



## JUTA'S ADVANCE NOTIFICATION SERVICE

AUGUST 2019

Dear South African Law Reports and Criminal Law Reports subscriber

Herewith the cases in the August 2019 law reports

**JUDGMENTS OF INTEREST IN THE AUGUST 2019 EDITIONS OF THE SALR, SACR AND THE NAMIBIAN LAW REPORTS.**

Click on the case name to download the original judgment.

### **SOUTH AFRICAN LAW REPORTS**

#### **The review of an unlawful tender award where there is unreasonable delay**

After a municipality had awarded a construction contract to the respondent, it instituted proceedings to review and set aside its own decision on the ground that there had been no lawful tender process. The Constitutional Court found that, despite the municipality's unreasonable delay in bringing a review, it was obliged to declare the award invalid as it was clearly unlawful, but that, in appreciation of the respondent's accrued rights, it would not set it aside. ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC)***

#### **Fairness, reasonableness and proportionality as requirements for the validity of contractual terms**

The High Court had refused to enforce the cancellation of the lease agreements of the respondents, and their eviction, as such a sanction was 'disproportionate' to the breach—a failure to renew timeously. However, the SCA reversed that decision, finding nothing offensive in the renewal clauses. In doing so, it confirmed that a court may refuse to enforce sanctions that were contrary to public policy, but rejected the notion that fairness, reasonableness and proportionality were self-standing requirements for the enforcement of a sanction. ***Trustees, Oregon Trust and Another v Beadica 231 CC and Others 2019 (4) SA 517 (SCA)***

#### **Claims for reflective losses**

Shareholders brought an action against their company directors when their shares declined in value due to losses the company suffered as a result of the directors' conduct. The court rejected the claim. It found that a shareholder could not recover the loss in share value as a result of a wrong done to the company, because such a loss was merely a reflection of the loss suffered by the company, which was the correct party to bring proceedings. ***Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others 2019 (4) SA 569 (GP)***.

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

### **Payment of admission-of-guilt fine by child proscribed by Child Justice Act 75 of 2008**

A 17-year-old accused was arrested and detained after having been found in possession of a small quantity of cannabis. On the recommendation of the arresting officer he paid an admission-of-guilt fine. The reviewing judge set aside the fine on the basis that it was proscribed by s 18(2) of the Child Justice Act 75 of 2008. He also held that in circumstances where a child was alleged to have committed such a minor offence, police officials should ideally release the child on written notice into the care of their parents in terms of s 21(2)(a) of the Act. *S v Garland* 2019 (2) SACR 162 (WCC)

### **Magistrate not empowered to impose 100 % non-parole period nor direct that determinate sentence commence running after life term**

A regional magistrate sentenced the accused, who was already serving a sentence of life imprisonment for another offence, to 15 years' imprisonment for the possession of a suspected stolen motor vehicle. He further ordered that he should never be released on parole and that the sentence should only start running after the completion of the life sentence. In an application for leave to appeal the sentence, the court found that the magistrate did not have the power in terms of s 276B of Criminal Procedure Act 51 of 1977 to fix a 100% non-parole period, nor was he empowered in terms of s 39(2)(a) of the Correctional Services Act 111 of 1998 to order that a determinate sentence commence running after the completion of a sentence of life imprisonment. *S v Makhokha* 2019 (2) SACR 198 (CC)

### **Belief in witchcraft taken into account in imposition of sentence**

A young woman enlisted her boyfriend to kill her grandmother whom she believed had bewitched her. The court on appeal found that her belief in witchcraft, together with the cumulative effect of her personal circumstances, constituted substantial and compelling circumstances justifying deviation from the prescribed life sentence. A sentence of 10 years' imprisonment was considered appropriate. *Director of Public Prosecutions v Moloto* 2019 (2) SACR 123 (SCA)

## **THE NAMIBIAN LAW REPORTS**

### **Deregistration of a religious order as an employer—whether the definitions of 'employer' and 'employee' in the Social Security Act 34 of 1994 read together with s 128A of the Labour Act 11 of 2007 applied to the religious order?**

The appellant church appealed against a decision in the Labour Court which dismissed its appeal from the refusal by the Social Security Commission to deregister it as an employer. The Labour Court applied the presumption contained in s 128A of the Labour Act and found that the service rendered by and the remuneration paid to members in the form of stipends, as well as the degree of supervision and control, met three of the listed factors which gave rise to the presumption of employment which it found that the appellant had not rebutted. On appeal it was contended for the appellant, inter alia, that there would first need to be an employment contract or another form of contractual relationship before the factors listed in s 128A could give rise to the presumption of being an employee. The Supreme Court held that each case had to be considered on its own facts with reference to the rules and practice of the specific religious order or church. *Christian Congregation of Jehovah's Witnesses of Namibia (Incorporated Association Not For Gain) v Social Security Commission of Namibia* 2019 (2) NR 342 (SC)

### **Review of four matters where magistrates had mero motu recused themselves**

In each of the matters the magistrates had mero motu recused themselves from part heard matters because the Magistrates Commission refused to consider or interview them for permanent appointments as regional magistrates despite the fact that they had acted in the same positions, because they did not possess the qualifications required for appointment as magistrate as provided for by s 14(2) of the Magistrates Act 3 of 2003. The Supreme Court held that the factual ground on which the two magistrates had recused themselves fell far short of the threshold necessary to satisfy the test for recusal. The conduct of the magistrates was wrong and had to be condemned. The recusals were set aside and the magistrates were ordered to proceed with the said matters. ***S v Stewe and Three Similar Matters*** 2019 (2) NR 359 (SC)

### **Sentence ruling in respect of a policeman using his service firearm in a domestic setting**

The accused, a commander of the criminal investigation unit at a police station at the time of the offences, had been in a relationship with the complainant and had not approved of her relationship with the deceased. He shot at her and shot and killed the deceased in the complainant's shack. The High Court held that a policeman who committed a crime not only breached the trust that the community had placed in him, he attacked and undermined the foundation of organised society and thus deserved a sentence that served as an example. The accused used his service pistol without authorisation. He engaged in a criminal activity, thereby acting outside his powers as an officer who was tasked to prevent crime. He could clearly be regarded as a danger to society and the only way was to remove him from public circulation for a substantial period of time. ***S v Awaseb*** 2019 (2) NR 377 (HC)

WE WELCOME YOUR FEEDBACK

Please send any comments or queries to [lawreports@juta.co.za](mailto:lawreports@juta.co.za).

