



## JUTA'S ADVANCE NOTIFICATION SERVICE

FEBRUARY 2012

**Dear South African Law Reports and Criminal Law Reports subscriber**

Herewith the cases of interest in the January reports. Also included below are the table of cases and flynotes. The *Namibian Law Reports* 2011(2) are now available. See below for more details.

### JUDGEMENTS OF INTEREST IN THE FEBRUARY EDITIONS OF THE SALR AND THE SACR

#### **SOUTH AFRICAN LAW REPORTS**

##### **Misconduct by an attorney: removal from the roll**

During a disciplinary matter, an attorney is expected to assist, and to put the full facts before the court. Wide denials, evasions and obstructionism had no place in such matters. Continued denials of misconduct indicate a lack of understanding of the conduct in question. *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA)

##### **Negligence on our roads: oncoming vehicles**

An experienced truck driver was on the road when he noticed that the driver of an oncoming vehicle was fidgeting behind himself and looking backwards. The car was however, still keeping to its lane. The truck driver took no steps to avoid a collision. The car drew into the truck's blind spot and collided with the truck. Was there room to apportion some negligence on the truck driver? *Van As v Road Accident Fund* 2012 (1) SA 387 (SCA)

##### **The appointment of the National Director of Public Prosecutions**

The appointment of the National Director of Public Prosecutions by the President is an executive act that is subject to judicial scrutiny in accordance with the rule of law. The appointee must, having regard to the importance of the office, be above reproach, independent, and ready to serve without fear, favour or prejudice. In order to ensure that the candidate is such a person, the President must establish that he or she is possessed of the qualities of experience, conscientiousness and integrity. These qualities are jurisdictional facts that must be objectively assessed to exist before an appointment can be made. *Democratic Alliance v President of the Republic of South Africa and Others* 2012 (1) SA 417 (SCA)

#### **SOUTH AFRICAN CRIMINAL LAW REPORTS**

##### **Civil forfeiture while criminal trial pending?**

The applicants approached the court contending that civil forfeiture proceedings could not be brought against them while a criminal trial was pending. They alleged that their right to remain silent was being violated because their defence to the forfeiture had to be in the form of an affidavit. *Khosana and Others v National Director of Public Prosecutions* 2012 (1) SACR 176 (FB).

##### **No corpse, no conviction for murder?**

In *S v Nkuna* 2012 (1) SACR 167 (B) the court reviews the case law on situations where the accused is charged with murder, but the body has never been recovered. The court weighs up

the requirement that there must be a satisfactory explanation why the body is missing, and looks at what circumstantial evidence would be sufficient for a conviction.

#### **Parole: prisoners' rights and credits under the old and new Acts**

Two important cases on parole which look at sentences imposed before commencement of the Correctional Services Act 111 of 1998: *Van Vuren v Minister of Correctional Services and Others* 2012 (1) SACR 103 (CC) and *Van Wyk v Minister of Correctional Services and Others* 2012 (1) SACR 159 (GNP). Issues covered include the interpretation of the transitional provisions, and the allocation of credits.

#### **WE WELCOME YOUR FEEDBACK**

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Kind Regards

**The Juta Law Reports Team**

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**FEBRUARY 2012**

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as to why body missing—Conviction of murder sustainable on basis that facts so incriminating and so incapable of any reasonable or innocent explanation as to be incompatible with any hypothesis other than finding that accused killed person who has disappeared.

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- Veldman and Another v Bester 2011 (2) NR 581 (HC)
- S v Nakale 2011 (2) NR 599 (SC)
- Le Roux v Minister of Home Affairs and Immigration and Others 2011 (2) NR 606 (HC)
- National Housing Enterprises v Beukes and Others 2011 (2) NR 609 (LC)
- S v Kanguro 2011 (2) NR 616 (HC)
- Konga Clearing Agencies CC v Minister of Finance 2011 (2) NR 623 (HC)
- Ongombe Farmers Association v Tjiuro and Others 2011 (2) NR 630 (HC)
- Petrus v Roman Catholic Archdiocese 2011 (2) NR 637 (SC)
- De Waal v De Waal 2011 (2) NR 645 (HC)
- S v Paulus 2011 (2) NR 649 (HC)
- Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd and Others 2011 (2) NR 670 (SC)
- Bella Vista Investments v Pombili and Another 2011 (2) NR 684 (HC)
- Roads Contractor Company v Nambahu and Others 2011 (2) NR 707 (LC)
- Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others 2011 (2) NR 726 (SC)
- Ashipala v Nashilongo and Another 2011 (2) NR 740 (HC)
- Rostock CC and Another v Van Biljon 2011 (2) NR 751 (HC)

