unit, ostensibly on the ground that Airbnb guests sourced by the current one, BAE Estates and Escapes, were breaking the body corporate's rules. The judge granted BAE's application for the review of the body corporate's decision on the ground that the decision had a direct harmful effect on it as an external party. Bozalek J agreed with BAE and set aside the body corporate's decision, pointing out that it was not even preceded by a basic investigation and then made without affording BAE or the owner a hearing. *BAE Estates and Escapes (Pty) Ltd v Trustees, The Legacy Body Corporate and Another* 2020 (4) SA 514 (WCC)

Financial institution and Fica: freezing of client's account prohibited in certain cases

A financial institution like a bank cannot freeze, or restrict a client's access to, an account because the client did not satisfactorily identify itself or its stakeholders on demand. The Financial Intelligence Centre Act 38 of 2001 (Fica) makes it possible for financial institutions to obtain the relevant documentation or information from other sources, for example the Companies and Intellectual Property Commission (CIPC), the Master of the High Court or the Department of Home Affairs. The view that, under Fica, a financial institution can demand from clients that they provide verification documents is, not justified. *Houtbosplaas (Pty) Ltd v Nedbank Ltd* 2020 (4) SA 560 (GP)

SA Express: business rescue or liquidate?

Ziegler, an unpaid creditor of SA Express, an ailing state-owned airline, made an urgent application in the Johannesburg High Court, asking it to place the airline in business rescue. The opposition came from the airline itself, which disputed urgency, requesting that the matter be scrapped from the roll. It also said that it would be saved by a government cash injection in 2020/21. The court, accepting Ziegler's evidence that the airline would become profitable if properly managed and that business rescue would yield a better return for creditors than immediate liquidation, granted Ziegler's application. The court accordingly made an order placing SA Express under supervision pending the commencement of business rescue proceedings. *Ziegler South Africa (Pty) Ltd v South African Express SOC Ltd and Others* 2020 (4) SA 626 (GJ)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Non-custodial sentence for elderly participant in large-scale enterprise of fraudulent VAT claims

A large-scale enterprise concerning fraudulent VAT claims was perpetrated by a father and son amounting to R60 million in wrongful refunds over period of more than six years. The father, 68-year-old first offender, who played a lesser role in enterprise, showed remorse and was not in the best of health, was given a non-custodial sentence. The son, however, who did not disclose his full involvement in the enterprise and delayed the trial unnecessarily, was sentenced to an effective term of 15 years' imprisonment. *S v Delport and Others* 2020 (2) SACR 179 (FB)

Enquiry into fitness to possess firearm to be held on each occasion convicted and imposition of globular sentences only in exceptional circumstances

The accused was convicted in a magistrates' court on single counts of theft, malicious damage to property and trespassing in contravention of s 1(1)(a) Trespass Act 6 of 1959. A globular sentence of three years' imprisonment was imposed but no enquiry was conducted into his fitness to possess a firearm since he had been declared unfit to do so in a previous matter. In remitting the matter for sentencing afresh, the reviewing judge noted that, although the imposition of globular sentences was to be reserved for exceptional circumstances, the mere practice thereof was not a misdirection per se warranting interference. The sentence was, however, a nullity for exceeding the maximum period prescribed by the Trespass Act. Further, there was no provision in the Firearms Control Act 60 of 2000 excusing a court from holding an inquiry into an accused's fitness to possess a firearm on each occasion convicted, and such should have been done in the instant matter. *S v Thobela* 2020 (2) SACR 222 (GJ)

Custodial sentence imposed for contravention of Electronic Communications and Transactions Act 25 of 2002

The appellant unlawfully accessed his former employer's national cellular network, causing data to be destroyed or otherwise rendered ineffective. He was subsequently convicted in the Specialised Commercial Crimes Court of two counts of contravening s 86 of the Electronic Communications and Transactions Act 25 of 2002. Although the trial in the SCCC was still proceeding when the Superior Courts Act 10 of 2013 replaced its predecessor, and leave to appeal was therefore granted in error to the Supreme Court of Appeal, the president of the SCA consented to the matter proceeding as an application for special leave to appeal. This application was nevertheless dismissed, with the SCA emphasising, in respect of the sentences of three years' imprisonment and a fine, respectively, the severity of the offences and the widespread consequences caused by the invasion of privacy of the clients. *S v Salzmann* 2020 (2) SACR 200 (SCA)

