



JUTA'S ADVANCE NOTIFICATION SERVICE

OCTOBER 2019

Dear South African Law Reports and Criminal Law Reports subscriber

Herewith the cases in the October 2019 law reports

JUDGMENTS OF INTEREST IN THE OCTOBER 2019 EDITIONS OF THE SALR AND SACR LAW REPORTS.

Click on the case name to download the original judgment.

SOUTH AFRICAN LAW REPORTS - SALIENTS

Dismissal on grounds of derivative misconduct

In this matter the Constitutional Court investigated the question whether an employer had been justified in dismissing certain employees that had engaged in a strike, which had turned violent, on the grounds of their failure to disclose information about the misconduct of their fellow employees. The court discussed the concept of 'derivative misconduct', on which the employer relied. It held that, given the principle was based on the relationship of trust between employer and employee, the employer here could not demand the employees in question to come forward, without having complied with their reciprocal duty to ensure their safety. The court concluded that the dismissal was unfair. *Numsa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd and Others* 2019 (5) SA 354 (CC)

Fairness and reasonableness as self-standing requirements for the lawfulness of a contract

In this case, heard before the High Court (Pretoria), a tenant disputed the cancellation of its lease by the landlord on the ground of lack of good faith by the latter. The court addressed the scope of public policy and good faith in respect of private contracts. It confirmed that 'fairness' and 'reasonableness' did not constitute self-standing requirements for the lawfulness of a contract, but rather informed policy. The court concluded that, on the facts, the tenant had failed to prove that the landlord had acted in bad faith. *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* 2019 (5) SA 443 (GP)

Common-law set-off and the National Credit Act

This case concerned the practice of banks applying common-law set-off against amounts received by consumers into accounts with them. The High Court (Johannesburg), consequent to declaratory proceedings brought by the National Credit Regulator, confirmed that, in respect of credit agreements subject to the National Credit Act (34 of 2005), common-law set-off was not applicable. Parties had to comply with the procedures provided in the Act (in s 124). *National Credit Regulator v Standard Bank of South Africa Ltd* 2019 (5) SA 512 (GJ)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Lack of apparent injuries in rape of child and effect on sentence

In sentencing the accused in a matter concerning the rape of a 10-year-old girl, the court found that a lack of apparent injuries ought not be considered as a substantial and compelling factor for reducing the prescribed sentence (leaving aside their statutory exclusion as such), since the mere absence of physical injury did not automatically equate with a lesser degree of degradation or psychological trauma. *S v Radebe* 2019 (2) SACR 381 (GP)

Effect on bail of having been granted leave to appeal

The court in this matter found that the fact that the applicant had been granted leave to appeal against his conviction and sentence for murdering his wife did not on its own entitle him to bail pending the hearing. It did not dispose of questions such as whether he was a flight risk or if his release would threaten law and order. *S v Rohde* 2019 (2) SACR 422 (WCC)

Whether sending of scurrilous emails amounting to contempt of court ex facie curiae

The respondent in this case sent numerous emails to a wide-ranging list of important persons and institutions containing scurrilous accusations of racism, corruption and dishonesty, including accusations against judges, and one judge in particular. The court found that the remarks expressed disdain in the extreme for the judiciary and constituted a classic case of contempt ex facie curiae. *Nelson Mandela Bay Municipality v Gcora* 2019 (2) SACR 451 (ECP)

WE WELCOME YOUR FEEDBACK

Please send any comments or queries to lawreports@juta.co.za.