Kind Regards

The Juta Law Reports Team

## **SOUTH AFRICAN LAW REPORTS**

**AUGUST 2019**

### **TABLE OF CASES**

- Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC)
- Diener NO v Minister of Justice and Correctional Services and Others 2019 (4) SA 374 (CC)
- eThekweni Municipality v Mounthaven (Pty) Ltd 2019 (4) SA 394 (CC)
- Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another 2019 (4) SA 406 (CC)
- Atwealth (Pty) Ltd and Others v Kernick and Others 2019 (4) SA 420 (SCA)
- CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others 2019 (4) SA 436 (SCA)
- De Lange NO v Minister of Water and Environmental Affairs 2019 (4) SA 445 (SCA)
- Dennegeur Estate Home Owners Association and Another v Telkom SA SOC Ltd 2019 (4) SA 451 (SCA)
- Freedom Stationery (Pty) Ltd and Others v Hassam and Others 2019 (4) SA 459 (SCA)
- Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh and Others 2019 (4) SA 471 (SCA)
- *Seaspan Grouse, The* 2019 (4) SA 483 (SCA)
- Trustees, Oregon Trust and Another v Beadica 231 CC and Others 2019 (4) SA 517 (SCA)

- Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd 2019 (4) SA 532 (SCA)
- Avnet South Africa (Pty) Ltd v Lesira Manufacturing (Pty) Ltd and Another 2019 (4) SA 541 (GJ)
- Beiersdorf AG v Koni Multinational Brands (Pty) Ltd 2019 (4) SA 553 (GJ)
- Mdyogolo, Ex parte 2019 (4) SA 561 (ECG)
- Hlumisa Investment Holdings RF Ltd and Another v Kirkinis and Others 2019 (4) SA 569 (GP)
- Jose and Another v Minister of Home Affairs and Others 2019 (4) SA 597 (GP)
- South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others 2019 (4) SA 608 (GJ)

## FLYNOTES

### **BUFFALO CITY METROPOLITAN MUNICIPALITY v ASLA CONSTRUCTION (PTY) LTD (CC)**

BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J  
2019 APRIL 16

**Review**—Grounds—Legality—Organ of state bringing review of own decision—Delay in bringing review—Approach to.

### **DIENER NO v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS (CC)**

MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J  
2018 NOVEMBER 29

**Company**—Business rescue—Practitioner—Rescue converted to liquidation—Ranking of practitioner's claim for remuneration and expenses—Companies Act 71 of 2008, ss 135(4) and 143(5).

### **ETHEKWINI MUNICIPALITY v MOUNTHAVEN (PTY) LTD (CC)**

MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J  
2018 OCTOBER 31

**Prescription**—Extinctive prescription—Debt—What constitutes—Claim for retransfer of property under contractual reversionary clause registered as title condition—Constituting 'debt' for purposes of extinctive prescription—Prescription Act 68 of 1969, ch III.

**Land**—Rights in—Registered title condition entitling transferor to claim retransfer of land if transferee not erecting buildings to certain value within certain time—Right to claim retransfer of land constituting personal, not real, right.

**Land**—Ownership—Restriction—By reversionary right—Binding on landowner in personal capacity—Hence constituting personal, not real, right—Registration against title deed not elevating it to latter.

**Land**—Transfer—Registration of transfer—Condition containing reversionary clause—Creating personal obligation—Registration not converting it into real right—Deeds Registries Act 47 of 1937, s 63.

**SPILHAUS PROPERTY HOLDINGS (PTY) LTD AND OTHERS v MOBILE TELEPHONE NETWORKS (PTY) LTD AND ANOTHER (CC)**

CAMERON J, FRONEMAN J, JAFTA J, LEDWABA AJ, MADLANGA J, MHLANTLA J, NICHOLLS AJ and THERON J  
2019 APRIL 24

**Sectional title**—Common property—Unit owner—Whether individual owners having standing to apply for removal of antenna erected on common property in contravention of zoning scheme—Sectional Titles Act 95 of 1986, s 41.

**Telecommunication**—Mobile cellular communication services—Service provider, in contravention of local zoning scheme regulations, installing cellphone antenna on common property of sectional title development—Whether individual owners having standing to apply for its removal—Sectional Titles Act 95 of 1986, s 41.

**ATWEALTH (PTY) LTD AND OTHERS v KERNICK AND OTHERS (SCA)**

WALLIS JA, ZONDI JA, DAMBUZA JA, DAVIS AJA and ROGERS AJA  
2019 MARCH 28

**Financial institution**—Financial services provider—Financial advisor—‘Advice’—What constitutes—Financial Advisory and Intermediary Services Act 37 of 2002, s 1 sv ‘advice’.

**Financial institution**—Financial services provider—Financial advisor—Breach of statutory duties—Delictual claim against for loss on recommended investments—Need to lead evidence on what reasonably skilled financial advisor would do in circumstances.

**Delict**—Pure economic loss—Investments—Claim for loss on investments recommended by financial advisor—Claim based on breach of statutory duties—Need to lead evidence on what reasonably skilled financial advisor would do in circumstances.

**CDH INVEST NV v PETROTANK SOUTH AFRICA (PTY) LTD AND OTHERS (SCA)**

PONNAN JA, SALDULKER JA, DAVIS AJA, CARELSE AJA and ROGERS AJA  
2019 APRIL 1

**Company**—Directors and officers—Board of directors—Resolutions—Round robin resolution—Validity—Board passing resolution contrary to its stated purpose—Amounting to misrepresentation and breach of directors’ duty of good faith—Resolution nullified—Companies Act 71 of 2008, s 74, s 76(3)(a).

**Company**—Shares and shareholders—Shares—Authorisation for shares in memorandum of association—Change—Round robin decision by board—Notice to directors—Companies Act 71 of 2008, s 36(2)(b) and (3), s 74.