## FLYNOTES

### **SOUTHERN ENGINEERING AND ANOTHER v COUNCIL OF THE MUNICIPALITY OF WINDHOEK (SC)**

MARITZ JA, STRYDOM AJA and O'REGAN AJA  
2010 JULY 7; 2011 APRIL 4

**Landlord and tenant**—Lease—Cancellation—Landlord cancelling lease—Tenant subsequently liquidated—First appellant purchasing right and title to premises—Liquidators having no authority to assign rights—First appellant evicted from leased premises—Respondent entitled to evict first appellant—Lease having been validly cancelled.

### **KASUTO v JOUBERT AND ANOTHER (HC)**

MULLER J  
2011 MARCH 4, 29

**Arbitration**—Arbitration agreement—Arbitration Act 42 of 1965 requiring written arbitration agreement—Arbitration agreement must set out issues upon which arbitrator must arbitrate—Application to set aside arbitrator's award, granted—No written agreement setting out issues to be arbitrated upon.

**S v KAVARI (HC)**

HOFF AJP and GEIER AJ  
2010 MAY 17; JUNE 9

**Appeal**—Power of attorney—Rule 67(1) of the magistrates' court rules—Rule requires strict compliance—Power of attorney must be filed together with notice of appeal—Power of attorney must clearly indicate mandate of legal practitioner—In present case power of attorney indicating appeal against sentence while notice of appeal indicated appeal against conviction—Appeal struck from the roll.

**MBEKELE v STANDARD BANK NAMIBIA LTD (VEHICLE & ASSET FINANCE) (HC)**

UEITELE AJ  
2010 JULY 6–9; AUGUST 2–3; SEPTEMBER 6–9 2011 JANUARY 25

**Contract**—Misrepresentation—Plaintiff entering into instalment sale agreement with defendant for purchase of second-hand vehicle—Plaintiff later discovering vehicle a rebuilt model—Court not satisfied defendant proved that this was brought to plaintiff's attention—Court holding this amounts to misrepresentation—Defendant acting wrongfully in not bringing this fact to plaintiff's attention—Misrepresentation constituting material aspect of contract—Plaintiff entitled to cancel contract—Court ordering delivery of vehicle back to defendant and repayment of purchase price less 30% for wear and tear on vehicle.

**GOUWS v OFFICE OF THE PRIME MINISTER (LC)**

HOFF J  
2008 JULY 18; 2011 APRIL 29

**Labour law**—Absenteeism—Section 24(5)(a)(i) of the Public Service Act 13 of 1995—Section providing that absence without permission for more than 30 days amounting to misconduct—Appellant absent for 34 days—Appellant dismissed from public service—Complaint in district labour court unsuccessful—Court dismissing appeal against this decision.

**KLEYNHANS v CHAIRPERSON OF THE COUNCIL FOR THE MUNICIPALITY OF WALVIS BAY AND OTHERS (HC)**

DAMASEB JP  
2009 OCTOBER 12; 2010 APRIL 6–8; 2011 MARCH

**Review**—Review in terms of rule 53—High Court rules—Unreasonable delay—What constitutes—Rules not prescribing time limit—Question whether delay unreasonable within court's discretion—Factors such as finality of administrative decisions, avoidance of prejudice and promotion of public interest will be taken into account—Applicant seeking to review municipality's decision to permit construction of certain buildings—Applicant becoming aware in June 2008 that respondents not intending to cease construction—Applicant launching proceedings in October 2008—Relief of academic value when matter eventually heard in 2010—Applicant not setting out on papers why not seeking urgent relief—Court not satisfied that evidential basis laid for delay—Condonation of delay not justified under the circumstances—Application for review dismissed on ground of unreasonable delay.