Kind Regards

The Juta Law Reports Team

SOUTH AFRICAN LAW REPORTS

OCTOBER

TABLE OF CASES

- *Nandutu and Others v Minister of Home Affairs and Others* 2019 (5) SA 325 (CC)
- *Numsa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd and Others* 2019 (5) SA 354 (CC)
- *Atakas Ticaret Ve Nakliyat AS v Glencore International AG* 2019 (5) SA 379 (SCA)
- *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA)
- *Griessel NO and Others v De Kock and Another* 2019 (5) SA 396 (SCA)
- *Maswanganyi v Road Accident Fund* 2019 (5) SA 407 (SCA)
- *National Home Builders Registration Council and Another v Xantha Properties 18 (Pty) Ltd* 2019 (5) SA 424 (SCA)
- *Singh and Others v Companies and Intellectual Property Commission and Others* 2019 (5) SA 432 (SCA)
- *Atlantis Property Holdings CC v Atlantis Exel Service Station CC* 2019 (5) SA 443 (GP)
- *Cloete v Edel Investments (Pty) Ltd* 2019 (5) SA 486 (WCC)
- *He & She Investments (Pty) Ltd v Brand NO and Others* 2019 (5) SA 492 (WCC)
- *Lundy v Beck* 2019 (5) SA 503 (GJ)
- *National Credit Regulator v Standard Bank of South Africa Ltd* 2019 (5) SA 512 (GJ)
- *New Nation Movement PPC and Others v President of the Republic of South Africa and Others* 2019 (5) SA 533 (WCC)
- *Pickitup Johannesburg SOC Ltd v Nair (Maharaj and Others, Third Parties)* 2019 (5) SA 540 (GJ)
- *Schoeman and Others v Lombard Insurance Co Ltd* 2019 (5) SA 557 (SCA)

- E v E 2019 (5) SA 566 (GJ)
- Competition Commission of South Africa v Media 24 (Pty) Ltd 2019 (5) SA 598 (CC)

FLYNOTES

NANDUTU AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS (CC)

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

2019 JUNE 28
[2019] ZACC 24

Immigration—Visas—Visitor’s visas—Requirement that holder of visitor’s visa leave country in order to change visa status, unless there were exceptional circumstances—Regulation setting out those circumstances failing to provide for foreign spouses or children of South African citizens or permanent residents—Immigration Act 13 of 2002, s 10(6)(b); Immigration Regulations, reg 9(9)(a).

NUMSA obo NGANEZI v DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD AND OTHERS (CC)

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

2019 JUNE 28
[2019] ZACC 25

Labour law—Dismissal—Derivative misconduct—Place and limits of doctrine in labour law—Derivative misconduct during violent strike—Unilateral versus reciprocal fiduciary duties—Dismissal, based on derivative misconduct, for failure to disclose information about misconduct of fellow employees—Employer failing to comply with reciprocal duty to guarantee employees’ safety—Dismissal unfair.

ATAKAS TICARET VE NAKLIYAT AS v GLENCORE INTERNATIONAL AG (SCA)

PONNAN JA, SWAIN JA, ZONDI JA, SCHIPPERS JA and GORVEN AJA

2019 MAY 30
[2019] ZASCA 77

Shipping—Admiralty proceedings—Practice—Joinder—Discretion to refuse or permit joinder in terms of Admiralty Jurisdiction Regulation Act 105 of 1983 left untouched by International Arbitration Act 15 of 2017.

ESKOM HOLDINGS SOC LTD v MASINDA (SCA)

LEACH JA, WALLIS JA, MOCUMIE JA, MOKGOHLOA AJA and WEINER AJA

2019 JUNE 18
[2019] ZASCA 98

Spoilation—Mandament van spolie—When available—Electricity supply—Prepaid electricity meter installed on property and wired unlawfully to national grid—Connection later discovered and severed—Whether order of reconnection could be granted based on mandament van spolie.

GRIESEL NO AND OTHERS v DE KOCK AND ANOTHER (SCA)

NAVSA ADP, LEACH JA, MAJIEDT JA, MOLEMELA JA and DAVIS AJA

2019 JUNE 6
[2019] ZASCA 95

Trust—Discretionary trust—Trustee empowered to select beneficiaries from listed potential beneficiaries—Potential beneficiaries may not be treated in arbitrary and discriminatory way

by trustee, who has fiduciary duty to all beneficiaries, including potential ones—But discrimination based on need of particular beneficiary might sometimes be justified.

MASWANGANYI v ROAD ACCIDENT FUND (SCA)

MAYA P, WALLIS JA, ZONDI JA, MOCUMIE JA and WEINER AJA

2019 JUNE 18

[2019] ZASCA 97

Court—Powers—To make settlements orders of court—Court’s discretion to exercise power—Factors bearing on—Effect of settlement on court’s jurisdiction.