**DE LANGE NO v MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS (SCA)**

NAVSA AP, LEACH JA, MOCUMIE JA, MOKGOHLOA AJA and DLODLO AJA  
2018 APRIL 17

**Prescription**—Extinctive prescription—Commencement—Claim based on delict—No ongoing infringement of right where conditions for its exercise not met or right not exercised—Claim based on losses resulting from government’s failure to maintain irrigation scheme—When water supply ended, plaintiff stopped exercising his right, which was conditional—Hence no ongoing infringement—Claim prescribed—National Water Act 36 of 1998, ss 22–27 and 39; Prescription Act 68 of 1969, s 12(3).

**Water**—Right to water—Infringement—Not infringed on ongoing basis where, as in present case, conditions for exercising such right not met or right not exercised—National Water Act 36 of 1998, ss 22–27 and 39.

**DENNEGEUR ESTATE HOMEOWNERS ASSOCIATION AND ANOTHER v TELKOM SA SOC LTD (SCA)**

LEWIS ADP, PONNAN JA, ZONDI JA, DLODLO AJA and EKSTEEN AJA  
2019 MARCH 29

**Spoliation**—Mandament van spolie—When available—Installation by one electronic communications network service provider of cables in same underground ducts and sleeves as existing cables of another such provider—No loss of possession—No spoliation—Electronic Communications Act 36 of 2005, s 22.

**Telecommunication**—Fibre optic network—Installation in infrastructure originally provided by Telkom—Whether amounting to spoliation—Electronic Communications Act 36 of 2005, s 22.

**FREEDOM STATIONERY (PTY) LTD AND OTHERS v HASSAM AND OTHERS (SCA)**

PONNAN JA, TSHIQI JA, VAN DER MERWE JA, SCHPPERS JA and CARELSE AJA  
2018 NOVEMBER 13

**Practice**—Judgments and orders—Default judgment—Rescission—On ground that judgment erroneously granted—Error required for rescission relating to procedure followed and not existence of defence—Accordingly, if party procedurally entitled to judgment, it cannot be one erroneously granted in absence of another party—Party that reconciled itself with reasonable prospect that relief could be granted not entitled to rescission on ground that such relief erroneously granted—Uniform Rules of Court, rule 42(1)(a).

**Company**—Oppressive conduct—Relief—Powers of court—Court not limited to relief formulated by applicant—Court's wide powers to make order it considers just and equitable—Companies Act 61 of 1973, s 252 (substantially repeated in Companies Act 71 of 2008, s 163).

**MOUNT EDGECOMBE COUNTRY CLUB ESTATE MANAGEMENT ASSOCIATION II (RF) NPC v SINGH AND OTHERS (SCA)**

PONNAN JA, SALDULKER JA, SWAIN JA, SCHIPPERS JA and ROGERS AJA  
2019 MARCH 28

**Road**—Public road—What constitutes—Roads within gated estate—Roads public when public commonly using them, or having right of access thereto as opposed to access by invitation—In present case, where general public not having access to roads within estate, such roads private—National Road Traffic Act 93 of 1996, s 1 sv 'public road'.

**Voluntary association**—Homeowners association—Conduct rules—Lawfulness of rules setting and enforcing speed limits on roads within gated estate—Whether such roads 'public roads' as defined in NRTA—If so, whether approval under NRTA required—National Road Traffic Act 93 of 1996, s 1 sv 'public road'.

**THE SEASPAN GROUSE**

**SEASPAN HOLDCO 1 LTD AND OTHERS v MS MARE TRACER SCHIFFAHRTS AND ANOTHER (SCA)**

MAYA P, WALLIS JA, MOLEMELA JA, MAKGOKA JA and SCHIPPERS JA  
2019 FEBRUARY 1

**Shipping**—Admiralty law—Maritime claim—Enforcement—Action in rem—Protective writ—May be issued in South Africa and served when vessel comes within jurisdiction—Not protecting claimant against intervening bona fide change in ownership—Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)(a)(i), s 3(7).

**Shipping**—Admiralty law—Maritime claim—Enforcement—Action in rem—Arrest, under protective writ, of associated ship—Ownership of arrested ship changed after issue of writ but before service or arrest—Whether action against ship can still proceed—Conflicting High Court decisions—Supreme Court of Appeal finding that action commencing on date of arrest—Action not surviving change in ownership—Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)(a)(i), s 3(7).

**Shipping**—Admiralty law—Maritime claim—Enforcement—Action in rem—Commencement—Protective writ—Whether action commenced by issue or service of writ—Conflicting High Court decisions—Supreme Court of Appeal deciding that action in rem commenced by service of writ—Admiralty Jurisdiction Regulation Act 105 of 1983, s 1(2)(a)(i).

**TRUSTEES, OREGON TRUST AND ANOTHER v BEADICA 231 CC AND OTHERS (SC)**

LEWIS ADP, CACHALIA JA, SALDULKER JA, MBHA JA and SCHIPPERS JA  
2019 MARCH 28

**Contract**—Enforcement—Public policy—Contractual certainty—Contracts enforceable unless contrary to public policy or enforcement unconscionable in circumstances—No principle that sanction claimed for breach must be proportional to its consequences.

**Contract**—Breach—Remedies—Cancellation—No principle that sanction claimed for breach must be proportional to its consequences.

**Contract**—Legality—Constitutionality and public policy—Pacta sunt servanda essential element of public policy—No consideration of public policy permitting courts to make contracts for parties.

**Lease**—Cancellation—Court's power to interfere—Failure by tenants to renew as stipulated—Neither renewal clause nor its enforcement contrary to public policy—Cancellation valid—No room for interference based on importation of proportionality test.

**VAN STADEN NO AND OTHERS v PRO-WIZ GROUP (PTY) LTD (SCA)**

WALLIS JA, MAKGOKA JA, SCHIPPERS JA, MOKGOHLOA AJA and ROGERS AJA  
2019 MARCH 8

**Close corporation**—Business rescue—Liquidation proceedings already initiated—Effect of application for business rescue—Locus standi of liquidators to oppose business rescue application—Liquidators' right to oppose application not removed—Companies Act 71 of 2008, s 131(6).

**Close corporation**—Business rescue—Costs—When punitive costs order appropriate.

**AVNET SOUTH AFRICA (PTY) LTD v LESIRA MANUFACTURING (PTY) LTD AND ANOTHER (GJ)**

S BUDLENDER AJ  
2019 MARCH 4

**Court**—Powers—To make settlement agreement order of court—Only where there was prior litigation, may agreement be made order.