**S v ONESMUS; S v AMUKOTO; S v MWESHIPANGE (HC)**

DAMASEB JP and LIEBENBERG J  
2011 MARCH 30

**Criminal procedure**—Plea—Plea of guilty in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 as amended by the Criminal Procedure Amendment Act 13 of 2010—Legislature not intending magistrates to impose excessive fines or lengthy custodial sentences—Magistrates cannot invoke s 112(1)(a) for the sake of disposing of cases expeditiously without fully enquiring into the details of the offence.

**NAMIB PLAINS FARMING AND TOURISM CC v VALENCIA URANIUM (PTY) LTD AND OTHERS (SC)**

SHIVUTE CJ, MARITZ JA and STRYDOM AJA  
2009 MARCH 17; 2011 MAY 19

**Practice**—Civil proceedings—Role of judge in civil proceedings—Judge cannot go on frolic of his or her own—Judge can only adjudicate upon issues before court—Judge can only raise new matters with consent of parties—Judge not having power to decide on issues not fully argued before him or her.

**NS v RH (HC)**

BOTES AJ  
2010 DECEMBER 8; 2011 APRIL 8, 21

**Husband and wife**—Custody—Plaintiff and defendant both foreigners—Parties adopting Namibian child—Plaintiff, Indian citizen, whose work visa had expired, intending to relocate to India—Defendant, German citizen, on temporary work visa in Namibia—When deciding on custody, best interests of child paramount—Court having wide powers—Court need not have regard to procedural structures, evidence or parties' contentions to determine best interests of child—Court will look at relationship between child and parent; compatibility; communication; temperament and character of parent; ability of parent to give child proper guidance, etc—Constitutional development resulting in parenting considered gender neutral—Mother cannot assume that court will award custody in her favour—Court in present case awarding custody to plaintiff—Plaintiff having had interim custody for three years—No reason, after evaluating all the evidence, to change present arrangement.

**Adoption**—Adoption of Namibian children by foreigners—Authorities needing to take all factors into account—Authorities to consider inter alia risk of relocation of child—Regard also to be had to subsidiarity principle in Convention on Rights of the Child—Namibia as yet not party to Hague Convention dealing with inter-country adoptions—Adoption of Namibian children by foreigners could result in court losing jurisdiction over such children if adoptive parents relocate—Time has come to rectify this situation by putting suitable measures in place to regulate such matters.

**NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY v CHRISTIAN AND ANOTHER (HC)**

SMUTS J  
2011 MARCH 22, 23; MAY 27

**Practice**—Withdrawal and dismissal of proceedings—Dismissal of vexatious proceedings—Applicant seeking order in terms of Vexatious Proceedings Act 3 of 1956 and common law—Purpose of act to put stop to groundless and persistent legal proceedings—Power of court to screen (not absolutely bar) persistent legal proceedings—Court must protect victims against harassment and public interest by precluding clogging of court roles by vexatious proceedings—First respondent launching multiplicity of applications against applicant—Applicant wasting considerable time and money in opposing applications—Court granting order against first respondent.

**Contempt of court**—What constitutes—First respondent admitting to having disregarded several court orders—Court satisfied that first respondent wilful and mala fide—Applicant proving contempt of court beyond reasonable doubt—Paramountcy of rule of law in Constitution requiring parties to adhere to court orders until varied or set aside.

**SOUTHLINE RETAIL CENTRE CC v BP NAMIBIA (PTY) LTD (SC)**

STRYDOM AJA, MTAMBANENGWE AJA and O'REGAN AJA  
2010 OCTOBER 15; 2011 JUNE 9

**Landlord and tenant**—Agreement of lease—Parties entering into agreement of lease for three years—Clause 2 allowing lessee to extend lease for further year—Clause 4.2 providing that lessor could give one month's written notice of intention to terminate lease—Lessee informing lessor that it wished to extend lease by one year—Lessor obtaining eviction order