NATIONAL HOME BUILDERS REGISTRATION COUNCIL AND ANOTHER v XANTHA PROPERTIES 18 (PTY) LTD (SCA)

LEACH JA, SALDULKER JA, VAN DER MERWE JA, GORVEN AJA and WEINER AJA

2019 JUNE 21

[2019] ZASCA 96

Housing—Consumer protection—Enrolment of home—Required also where homes being built with intention that they be let and not sold—Housing Consumers Protection Measures Act 95 of 1998, s 14(1).

SINGH AND OTHERS v COMPANIES AND INTELLECTUAL PROPERTY COMMISSION AND OTHERS (SCA)

NAVSA ADP, MBHA JA, SCHIPPERS JA, MOKGOHLOA AJA and DAVIS AJA

2019 MAY 30

[2019] ZASCA 69

Company—Complaints—Power of Companies and Intellectual Property Commission (CIPC) to investigate—Whether complaint time-barred—Effect of pending litigation on CIPC investigation, where subject-matter of complaint also material issue in such litigation—Companies Act 71 of 2008, ss 219(1)(a) and 219(2).

ATLANTIS PROPERTY HOLDINGS CC v ATLANTIS EXEL SERVICE STATION CC (GP)

OPPERMAN J, VALLY J and WINDELL J

2019 APRIL 11

Contract—Breach—Remedies—Cancellation—Whether party claiming cancellation obliged to act in good faith as self-standing requirement—Majority decision holding law of contract imposing no such obligation and that test remained whether public policy or identifiable constitutional value or principle offended—Minority decision holding that Constitutional Court developed such obligation, and that it was bound thereby as opposed to contrary Supreme Court of Appeal authority.

Lease—Cancellation—Right to cancel fixed term lease—Whether party claiming cancellation obliged to act in good faith—Law of contract imposing no such self-standing obligation, nor was such obligation developed by Constitutional Court.

CLOETE v EDEL INVESTMENTS (PTY) LTD (WCC)

GAMBLE J

2019 MARCH 5

Damages—Quantification—Claim in delict for lost profits—Exception to particulars on basis that claim for positive interesse not sustainable in delict—No ground for distinction between positive and negative interesse—Claim in delict for loss of profits sustainable—Exception dismissed.

HE & SHE INVESTMENTS (PTY) LTD v BRAND NO AND OTHERS (WCC)

MYBURGH AJ
2019 FEBRUARY 26

Practice—Judgments and orders—Summary judgment—Risk of abuse of process by both sides—Defendant’s option to disclose defence—Sufficient particularity and bona fides—While imprecision sometimes excusable, incompleteness will negate defence—Uniform Rules of Court, rule 32(3)(b).

LUNDY v BECK (GJ)

SNYCKERS AJ
2019 MAY 22

Insolvency—Compulsory sequestration—Abuse of process—Ulterior purpose—Adverse costs order may follow.

Insolvency—Compulsory sequestration—Act of insolvency—Failure to satisfy judgment—Nulla bona return—Payment, after launching of sequestration proceedings and obtaining of provisional sequestration order, of debt on which return founded, precluding further reliance on said act of insolvency—Petitioning creditor debarred from relying on interest subsequently accrued—Insolvency Act 24 of 1936, s 8(b).

NATIONAL CREDIT REGULATOR v STANDARD BANK OF SOUTH AFRICA LTD (GJ)

KEIGHTLEY J
2019 JUNE 27

Credit agreement—Consumer credit agreement—Debt enforcement—Collection and repayment practices—Common-law set-off—Credit provider’s common-law right to set-off not applicable in respect of credit agreements that are subject to NCA—National Credit Act 34 of 2005, ss 90(2)(n) and 124.

NEW NATION MOVEMENT PPC AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (WCC)

DESAI J
2019 APRIL 17

Election law—Parliamentary election—Failure of Electoral Act to make provision for independent candidates to contest provincial and national elections—Whether constitutional right to stand for public office infringed—Constitution, s 19(3)(b); Electoral Act 73 of 1998, s 57A and sch 1A.

Constitutional law—Legislation—Validity—Electoral Act 73 of 1998, s 57A and sch 1A—Failure to make provision for independent candidates to contest provincial and national elections—Whether infringing individual’s right to stand for public office in terms of s 19(3)(b) of Constitution—Constitution, s 19(3)(b); Electoral Act 73 of 1998, s 57A and sch 1A.