**BEIERSDORF AG v KONI MULTINATIONAL BRANDS (PTY) LTD (GJ)**

FISHER J  
2019 FEBRUARY 12

**Competition**—Unlawful competition—Passing-off—Deception as to trade source—Use of parts of competitor's past get-up—If having necessary distinction in relation to competitor's mark or brand, could still suffice to create confusion, even though such parts discontinued—Potential of hallmarks in get-up and logo to retain reputation through changes and rebrands.

**EX PARTE MDYOGOLO (ECG)**

PLASKET J and BESHE J

2018 NOVEMBER 23

**Attorney**—Admission and enrolment—Application for—Criminal conviction—Applicant disclosing previous convictions but falsely claiming that robbery convicted for was committed in context of liberation struggle—Court refusing application for admission for lying under oath—Application for leave to appeal refused—Applicant not discharging onus of proving that he was fit and proper to practise as attorney—No merit in other grounds for leave to appeal, namely that 22 years had elapsed since robbery committed, that Law Society did not object to application, and that applicant not attorney at time of robbery.

**HLUMISA INVESTMENT HOLDINGS RF LTD AND ANOTHER v KIRKINIS AND OTHERS (GP)**

MOLOPA-SETHOSA J

2018 AUGUST 31

**Company**—Shares and shareholders—Shareholders—Proceedings by and against—Action by shareholders against directors for compensation for loss in value of shares flowing from loss to company as result of directors' conduct—Common-law rule against recovery of reflective loss prohibiting such claims—Company being proper plaintiff—Section 218(2) of Companies Act, allowing civil actions against persons breaching Act, not altering common-law position—Companies Act 71 of 2008, s 218(2).

**Company**—Directors and officers—Director—Fiduciary duty—Breach—Action brought by shareholders under s 218(2) of Companies Act against directors for compensation for loss in value of shares—Shareholders alleging breach by directors of their duties towards company in terms of s 76(3)—In such circumstances, shareholders wrong to bring claim under s 218(2), and should have brought it under s 77(2), which provides special remedy—Companies Act 71 of 2008, ss 76(3), 77(2) and 218(2).

**JOSE AND ANOTHER v MINISTER OF HOME AFFAIRS AND OTHERS (GP)**

YACOOB AJ

2019 MARCH 15

**Immigration**—Citizenship—By naturalisation—Where one fulfils requirements of s 4(3) of Citizenship Act, one then has right, and choice, to apply for citizenship, and, having made choice to apply, one then has right for that citizenship to be granted—No room for exercise of discretion—South African Citizenship Act 88 of 1995, s 4(3).

**Immigration**—Citizenship—By naturalisation—Requirement that applicant's birth be 'registered' in terms of Births and Deaths Registration Act 51 of 1992—What constitutes registration for such purposes—South African Citizenship Act 88 of 1995, s 4(3).

**Immigration**—Citizenship—By naturalisation—Application—Failure of decision maker to determine application—Appropriate remedy—Applicants having met all requirements under s 4(3) of Citizenship Act—Order of court requiring decision-maker to grant application—South African Citizenship Act 88 of 1995, s 4(3).

**SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD v SOUTH AFRICAN BROADCASTING CORPORATION PENSION FUND AND OTHERS (GJ)**

MAIER-FRAWLEY AJ

2019 JANUARY 18

**Pension**—Benefits—Withholding—Power of fund to withhold payment of benefits pending determination of member's liability to employer for compensation for damage caused by reason of theft, dishonesty, etc—Whether, for purposes of interim interdictory relief compelling fund to withhold benefits pending employer's action for recovery of losses,



applicant employer established prima facie case for member's liability—Pension Funds Act 24 of 1956, s 37D(1)(b)(ii).

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

**AUGUST 2019**

### **TABLE OF CASES**

- Director of Public Prosecutions v Moloto 2019 (2) SACR 123 (SCA)
- Cloete and Another v S and a Similar Application 2019 (2) SACR 130 (CC)
- Minister of Police v Vowana and Another 2019 (2) SACR 148 (ECM)
- S v Garland 2019 (2) SACR 162 (WCC)
- S v Tucker 2019 (2) SACR 166 (WCC)
- S v Makhokha 2019 (2) SACR 198 (CC)
- S v Mququ 2019 (2) SACR 207 (ECG)
- S v Ramootsi and Another 2019 (2) SACR 216 (FB)
- Mochebelele v Director of Public Prosecutions, Gauteng and Others 2019 (2) SACR 231 (SCA)

### **FLYNOTES**

#### **DIRECTOR OF PUBLIC PROSECUTIONS v MOLOTO (SCA)**

TSHIQI JA, MAJIEDT JA and VAN DER MERWE JA  
2019 MAY 15, 31

**Murder**—Sentence—Imposition of—Factors to be taken into account—Belief in witchcraft—Young woman having grandmother killed whom she believed had bewitched her—Cumulative effect of personal circumstances and belief in witchcraft justifying deviation from prescribed minimum—Sentence of 10 years' imprisonment imposed.

**Sentence**—Prescribed minimum sentences—Imposition of in terms of Criminal Law Amendment Act 105 of 1997—Substantial and compelling circumstances—Trial court not conducting exercise establishing whether substantial and compelling circumstances present justifying deviation from prescribed minimum—Misdirection justifying imposition of sentence afresh.

#### **CLOETE AND ANOTHER v S AND A SIMILAR APPLICATION (CC)**

MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J  
2019 FEBRUARY 19

**Appeal**—To Constitutional Court—Leave to appeal—Against decision of President of Supreme Court of Appeal under s 17(2)(f) of Superior Courts Act whether to refer decision of SCA refusing leave to appeal—Normally no appeal lying against such decision of President—Superior Courts Act 10 of 2013.

**MINISTER OF POLICE v VOWANA AND ANOTHER (ECM)**

MALUSI J and JOLWANA J

2018 OCTOBER 18; 2019 FEBRUARY 14

**Court**—Decisions of—Judgments—Judgment rewritten by attorney with approval of magistrate—Independence and impartiality of judicial officers—Proceedings set aside on review. **Court**—Magistrates' court—Judgments—Salutary practice that delivery of reserved judgments be done in open court.