THE NAMIBIAN LAW REPORTS

Drug offences—whether mens rea an element of this offence

Accused was convicted in a magistrate's court of the possession of three parcels of cannabis valued at N\$150. He pleaded guilty but on questioning claimed that he was unaware that the blanket in which the cannabis was found, contained the prohibited substance. The review court held that it was clear that animus by the accused to possess the cannabis was lacking, and furthermore, that mens rea was indeed an element of the offence. If the accused was unaware of the cannabis hidden in the blanket as he said, he then could not have been convicted on the strength of the other admissions he made when questioned by the court. *S v Hanse* 2020 (2) NR 499 (HC)

Local authority cutting water supply to a place of business in terms of its credit and debtor control policy

On the return day of a spoliation order granted against a local authority for the cutting off of the water supply to the applicant, the respondents contended that the suspension of the supply was lawful in terms of its credit and debtor control policy, a policy which it alleged formed part of the municipal by-laws established in terms of the Local Authorities Act 23 of 1992. The court held that a policy by a public authority was not law: it was not subordinate or subsidiary legislation and was not a regulation within the meaning of s 94 of the Local Authorities Act. The power of a public authority to act had to be traceable to an enabling Act or subordinated or delegated legislation made under such Act. The exercise of public power in the present case was accordingly unlawful and invalid. *Theron v Village Council of Stampriet and Another* 2020 (2) NR 524 (HC)

The application of the *res ipsa loquitur* rule in an action for damages arising from a motor vehicle accident

The appellant instituted action in the High Court against the three respondents for damages arising from a motor vehicle collision in which her BMW vehicle, stationary at traffic lights, was hit in its rear by the third respondent's Mercedes Benz, which had been propelled forward by the impact of the minibus driven by the first respondent, which had collided with the rear of the Mercedes Benz. The court a quo held on an application of the *res ipsa loquitur* rule that the third respondent, whose Mercedes Benz was stationary behind the BMW of which the brake pedal was pressed, should have changed lanes. The court found that he had been negligent and that his negligence had been the cause of the collision and that he did nothing to prevent the Mercedes Benz from colliding with the rear-end of the BMW. The Supreme Court held that the court a quo misdirected itself in expecting or requiring the third respondent (cross-appellant) to have taken steps in order to avoid the minibus colliding with the rear of his vehicle. The court should accordingly have found that the first respondent had failed to satisfactorily explain his conduct and thus failed to discharge the evidential burden on him created by the presumption of *res ipsa loquitur*. *Dausab v Hedimund and Others* 2020 (2) NR 558 (SC)

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PROSECUTOR-GENERAL v OMBUDSMAN AND ANOTHER (HC)

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2019 AUGUST 13; 2020 MARCH 26

Criminal procedure—Accused—Legal representation—By Ombudsman—In matter alleging violation of constitutional right—Accused however not having filed application in terms of art 25(2) of Constitution and Ombudsman therefore could not come to his assistance.

Criminal procedure—Accused—Legal representation—By Ombudsman—In matter alleging violation of constitutional right—Ombudsman prohibited by Ombudsman Act 7 of 1990 from enquiring into decision in civil or criminal case by court of law and restricted by art 91 of Constitution.

MINISTER OF SAFETY AND SECURITY AND OTHERS v CHUNGA (SC)

SHIVUTE CJ, MOKGORO AJA and NKABINDE AJA

2019 OCTOBER 1; 2020 MAY 7

Delict—Malicious prosecution—Continuing malicious prosecution—Requirements for proof of—That prosecution instituted without reasonable and probable cause—Distinction between civil and criminal standards of proof important—Information before prosecutorial team not merely evidence given in court during trial but also information contained in witness statements.