Constitutional law—Human rights—Right to stand for public office—Failure of Electoral Act to make provision for independent candidates to contest provincial and national elections—Whether constitutional right to stand for public office infringed—Constitution, s 19(3)(b); Electoral Act 73 of 1998, s 57A and sch 1A.

PICKITUP JOHANNESBURG SOC LTD v NAIR (MAHARAJ AND OTHERS, THIRD PARTIES/ EXCIPIENTS) (GJ)

LEECH AJ
2019 MAY 17

Delict—Joint wrongdoers—Joint liability—Right to contribution inter se—Role of clean-hands doctrine—Right of municipal official responsible for loss suffered by municipality to recover contribution from other officials who were joint wrongdoers—Local Government: Municipal Finance Management Act 56 of 2003, s 176(2).

SCHOEMAN AND OTHERS v LOMBARD INSURANCE CO LTD (SCA)

TSHIQI JA, SWAIN JA, MATHOPO JA, MAKGOKA JA and PLASKET AJA
2019 MAY 29
[2019] ZASCA 66

Contract—Specific contracts—Demand guarantee or performance guarantee—Compliance—Strict or substantial—SCA approving court a quo’s findings that correct approach was to determine what was required of particular contract under consideration, properly interpreted.

Contract—Specific contracts—Demand guarantee or performance guarantee—Requirement that demand be made at address of beneficiary—Demand hand-delivered to address of guarantor—Requirement directory, not mandatory—Demand effective.

E v E (GJ)

MAKUME J, KOLLAPEN J and MODIBA J
2019 JUNE 12

Marriage—Divorce—Rule 43 proceedings—Permissible length of rule 43(2) and (3) affidavits—Whether application may be dismissed for prolixity—Court’s discretion under rule 43(5) to hear further evidence—Use of when respondent’s papers raise dispute of fact—Use of to direct disclosure of further evidence, financial and otherwise—Financial disclosure form—Uniform Rules of Court, rules 43(2), (3) and (5).

COMPETITION COMMISSION OF SOUTH AFRICA v MEDIA 24 (PTY) LTD (CC)

MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J
2019 JULY 3
[2019] ZACC 26

Competition—Unlawful competition—Prohibited practices—Abuse of dominance—Predatory pricing—Appropriate cost benchmarks—Discussion of—Whether standard of ‘average total cost’ could ever be used to assess predatory pricing—Competition Act 89 of 1998, s 8(c).

Competition—Unlawful competition—Prohibited practices—Abuse of dominance—Predatory pricing—Relevance of dominant firm’s intent in assessing predatory pricing—Competition Act 89 of 1998, s 8(c).

Court—Constitutional Court—Jurisdiction—Matter of general public importance—What constitutes—Appropriate cost benchmark for purposes of assessing predatory pricing in breach of Competition Act 89 of 1998—Constitution, s 167(3)(b)(ii).

SOUTH AFRICAN CRIMINAL LAW REPORTS

OCTOBER 2019

TABLE OF CASES

- S v Mokoena 2019 (2) SACR 355 (SCA)
- Barnard v Minister of Police and Another 2019 (2) SACR 362 (ECG)
- S v Radebe 2019 (2) SACR 381 (GP)
- S v Serame 2019 (2) SACR 407 (GJ)
- S v Rohde 2019 (2) SACR 422 (WCC)
- National Director of Public Prosecutions v Johnson and Another 2019 (2) SACR 438 (NCK)
- Nelson Mandela Bay Municipality v Gcora 2019 (2) SACR 451 (ECP)

FLYNOTES

S v MOKOENA (SCA)

MAYA P, TSHIQI JA, SALDULKER JA, SWAIN JA and GORVEN AJA
2019 MAY 14, 30
[2019] ZASCA 74

Trial—Delay in prosecution of—Investigation into—Investigation in terms of s 342A(3) of Criminal Procedure Act 51 of 1977—Requirements of s 342A(4)(a) peremptory—Presiding officer not permitted to act *mero motu* in invoking section—Grant of order in conflict with provisions leading to failure of justice—Provisions of s 324(c) of Act then applicable—Proceedings had to be set aside and could not be reinstated before same presiding officer.