**S v GARLAND (WCC)**

NUKU J and FRANCIS AJ

2019 FEBRUARY 27

**Admission of guilt**—Setting-aside of—Payment of by child—Proscribed by s 18(2) of Child Justice Act 75 of 2008.

**Child**—Arrest—On minor offence—Responsibility of police officials considering release or detention of child prior to first appearance at preliminary inquiry—Should ideally release child on written notice into care of parent, appropriate adult or guardian in terms of s 21(2)(a) of Child Justice Act 75 of 2008.

**S v TUCKER (WCC)**

SHER J and SAMELA J

2019 MARCH 28

**Extradition**—Application for—Nature of magistrate's enquiry under Extradition Act 67 of 1962—Request from non-associated state—Approach that magistrate relegated to mere scribe and record compiler and not able to rule on breaches of treaty or fundamental human rights, questioned.

**Extradition**—Application for—Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962—Conducted in manner of preparatory examination—Process not requiring, however, that formal charges be put to person or that they plead to such charges—Semble: Advisable that s 9 receive necessary legislative attention to clarify procedure.

**Extradition**—Application for—Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962—Evidence—Hearsay evidence admissible.

**Extradition**—Application for—Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962—Evidence—Magistrate not permitted to simply refuse to accept evidence produced by extraditee reflecting upon his human rights or rights to fair trial, were he to be extradited.

**S v MAKHOKHA (CC)**

MOGOENG CJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, LEDWABA AJ, MADLANGA J, MHLANTLA J, NICHOLLS AJ and THERON J

2019 MAY 3

**Sentence**—Imprisonment—Term of—Non-parole period—Section 276B of Criminal Procedure Act 51 of 1977—Imposition of—Court not having power to fix 100% non-parole period—Such constituting infringement of applicant's rights under s 12(1)(a) of Constitution.

**Sentence**—Imprisonment—Multiple terms of imprisonment—Life imprisonment and determinate sentence—Order in which to be served—Court not empowered to order that determinate sentence commence running after completion of sentence of life imprisonment—Correctional Services Act 111 of 1998, s 39(2)(a).

**S v MQUQU (ECG)**

RUGUNANAN AJ  
2019 MAY 9, 14

**Bail**—Pending trial—When to be granted—New factors emerging after previous refusal of bail—Accused’s trial delayed for lengthy period and state of health declining after contracting tuberculosis and developing diabetes—Accused also suffering financially—Magistrate failing to take all aspects of evidence into account—Bail granted on appeal—Criminal Procedure Act 51 of 1977, ss 60(4) and 60(11)(a) read with sch 6.

**S v RAMOOTSI AND ANOTHER (FB)**

REINDERS J, MHLAMBI J and OPPERMAN J  
2018 OCTOBER 22; DECEMBER 14

**Evidence**—Admissibility—Necessity for ruling on—Court failing to give ruling on admissibility of hearsay evidence and confessions—Convictions set aside.

**MOCHEBELELE v DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG AND OTHERS (SCA)**

WALLIS JA, MAKGOKA JA, SCHIPPERS JA, PLASKET AJA and GORVEN AJA  
2019 MAY 21, 31

**Extradition**—Application for—Procedure during enquiry in terms of ss 9 and 10 of Extradition Act 67 of 1962—Powers of magistrate—Magistrate’s power to discharge person limited to only two instances in terms of s 10(3)—Court could not take into account that person still awaiting final decision on status as refugee.

## **THE NAMIBIAN LAW REPORTS**

**2019 (2)**

### **TABLE OF CASES**

- Konrad v Ndapanda 2019 (2) NR 301 (SC)
- Minister of Safety and Security and Others v Mahupelo 2019 (2) NR 308 (SC)
- S v Gariseb 2019 (2) NR 334 (SC)
- Christian Congregation of Jehovah’s Witnesses of Namibia (Incorporated Association Not For Gain) v Social Security Commission of Namibia 2019 (2) NR 342 (SC)
- S v Stewe and Three Similar Matters 2019 (2) NR 359 (SC)
- S v Lameck And Others 2019 (2) NR 368 (HC)
- S v Awaseb 2019 (2) NR 377 (HC)
- Steyn v Stanley 2019 (2) NR 384 (HC)
- Ndevahoma v Shimwooshili and Others 2019 (2) NR 394 (HC)
- Gaweseb v Council of the Municipality of Windhoek and Others 2019 (2) NR 409 (HC)
- Imene v Namdeb Diamonds (Pty) Ltd and Others 2019 (2) NR 426 (LC)
- Kamwi v Chairperson of the Council of the Local Authority of Katima Council and Others 2019 (2) NR 435 (HC)
- Akwenye and Another v Akwenye and Others 2019 (2) NR 446 (HC)
- Germanus v Dundee Precious Metals Tsumeb and Others 2019 (2) NR 453 (LC)
- Angula v Stuttaford Van Lines and Another 2019 (2) NR 461 (LC)
- Rossing Uranium Ltd v Goseb and Another 2019 (2) NR 464 (LC)

- S v Diergaardt 2019 (2) NR 471 (HC)
- S v Rooi 2019 (2) NR 479 (HC)
- S v Absalom 2019 (2) NR 483 (NLD)
- S v Kamenye and Twelve Similar Cases 2019 (2) NR 486 (NLD)
- QJ v EJ 2019 (2) NR 494 (HC)
- S v Sheetekela and Others 2019 (2) NR 513 (SC)
- S v Manale 2019 (2) NR 517 (HC)
- Thomas v Directorate of Legal Aid and Others 2019 (2) NR 523 (HC)
- Akatama v Commissioner-General: Hamunyela and Others 2019 (2) NR 538 (NLD)
- Namibia Airports Co Ltd v Fire Tech Systems CC and Another 2019 (2) NR 541 (SC)
- Director-General of the Namibian Central Intelligence Service and Another v Haufiku and Others 2019 (2) NR 556 (SC)
- Clear Enterprises (Pty) Ltd v Minister of Finance and Others 2019 (2) NR 578 (HC)
- Zillion Inv Holding (Pty) Ltd v Salz-Gossow (Pty) Ltd 2019 (2) NR 594 (SC)
- S v Tangi 2019 (2) NR 600 (NLD)

## FLYNOTES

### **KONRAD v NDAPANDA (SC)**

SHIVUTE CJ, CHOMBA AJA and MOKGORO AJA  
2018 OCTOBER 3; 2019 FEBRUARY 28

**Practice**—Applications and motions—Dispute of fact—Court’s discretion in rule 67 of Rules of High Court to dismiss application—Such discretion to be exercised bearing in mind overriding objective of rules to facilitate resolution of real issues in dispute justly and speedily, efficiently and cost effectively as far as practicable.