MAHUPELO v MINISTER OF SAFETY AND SECURITY AND OTHERS (HC)

NDAUENDAPO J

2019 SEPTEMBER 9–11; 2020 MAY 6

Delict—Maicious prosecution—Continuing malicious prosecution—Constitutional damages—Proof of—Plaintiff held in custody for 13 years pending and during trial—Plaintiff having failed to assert rights to apply for bail; make application for order that unreasonable delay in finalising his trial infringed his constitutional right to fair trial under art 12 of Constitution; and had failed to apply to have trial separated as provided for by s 157 of Criminal Procedure Act 51 of 1977—From proper reading of art 25(3) and (4) of Constitution, only when infringement of rights and freedoms were unlawful could court award monetary compensation—Infringements not unlawful in circumstances and requirements of art 25(3) and (4) not met.

KANDANDO v MEDICAL AND DENTAL COUNCIL OF NAMIBIA AND ANOTHER (SC)

DAMASEB DCJ, MAINGA JA and FRANK AJA

2020 MARCH 31; MAY 7

Appeal—To Supreme Court—Prosecution of—Time limits—Flagrant breaches of rules—Whether condonation ought to be granted—Applicant not coming close to compliance with rules—Court nonetheless considering prospects of success—Supreme Court Rules, rules 7(1), 14(2), 14(3)(a), 14(3)(b).

PERMANENT SECRETARY IN THE MINISTRY OF FINANCE AND OTHERS v OLGN FINANCE CC (SC)

MARITZ JA, CHOMBA AJA and GIBSON AJA

2006 OCTOBER 4; 2020 MAY 7

Administrative law—Administrative action—What constitutes—Revocation by Ministry of Finance of registration as microlender and payroll debit order facility—Such constituting administrative actions.

Review—Generally—Effect of opportunistic conduct by applicant—Such conduct severable in instant case from issue of whether application for review brought within reasonable time.

S v PIENAAR (HC)

LIEBENBERG J and SIBEYA AJ

2020 JANUARY 20; MAY 11

Criminal procedure—Evidence—Identification—Dock identification—To be treated with caution but sufficient safeguards where witnesses had ample opportunity to observe accused during commission of offences and were able to point out distinguishing features.

Criminal procedure—Sentence—Generally—Accused acknowledging offences during plea in mitigation but recanting in appeal—Effect of.

S v HANSE (HC)

LIEBENBERG J and SIBEYA AJ

2020 MARCH 20

Criminal law—Drug offences—Dagga—Possession of in contravention of s 2(b) of Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971—Proof of—Mens rea element of offence.

EMPLOYEES OF SWAKOPMUND URANIUM v SWAKOP URANIUM (HC)

PRINSLOO J

2020 FEBRUARY 26; MAY 5

Court—Jurisdiction—Labour Court—Concurrent jurisdiction of High Court—Effect of 12-month bar in Labour Act 11 of 2007, s 86(2)(b).

Court—Jurisdiction—Labour Court—Forum shopping—What constitutes—Concurrent jurisdiction of High Court—Effect of 12-month bar in Labour Act 11 of 2007, s 86(2)(b).

Prescription—Extinctive prescription—Labour claims—Forum shopping—Effect of 12-month bar in Labour Act 11 of 2007, s 86(2)(b).

TEACHERS UNION OF NAMIBIA v NAMIBIA NATIONAL TEACHERS UNION AND OTHERS (SC)

SHIVUTE CJ, SMUTS JA and HOFF JA

2020 MARCH 24; MAY 7

Contempt of court—Compliance with court orders—Proof of contempt—Matter decided on affidavits—Respondents' version not clearly untenable or so far-fetched that it could be rejected on papers alone—Contempt not proved.

THERON v VILLAGE COUNCIL OF STAMPRIET AND ANOTHER (HC)

PARKER AJ

2020 MARCH 10; APRIL 2

Spoliation—Mandament van spolie—When available—Cutting off of water supply—Local authority relying on provisions of credit and debtor control policy purportedly made under s 36 of Local Authorities Act 23 of 1992—Action taken not traceable to any law and policy by public authority not law—Applicant entitled to spoliation order.

Costs—Scale of costs—Punitive award—When made—Applicant obtaining spoliation order restoring water supply by local authority but had unlawfully and unreasonably refused to settle utility bills but had rather settled them with water corporation—Applicant not entitled to punitive costs order.

