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OCTOBER 2020

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JUDGMENTS OF INTEREST IN THE OCTOBER 2020 EDITIONS OF THE *SALR* and, *SACR. SEE* ALSO, FURTHER BELOW, THE TABLE OF CASES FOR *THE BOTSWANA LAW REPORTS* 2018 (2).

Click on the case name to download the original judgment.

SOUTH AFRICAN LAW REPORTS

Unlawful competition: Interdicting an injurious falsehood from a competitor
In Nativa (Pty) Ltd v Austell Laboratories 2020 (5) SA 452 (SCA) a High Court had dismissed Nativa's application for an interdict prohibiting Austell from flighting an ad claiming that Nativa's OsteoEze joint care products contained ingredients that were harmful to those with high blood pressure, diabetes and asthma. The ad, which pomoted Austell's rival Piascledene supplement, had a picture of OsteoEze and 'health risk' warning. The picture was later blurred so that the OsteoEze name was no longer 'clearly and readily identifiable', as the High Court put it. The High Court dismissed the application on the grounds the ad no longer contained a direct or indirect reference to OsteoEze, the expert evidence on the risk posed by its ingredients was inconclusive, and because it was impossible to attribute disparaging comments to the respondent.

In an appeal the Supreme Court of Appeal reversed this ruling. It found that the thrust of Austell's ad—that the OsteoEze ingredients were harmful—was false, and that it had influenced people to choose Piascledine over OsteoEze. In addition, viewers would not have picked up on the difference between the original ad and the blurred one, it being probable that they would associate both with Austell's product. The SCA reiterated that fault was not a requirement for injurious falsehood: falsehood and injury were sufficient. The SCA, having concluded that the requirements for an interdict were satisfied, upheld the appeal and granted the interdict. *Nativa (Pty) Ltd v Austell Laboratories* 2020 (5) SA 452 (SCA)

Corona Extra: Government's decision to move from level 4 to revel 3 pronounced lawful
The One South Africa movement, alter ego of veteran politician Mr Mmusi Maimane, went to the Pretoria High Court to seek the annulment of the government's decision to relax the Covid-19 lockdown restrictions from level 4 to level 3, claiming that in so doing it violated citizens' right to life. In *One South Africa Movement and Another v President of the RSA and Others* 2020 (5) SA 577 (GP) the Pretoria Court disagreed, ruling that saying so did not make it so. The government had made a difficult choice taking multiple factors, including the economic effect of a strict lockdown, into account. There were several options open to the government, and its decision to move to level 3 was not unreasonable or irrational given the need to reopen the economy. The same went for its decision to selectively reopen schools, where it had to balance the risk the disease posed to children against their right to education. *One South Africa Movement and Another v President of the RSA and Others* 2020 (5) SA 577 (GP)

Is it okay for an independent school invoke a cancellation clause to kick out kids for having a disruptive dad? The law according to the Constitutional Court
It's not okay without giving parents and children a hearing. See *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC).

SOUTH AFRICAN CRIMINAL LAW REPORTS

Medical practitioners not entitled to receive special treatment by virtue of their profession

The applicant, an obstetrician and gynaecologist, was convicted in a regional court of culpable homicide arising from professional negligence. He was sentenced to five years' imprisonment. After the High Court and Supreme Court of Appeal refused leave to appeal against the conviction and sentence, he approached the Constitutional Court for same. He contended that his fair-trial rights had been infringed and that his sentence was shockingly inappropriate. The latter on the basis that doctors played a special role in providing access to healthcare services and should not be treated in the same way, for example, as a negligent driver causing someone's death. The court rejected this contention and refused leave to appeal against sentence. As to the conviction, the court held that the late pronouncement on the admissibility of certain evidence and reliance by the court on textbook evidence not produced in evidence during the trial, were constitutionally-impermissible irregularities vitiating the trial, and set it aside. *S v Van der Walt* 2020 (2) SACR 371 (CC)

Conviction of co-perpetrator not prerequisite for imposition of life imprisonment in case of multiple rape

A sentence of life imprisonment was imposed on the appellant for rape in a matter where his companion, who had also raped the complainant, had not been arrested and convicted. The appellant questioned the applicability in the circumstances of the minimum-sentencing provisions concerning multiple rape as contemplated in item *(a)*(i) of part I of sch 2 to the Criminal Law Amendment Act 105 of 1997. The court on appeal, both distinguishing and criticising the decision in *S v Mahlase* [2013] ZASCA 191, held that it was immaterial, for the purposes of sentencing one of the persons who had the raped victim, whether a co-perpetrator had been convicted. *S v Mahlase* 2020 (2) SACR 384 (KZP)

General rule with respect to sentencing in case of first offender convicted of culpable homicide flowing from negligent driving

The appellant was found to be grossly negligent in running over person at a pedestrian crossing and convicted of culpable homicide. He was a first offender who showed true remorse and was sentenced to three years' imprisonment. The option of correctional supervision was not considered. The court held that for many years it had been accepted, though not as an inflexible rule, that in the absence of a high degree of negligence, an unsuspended sentence of imprisonment, without the option of a fine, should not be imposed on first offenders. The matter was remitted to the magistrate for reconsideration of the sentence. *S v Mlanga* 2020 (2) SACR 416 (ECG)

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