### **MINISTER OF SAFETY AND SECURITY AND OTHERS v MAHUPELO (SC)**

SHIVUTE CJ, CHOMBA AJA and MOKGORO AJA  
2018 JULY 4; 2019 FEBRUARY 28

**Delict**—Malicious prosecution—Continuing malicious prosecution—Whether established on evidence—Court on appeal overturning High Court’s decision where prosecution had honest belief founded on reasonable grounds that continuation of prosecution was justified.

**Constitutional practice**—Courts—Supreme Court—Inappropriate for apex court to decide issue where court a quo not given benefit of its own views—Matter of constitutional damages remitted to court a quo.

### **S v GARISEB (SC)**

MAINGA JA, SMUTS JA and CHOMBA AJA  
2019 MARCH 13; APRIL 1

**Criminal law**—Rape—What constitutes—‘Genital stimulation’ as intended by s 1(1)(c) of Combating of Rape Act 8 of 2000—Stimulation in question not that of perpetrator but victim.

**Criminal procedure**—Conviction—Competent verdicts—Charge of rape—Attempted rape competent verdict in terms of s 18 of the Riotous Assemblies Act 17 of 1956.

### **CHRISTIAN CONGREGATION OF JEHOVAH’S WITNESSES OF NAMIBIA (INCORPORATED ASSOCIATION NOT FOR GAIN) v SOCIAL SECURITY COMMISSION OF NAMIBIA (SC)**

DAMASEB DCJ, MAINGA JA and SMUTS JA  
2019 MARCH 7; APRIL 3

**Labour law**—Employee—What constitutes—Of church or religious order—Whether ‘employees’ as intended by Social Security Act 34 of 1994 read together with s 128A of Labour

Act 11 of 2007—Each case had to be considered on its own facts with reference to rules and practice of specific religious order or church.

**S v STEWE AND THREE SIMILAR MATTERS (SC)**

DAMASEB DCJ, MAINGA JA and FRANK AJA

2019 MARCH 6, 15

**Magistrate**—Recusal—Mero motu recusal of magistrate—Magistrates recusing themselves in protest at their treatment by Magistrates Commission—Recusals impermissible and strongly deprecated—Recusals set aside and magistrates ordered to finalise cases.

**S v LAMECK AND OTHERS (HC)**

LIEBENBERG J

2019 JANUARY 16, 17, 24

**Criminal law**—Corruption—Investigation under provisions of Anti-Corruption Act 8 of 2003—Summons—Validity of—Issuing of summonses prior to the initiation of an investigation contemplated in s 18(3)—Summonses invalid and evidence obtained in consequence of summons unlawful.

**S v AWASEB (HC)**

USIKU J

2019 JANUARY 16; FEBRUARY 21

**Criminal procedure**—Sentence—Murder—Mitigating and aggravating circumstances—Accused, police officer, used his service firearm in domestic setting—Deterrence as objective of punishment emphasised—Direct imprisonment not avoidable—Accused not having shown genuine remorse at all—Policeman who committed crime attacking and undermining foundation of organised society and thus deserving sentence that served as example—Accused used his service pistol without authorisation—Accused engaged in criminal activity, acting outside his powers as officer who was tasked to prevent crime—Accused regarded as danger to society and only way was to remove him from public circulation for substantial period of time.

**STEYN v STANLEY (HC)**

USIKU J

2018 JULY 3, 5; SEPTEMBER 13; DECEMBER 7

**Evidence**—Production and admission of—Sufficiency of proof—Proof of claim on balance of probabilities—Circumstantial evidence and direct evidence—In finding facts or making inferences in a civil case one may, by balancing probabilities select conclusion which seems to be more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion was not only reasonable one.

**Animal**—Damages caused by—*Actio de pauperie*—Defendant's dogs allegedly having attacked and killed plaintiff's livestock on plaintiff's farm—Requirements for liability—Defendant liable for damages caused to extent as proved by evidence.

**NDEVAHOMA v SHIMWOOSHILI AND OTHERS (HC)**

UEITELE J

2018 OCTOBER 23; 2019 JANUARY 25

**Land**—Communal land—Right of leasehold—Size of farm—Fact that farm exceeded 100 hectares did not per se invalidate leasehold granted in terms of s 30 of Agricultural Communal Land Reform Act 5 of 2002.

**Land**—Communal land—Right of leasehold—Leaseholder claiming exclusive rights—Argument fallacious—Communal land vested in state which held it in trust for benefit of traditional communities—Agricultural Communal Land Reform Act 5 of 2002, s 17.

**Land**—Communal land—Right of leasehold—Right to claim eviction—Only chief or traditional authority or land board concerned could institute legal action for eviction of person occupying communal land—Agricultural Communal Land Reform Act 5 of 2002, s 43.

**GAWESEB v COUNCIL OF THE MUNICIPALITY OF WINDHOEK AND OTHERS (HC)**

PRINSLOO J

2018 AUGUST 10; OCTOBER 29, 31

**Administrative law**—Administrative action—Issuing of licence or permit—Finality of decision—Licence remaining valid until set aside by court.

**Administrative law**—Fair administrative justice—Article 18 of Namibian Constitution—Unilateral decision to revoke prior approval of applicant's building plans was not in spirit of art 18—Article requiring administrative officials to act fairly and reasonably, and comply with requirements imposed upon such bodies and officials by common law and any relevant legislation—Decision taken without affording applicant opportunity to make representations or to be heard, leaving applicant with far-reaching consequences.

**Administrative law**—Review—Application to review and set aside administrative decisions—Third to seventh respondents bringing counter-application to review and set aside first and second respondents decision to approve applicant's building plans—Third to seventh respondents delaying in seeking review—Unreasonable delay in context of construction work under building permit—Counter-application dismissed.

**IMENE v NAMDEB DIAMONDS (PTY) LTD AND OTHERS (LC)**

MASUKU J

2018 APRIL 17; OCTOBER 18

**Labour law**—Dismissal—Fairness of—Disciplinary hearing—Charge sheet—Playing important role in fairness of proceedings.

