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JANUARY 2021

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JUDGMENTS OF INTEREST IN THE JANUARY 2021 EDITIONS OF THE *SALR* and, *SACR. SEE* ALSO, FURTHER BELOW, THE TABLE OF CASES FOR *THE BOTSWANA LAW REPORTS* 2018 (3).

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SOUTH AFRICAN LAW REPORTS

***Van Meyeren v Cloete* redux: no authority for defence of third-party negligence to pauperien claim**

Having escaped after intruders broke the lock on front gate, appellant's his dogs injured a respondent. Can appellant defeat respondent's pauperien claim with a defence negligent conduct by a non-custodian outsider (the intruders)? In *Lever v Purdy* 1993 (3) SA 17 (A) the court allowed Lever, a dog owner, to escape liability where the negligence of a man who was looking after his property, had resulted in the Purdy being bitten.

In *Van Meyeren v Cloete* 2021 (1) SA 59 (SCA) the Supreme Court of Appeal, after an extensive analysis of the common law, concluded that there was no clear authority for such a defence and that it was not in the interest of justice to develop the common law to allow such a defence where the negligent intermediary did not have custody of the animal. The SCA pointed out that the ratio for the *actio de pauperie* was that it was appropriate for the owner to bear responsibility for the harm caused to an innocent person by its animal, and that, pauperien liability being strict, absence of fault on the part of the owner has never been a basis for avoiding it. The owner was exonerated only where the victim had provoked the animal or where a third party had negligently failed to control and animal *in their custody and control*. The court ruled that whatever the anthropomorphic concepts underpin pauperien liability, the reality is that animals can cause harm to people and property in various ways. When they do so and the victim of their actions is innocent of fault for the harm they have caused, the interests of justice require that as between the owner and the injured party it is the owner who should be held liable for that harm. People were entitled to walk our streets without having to fear being attacked by dogs and, where such attacks occur, they should in most circumstances be able to look to the owner of the dog for recompense. The SCA accordingly dismissed Van Meyeren's appeal.

Special needs school refused to readmit addicted child with foetal alcohol syndrome until she was 'cured'—Okay?

Not okay, said Judge Mathbula of the Free State Division, Bloemfontein in *Cassim NO v MEC, Deportment of Social Development, Free State and Others* 2021 (1) SA 184 (FS). He pointed out that the school's argument that it lacked specialists to properly deal with her and that she would put other learners at risk, and would therefore not admit her behaviour improved (she stopped using snuff and alcohol), was untenable. The judge accordingly granted an application by her *curator ad litem* to compel the school to accept her.

Unfair dismissal on the basis of disability—what about misconduct brought about by depression?
In *Legal Aid South Africa v Jansen* 2021 (1) SA 245 (LAC) the Labour Appeal Court was confronted by an appeal by an employer who had fired a worker whose admitted misconduct was caused by depression. The court a quo had found the dismissal to have been automatically unfair and ordered reinstatement. The LAC ruled that the worker, Mr Jansen, had failed to show that his conduct was caused by his depression or that he was dismissed for being depressed. The court therefore upheld the employer's appeal.

SOUTH AFRICAN CRIMINAL LAW REPORTS

Municipal councillor imprisoned for assaulting fellow councillor while council in session
Municipal councillor and leader of the ANC in the Nelson Mandela Bay Municipality Council was convicted of assault with intent to do grievous bodily harm for hitting the complainant, a DA councillor, over the head with a glass jug filled with water, causing serious injury. A sentence of three years' imprisonment, of which one year was suspended, was confirmed on appeal. *S v Lungisa* 2021 (1) SACR 1 (SCA)

Search-and-seizure powers under s 13(7)*(c)* of South African Police Service Act 68 of 1995, violating right to privacy and unconstitutional
The police cordoned off areas of the Johannesburg inner city and conducted warrantless searches in 11 buildings occupied by some 3000 people. Authorisations were granted by various police commissioners in terms of s 13(7) of the South African Police Services Act 68 of 1995. The applicants challenged both the validity of the authorisations and constitutionally of the provision. The court found that the powers granted under s 13(7)*(c)* to be overbroad, less restrictive measures existing to achieve the purpose in s 22 of the Criminal Procedure Act 51 of 1977, and the provision unconstitutional. The authorisations themselves were driven by purposes other than 'the public order', appeared to have been simply rubber-stamped, and were reviewed and set aside. *Residents, Industry House v Minister of Police and Others* 2021 (1) SACR 66 (GJ)

Court addressing difficulties presented by court a quo combining offences in verdict
The appellant was charged with two counts: housebreaking with the intent to commit an offence unknown to the state and the attempted rape of a minor female, but the court a quo combined the two offences, convicting the appellant of housebreaking with the intent to rape and attempted rape. He sentenced the appellant to life imprisonment. The court on appeal held that this could not be done, and a verdict should have been pronounced on each of the counts. As to the sentence, although not desirable that counts be taken together for sentence, it was possible, and in the present case, appropriate. The fact, however, that the relevant legislation provided for a person who attempted to commit a sexual offence to receive the same punishment as one who committed the offence, did not mean that the prescribed minimum sentences applicable in such an instance, and the sentence was reduced to 10 years' imprisonment. *S v Lekeka* 2021 (1) SACR 106 (FB)

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Kind Regards

The Juta Law Reports Team

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