BARNARD v MINISTER OF POLICE AND ANOTHER (ECG)

STRETCH J and RUGUNANAN AJ
2019 MAY 17, 31

Arrest—Arrest without warrant—Lawfulness of—Duty of arresting officer—Peace officer who failed to substantiate suspicion when able to do so did not act reasonably—In *casu*, failure to consider explanation and evaluate authenticity thereof, by making call to fellow officer, constituting unreasonable conduct—Criminal Procedure Act 51 of 1977, s 40(1)(b).

Arrest—Arrest without warrant—Lawfulness of—Duty of arresting officer—Court's failure to consider arresting officer's neglect to exercise discretion in arresting person leading to incorrect determination of lawfulness of arrest—Criminal Procedure Act 51 of 1977, s 40(1)(b).

S v RADEBE (GP)

SPIILG J, RAUTENBACH AJ and MAYISELA AJ
2018 DECEMBER 13; 2019 JULY 10

Rape—Sentence—Life imprisonment—Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997—Substantial and compelling circumstances—What constitutes—Lack of apparent injuries—Not available to accused in terms of s 51(3)(aA) of Act 105 of 1997—Notwithstanding, such factor ought not to be considered because mere absence of physical injury could not automatically equate with lesser degree of degradation or emotional and psychological trauma.

Rape—Sentence—Life imprisonment—Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997—Substantial and compelling circumstances—Conundrum facing prosecutors and presiding officers where accused offered plea bargain where some facts amounting to aggravating factors omitted—Duty of prosecutor and magistrate to place proper evidence before court.

S v SERAME (GJ)

GRANT AJ
2019 JUNE 18; AUGUST 1

Plea—Plea of guilty—Alteration to plea of not guilty—Prior questioning by presiding officer in terms of s 112(2) of Criminal Procedure Act 51 of 1977—Questioning taking place under oath at invitation of defence counsel—Permissibility of—Such procedure neither prohibited nor specifically required—No stepwise approach required.

Trial—Presiding officer—Recusal of—Recusal on basis of irregularity allegedly committed—No such basis for recusal in law.

Trial—Presiding officer—Recusal of—Court unable to proceed without required trust in counsel for both state and defence and recusing itself.

Legal practitioners—Duties of—Interests of client—Inconsistent instructions—Counsel apparently unaware of ethical dilemma and resultant obligations.

Legal practitioners—Conduct of—Manner in which counsel conducted himself in court deprecated.

S v ROHDE (WCC)

SALIE-HLOPHE J
2019 AUGUST 15

Bail—Pending appeal—Accused granted leave to appeal—Effect of—Did not necessarily dispose of question as to whether flight risk—Not on own entitling applicant to bail pending hearing of appeal—Crime of which convicted ultimate and most extreme form of gender-based violence and release on basis of having been granted leave to appeal, to allow management of wealth and other needs and comforts, would threaten law and order.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v JOHNSON AND ANOTHER (NCK)

MAMOSEBO J
2019 JUNE 7; JULY 12

Prevention of crime—Forfeiture order in terms of Prevention of Organised Crime Act 121 of 1998—Proceeds of unlawful activities—What constitutes—Movement of large amount of money around country—Highly questionable and not cogently explained—Lack of reporting to authorities of large amounts of cash in contravention of s 64 of Financial Intelligence Centre Act 38 of 2001—Money forfeited to state in terms of s 60 of POCA.

NELSON MANDELA BAY MUNICIPALITY v GCORA (ECP)

MBENENGE JP, MAKAULA J and NTSEPE AJ
2018 JUNE 7; JULY 10

Contempt of court—Contempt *ex facie curiae*—What constitutes—Numerous emails directed to wide-ranging list of important persons and institutions containing scurrilous accusations of racism, corruption and dishonesty, including accusations against judges, and one judge in particular—Classic example of contempt *ex facie curiae*.

Contempt of court—Contempt *ex facie curiae*—Sentence—Numerous emails directed to wide-ranging list of important persons and institutions containing scurrilous accusations of racism, corruption and dishonesty, including accusations against judges, and one judge in particular—Conduct contemptuous and exhibiting extreme unlawful disdain for judicial authority—Court taking into account subsequent apology and imposing non-custodial sentence.