**Labour law**—Arbitration—Arbitrator's duties—Inspection in loco—Part and parcel of arbitration proceedings and proceedings at such inspection had to be properly recorded and caused to formally form part of record of proceedings—Record of proceedings incomplete.

**Labour law**—Arbitration—Arbitrator's duties—Witnesses—Hearsay evidence—Where witnesses available they should testify instead of relying on hearsay evidence.

**Labour law**—Arbitration—Arbitrator's duties—Intervention in hearing by outsider impermissible.

**KAMWI v CHAIRPERSON OF THE COUNCIL OF THE LOCAL AUTHORITY OF KATIMA MULILO AND OTHERS (HC)**

MASUKU J

2018 MAY 16; NOVEMBER 15

**Contract**—Offer and acceptance—Terms of offer must be certain and definite—Sale of land within local authority area subject to provisions of s 30(1)(t) of Local Authorities Act 23 of 1992, as amended—Not all terms for sale of property were agreed upon by parties—No deed of sale came into existence.

**AKWENYE AND ANOTHER v AKWENYE AND OTHERS (HC)**

ANGULA DJP

2018 FEBRUARY 14; MARCH 13, 28; AUGUST 15; OCTOBER 31

**Costs**—Wasted costs—Of intervening party—Costs of parties intervening on basis that they had interest in matter—Relief sought against them abandoned after they intervened—Intervening parties entitled to their costs.

**GERMANUS v DUNDEE PRECIOUS METALS TSUMEB AND OTHERS (LC)**

PARKER AJ

2018 OCTOBER 5, 23

**Labour law**—Arbitrator's award—Appeal against—Grounds of appeal—Notice of appeal must contain grounds within meaning of Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner, rule 23—Grounds must not be conclusions drawn by drafter of notice of appeal—Appellant had not established why sanction of dismissal was not appropriate sanction and why arbitrator's decision in upholding sanction of dismissal was wrong—Arbitrator exercised her discretion on judicial grounds and for sound reasons, which she properly articulated, that was, without bias or caprice or application of wrong principle.

**ANGULA v STUTTAFORD VAN LINES AND ANOTHER (LC)**

PARKER AJ

2018 NOVEMBER 9, 27

**Labour law**—Arbitrator's award—Appeal against—Unfair dismissal—Court finding arbitrator was wrong declining to order reinstatement—There was no evidence that employment relationship between employer and employee had broken down irretrievably—Arbitrator had found that fact on evidence—Arbitrator erred in law and his refusal to order reinstatement was wrong and perverse—Court having all facts before it and so was in as good position as arbitrator to order reinstatement—Court therefore entitled to interfere and put right the wrong.

**ROSSING URANIUM LTD v GOSEB AND ANOTHER (LC)**

PARKER AJ

2018 OCTOBER 19; 2019 FEBRUARY 7

**Labour law**—Arbitrator's award—Appeal against—Unfair dismissal—Time limit within which to refer dispute to Labour Commissioner in terms of s 86(2)(a) of Labour Act 11 of 2007—Six 'calendar months'—Meaning of—Ordinary dictionary meaning.

**Labour law**—Arbitrator's award—Appeal against—Unfair dismissal—Fair reason to dismiss as opposed to valid reason to dismiss—Arbitrator exercised his discretion on judicial grounds and for sound reasons and court should be very slow to interfere and substitute its own decision.

**Labour law**—Arbitrator's award—Appeal against—Unfair dismissal—Rule 20 (of Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner) agreement made between unfairly dismissed employee and errant employer which excluded reinstatement as remedy was invalid and of no force—Rule could not permit parties to take away power of arbitrator in terms of s 86(15) of Labour Act 11 of 2007 to order reinstatement.

**S v DIERGAARDT (HC)**

NDAUENDAPO J and USIKU J

2019 JANUARY 19; MARCH 15

**Criminal procedure**—Evidence—Mutually destructive versions—Proper approach to assessment of evidence—Not permissible for court to reject defence witnesses, including accused, merely because court satisfied as to reliability and credibility of state witnesses—Court to apply its mind to probabilities of case—Only after so applying its mind would court be justified in reaching conclusion as to whether guilt of accused established beyond reasonable doubt.

**Criminal procedure**—Evidence—Witness—Issue central to dispute between state and defence—Failure by state to call witness who was present and could testify to such issue to corroborate complainant's case—Such failure detrimental to state's case.

**Criminal law**—Theft—Intent—Bona fide belief on part of accused that thing alleged to be stolen belongs to him to exclusion of any other person—Such excluding intention to steal—To be proved that accused intended to deprive owner permanently of whole benefit of ownership of thing in question.

**S v ROOI (HC)**

ANGULA DJP, LIEBENBERG J and SHIVUTE J  
2019 MARCH 20

**Criminal law**—Drug offences—Methaqualone—Possession of in contravention of s 2(b) of Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971—Proclamation 277 of 1977 amending schedule to Act by deleting 'Methaqualone' in part II and adding 'Methaqualone' to part I of schedule—Proclamation 277 of 1977 applicable in Namibia—Accused charged with possession of Methaqualone under part III of schedule should accordingly be charged and convicted of possession of a dependence-producing substance under part I of the schedule.

**Criminal law**—Drug offences—Methaqualone and cannabis—Possession of in contravention of s 2(b) of Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971—Accused convicted of possession of Methaqualone in contravention of s 2(b) of Act and separate conviction of possession of cannabis in contravention of s 2(b) of Act—Accused should have been convicted of one count of possession of methaqualone and cannabis (both dependence-producing substances under part I of schedule to Act) in contravention of s 2(b) of Act 41 of 1971—Convictions amended accordingly.

**S v ABSALOM (NLD)**

JANUARY J and SALIONGA J  
2019 FEBRUARY 26

**Criminal law**—Abortion—Contravention of s 10(1)(a) of Abortion and Sterilization Act 2 of 1975—Charge—Necessary averments—Charge should make reference to s 1 of Act—Charge should also allege all elements of charge of procuring an abortion—Specimen charge set out in earlier reported judgment to be used.

**Criminal procedure**—Plea—Guilty—Questioning in terms of s 112(1)(b) of Criminal Procedure Act 51 of 1977—Abortion—Contravention of s 10(1)(a) of Abortion and Sterilization Act 2 of 1975—Accused not admitting that she was not medical practitioner or that she had intentionally procured abortion or that at time of abortion foetus was still alive—Conviction set aside.