ST JOHN'S APOSTOLIC FAITH MISSION CHURCH v BUSINESS AND INTELLECTUAL PROPERTY AUTHORITY AND ANOTHER (HC)

MASUKU J

2019 AUGUST 19; 2020 MAY 7

Company—Formation and constitution—Name—'Undesirable' name—What constitutes—Substantial similarity—Churches having almost identical name with merely addition of word 'Church' at end of name—Companies Act 28 of 2004, ss 50, 51(1), 52(1)(a).

Practice—Applications and motions—Interlocutory application—Striking out—Procedural requirements of rule 32(9) and (10) of High Court Rules—Where parties had breached requirements and party accused of breach had achieved substantial compliance, no room for application of rule 32(9) and (10).

UNISTRAT PROPERTY DEVELOPMENT FIVE SEVEN TWO SEVEN (PTY) LTD v CHAIRPERSON OF THE COUNCIL FOR THE MUNICIPALITY OF WINDHOEK AND OTHERS (HC)

ANGULA DJP

2019 OCTOBER 22; 2020 MAY 6

Practice—Parties—Locus standi—Joint venture—JV was unincorporated entity at time of awarding of contract to it—Neither applicant nor members of JV complying with statutory requirements of s 42 of Companies Act 28 of 2004—Members of JV contracting with respondent in their own right and no nexus between applicant and members of JV—JV not common law promotor of contract for benefit of third party—Applicant lacking locus standi to challenge cancellation of award.

BANK WINDHOEK LTD v GARISEB AND ANOTHER (HC)

ANGULA DJP

2019 OCTOBER 23; 2020 MAY 13

Execution—Sale in execution—Immovable property—Application for order declaring property executable—Court’s discretion—No likelihood that respondents would be able to repay debt in light of default over lengthy period—Property declared executable—High Court Rules, rule 108(1)(b).

DAUSAB v HEDIMUND AND OTHERS (SC)

DAMASEB DCJ, MAINGA JA and ANGULA AJA

2019 NOVEMBER 8; 2020 MAY 7

Motor vehicle accident—Negligence—Proof—Res ipsa loquitur—Application of in rear end motor vehicle collision.

S v NOWASEB (HC)

SHIVUTE J and LIEBENBERG J

2019 NOVEMBER 4; 2020 MARCH 6

Criminal procedure—Accused—Legal representation—Accused convicted and sentenced for rape—Court proceeded with trial in absence of accused’s legal representative and despite protestations that accused could not continue without contents of police docket—Least that court could have done would be to order that docket be made available to accused and matter be postponed for final postponement—Serious misdirection vitiating trial.

OHORONGO CEMENT (PTY) LTD v JACK’S TRADING CC AND OTHERS AND A SIMILAR MATTER (SC)

SHIVUTE CJ, MARITZ JA and MAINGA JA

2013 JULY 9; 2020 MAY 20

Practice—Parties—Joinder—When joinder required—Party necessary and interested party—Application for joinder made before settlement agreement—Necessary for High Court to have heard and determined application to intervene before settlement agreement made order of court.

Court—Supreme Court—Referral to by Attorney-General in terms of art 79(2) of Constitution—Matter referred in terms of settlement agreement to which Attorney-General had not been party—Not given that Supreme Court would accept such referral—Fact that matter raised constitutional questions not on its own warranting Supreme Court to hear matter.

Revenue—Customs and excise—Commissioner—Powers of—Commissioner not empowered to grant blanket deferment for indefinite period in terms of s 41(2) of Customs and Excise Act 20 of 1998.

Revenue—Customs and excise—New duty or increase in rate of duty payable—Powers of Minister of

FISCHER v SEELENBINDER AND ANOTHER (SC)

SHIVUTE CJ, FRANK AJA and NKABINDE AJA

2020 MARCH 12; JUNE 8

Spoliation—Mandament van spolie—When available—Even if applicant exercised only precarious right of possession, still entitled to bring mandament van spolie.

Spoliation—Mandament van spolie—When available—Question whether applicant continued to possess premises not dependent on right to possess he thought he had, but on whether he exercised necessary direct physical control over premises.

Costs—Attorney and client costs—Spoliation proceedings—Punitive costs not ‘traditionally’ ordered.