**Criminal procedure**—Sentence—Community service—Sentence not specifying type of work to be performed or time within which it was to be performed—Sentence vague for lack of particularity.

**S v KAMENYE AND TWELVE SIMILAR CASES (NLD)**

JANUARY J and SALIONGA J  
2019 MARCH 26

**Criminal procedure**—Review—Record—Magistrate and clerk of court should take proper care when preparing records—Record to be prepared in accordance with 'Chapter XIII of the Codified Instructions: Clerk of the Criminal Court' issued by the Permanent Secretary for Justice—Important that presiding magistrate's date of appointment appearing on charge in such record—Magistrate has ultimate responsibility for ensuring correct record of proceedings before him or her.



**QJ v EJ (HC)**

PRINSLOO J

2018 NOVEMBER 5-7; DECEMBER 3; 2019 MARCH 8, 13

**Marriage**—Divorce—Jurisdiction—High Court—Foreign divorce order—‘Limited divorce order’ granted by United States court—Effect of on jurisdiction of Namibian High Court—Parties still considered to be husband and wife—High Court had jurisdiction.

**Marriage**—Custody of minor children—Custody order having been granted by United States court in ‘limited divorce order’—Child permanently resident in Namibia—Court not bound by US court’s decision—Matrimonial Causes Jurisdiction Act 22 of 1939, s 5.

**Marriage**—Custody of minor children—Right of access to child by noncustodial parent—Access by digital platforms—Non-custodial parent resident in United States whereas child and her mother resident in Namibia—Best interests of child—Court fashioning order to facilitate extensive but reasonable access via Skype or FaceTime or other social media application.

**S v SHEETEKELA AND OTHERS (SC)**

DAMASEB DCJ, HOFF JA and FRANK AJA

2019 APRIL 15, 17

**Criminal procedure**—Evidence—Witness—Cross-examination—Of witness for state not called during state’s case and who had been made available to defence—Despite prosecutor having consulted with witness, witness could be cross-examined by prosecution using services of another prosecutor—No rule that there could only be one prosecutor in case.

**S v MANALE (HC)**

USIKU J

2019 FEBRUARY 28; MARCH 1; APRIL 25

**Criminal law**—Fraud—Sentence—Fraud perpetrated by bank employee making false claims on estates of deceased persons—Crimes committed over a period of 17 months involving amount of N\$5 million—Accused sentenced to 17 years’ imprisonment.

**THOMAS v DIRECTORATE OF LEGAL AID AND OTHERS (HC)**

GEIER J

2019 APRIL 10, 11, 26

**Court**—High Court—Jurisdiction—Accused standing trial brought application in civil stream seeking order interdicting state from continuing prosecution against him—Although form of remedies he sought were civil in nature, purpose thereof was to halt his trial—Court declining jurisdiction in favour of judge seized with criminal trial.

**AKATAMA v COMMISSIONER-GENERAL: HAMUNYELA AND OTHERS (NLD)**

CHEDA J

2019 MARCH 27; MAY 9

**Prison**—Prisoner—Parole—Release on—Court’s powers to order release limited—Prison authorities and parole board were given that function—No rule that offender who had served half his sentence was automatically entitled to be released.

**NAMIBIA AIRPORTS CO LTD v FIRE TECH SYSTEMS CC AND ANOTHER (SC)**

MAINGA JA, SMUTS JA and HOFF JA

2018 APRIL 3; 2019 APRIL 12

**Administrative law**—Review—Right to fair administrative justice—Breach of—Public law remedies—Only in exceptional circumstances that private law remedies would be granted to party for breach of right in public domain—Claim for damages was private law remedy—Court a quo therefore erred in granting leave to pursue damages.

**Administrative law**—Review—Right to fair administrative justice—Tender award—Flawed tender—Remedies—Court finding award of tender irregular but not setting it aside because of practical difficulties—Applicant had not attempted to interdict award but had waited before seeking its setting aside—Cross-appeal dismissed.

**DIRECTOR-GENERAL OF THE NAMIBIAN CENTRAL INTELLIGENCE SERVICE AND ANOTHER v HAUFIKU AND OTHERS (SC)**

DAMASEB DCJ, MAINGA JA and SMUTS JA

2019 MARCH 4; APRIL 12

**Constitutional law**—Fundamental rights—Freedom of speech and expression in terms of art 21(1)(a) of Constitution of Namibia—Freedom of press—Designation by government of information as being violation of Protection of Information Act 84 of 1982 and Namibian Central Intelligence Service Act 10 of 1997—Mere assertion insufficient and government required to place sufficient evidence before court, in camera if necessary, in order for court to make assessment.

**Practice**—Interdict—When to be granted—Mootness—Application to suppress publication of information alleged to be state secret—Information published on e-justice system—Whether matter then moot.

**CLEAR ENTERPRISES (PTY) LTD v MINISTER OF FINANCE AND OTHERS (HC)**

MASUKU J

2018 SEPTEMBER 13; 2019 MAY 17

**International law**—Diplomatic immunity—Conferring of—Southern African Customs Union—Proof of—Act of granting immunity not to be confused or conflated with proof thereof—Absolute immunity granted by Namibia in terms of headquarters agreement.

**ZILLION INVESTMENT HOLDING (PTY) LTD v SALZ-GOSSOW (PTY) LTD (SC)**

SMUTS JA, HOFF JA and FRANK AJA

2019 APRIL 1, 17

**Engineering and construction law**—Construction agreement—Dispute resolution—Construction contract in Federation Internationale des Ingenieurs- Conceils (FIDIC) form—Adjudicator making order that respondent had to pay contractor—Provisions of contract clear that respondent had to pay and obligation not suspended by pending arbitration.

**S v TANGI (NLD)**

TOMMASI J and JANUARY J

2018 MARCH 6, 20

**Criminal procedure**—Sentence—Theft—Maximum sentence of five years' imprisonment with one year suspended imposed on young first offender for theft from employer of goods worth N\$42 900—Custodial sentence required when stealing from employer—Sentence was disproportionate to other sentences imposed for similar offences—Sentence startlingly inappropriate and substituted with two years' imprisonment, with one year conditionally suspended.