against lessee in court a quo—On appeal court holding that option to renew lease was irrevocable offer in favour of lessee not lessor—Lessee must exercise option before expiration of lease—Lease would normally continue on same terms and conditions as before—Clause 2 appearing to confer option, ie agreement in which irrevocable offer made by one party to other—Clause 4.2, on other hand, providing for possibility that lessor may in future make offer to lessee on terms to be determined at some future date—Clause 4.2 containing neither irrevocable offer by lessor, nor irrevocable undertaking by lessee to accept any future offer by lessor if lessor decided to make it—Not accurate to refer to clause 4.2 as conferring ‘an option’ upon lessors—High Court incorrect when finding that clause 2 of Schedule to be read subject to clause 4.2 of Memorandum of General Conditions of Lease—Two clauses could not be read together—Clause 4.2 not containing option—Merely containing provision stating that lessor may decide once lease period coming to an end to offer lessee further contract on same or different terms—Not purporting to require lessor to do so, nor to compel lessee to accept such offer, if ever made—Clause 4.2 clearly contemplating different or new lease in future—Not renewal of existing lease—Reasoning of High Court that clause 4.2 a provision regulating ‘option’ referred to in clause 2 of Lease Schedule could not be accepted.

**VELDMAN AND ANOTHER v BESTER (HC)**

GEIER AJ

2011 FEBRUARY 8, 17

**Practice**—Irregular proceedings—Application in terms of High Court rule 30—Such application must comply with rule 6(11)—Such proceedings incidental to pending proceedings—Parties not required to file affidavits unless specific circumstances required such affidavits—Where exchange of affidavits was required, short form (form 2(a)) was required—In present case defendant given sufficient notice with necessary particulars—Present case not requiring filing of affidavits.

**Practice**—Pleadings—Simple summons for debt or liquidated demand—Such summons to be as near as possible to form 9—Summons must contain sufficient particularity for defendant to know what case he must meet—Such summons should be able to stand on its own feet and not amount to a nullity—Allegations must be sufficient for court to decide whether judgment should/could be given—Simple summons need not give minute detail and comply with rule 18(4) and 18(6).

**S v NAKALE (SC)**

SHIVUTE CJ, MAINGA JA and STRYDOM AJA

2011 MARCH 28; APRIL 20

**Appeal**—Application for condonation for late filing of notice of appeal—Court dismissing application for condonation without dealing with merits of appeal—Appeal should be struck from roll—Incorrect in these circumstances to dismiss appeal.

**Appeal**—Application for condonation for late filing of notice of appeal—Court a quo refusing application for condonation—Court not dealing with merits of appeal—Appellant can appeal to Supreme Court as of right, against refusal of application for condonation.

**LE ROUX v MINISTER OF HOME AFFAIRS AND IMMIGRATION AND OTHERS (HC)**

SMUTS J

2011 JUNE 6

**Citizenship**—Citizenship by birth—Section 26 of Citizenship Act 14 of 1990 not applicable to Namibian citizens by birth in terms of art 4(1)(b) of Constitution.

**NATIONAL HOUSING ENTERPRISES v BEUKES AND OTHERS (LC)**

SMUTS J

2011 MAY 5, 13

**Constitutional law**—Right to fair trial entrenched in art 12 of Constitution—Despite informality of proceedings in district labour court and Labour Court, party entitled to be fully apprised of case it is required to meet—Reference in art 12 to ‘competent court’—Such reference not only to properly constituted court, but also that presiding officer has necessary skill to deal competently with case.

**S v KANGURO (HC)**

LIEBENBERG J  
2011 JULY 4, 7

**Criminal procedure**—Sentence—Accused convicted of murdering her one-year-old son—Accused having diminished responsibility when crime committed—Accused sentenced to 12 years' imprisonment of which four years conditionally suspended for five years.

**KONGA CLEARING AGENCIES CC v MINISTER OF FINANCE (HC)**

DAMASEB JP  
2011 JUNE 20, 23

**Principal and agent**—Locus standi of agent—Agent has no locus standi to institute proceedings in his own name—Agent must have authority from principal to do so.

**ONGOMBE FARMERS ASSOCIATION v TJIURO AND OTHERS (HC)**

HEATHCOTE AJ  
2011 JUNE 27; JULY 6

**Police**—Actions against—One month notice period in terms of s 39 of Police Act 19 of 1990—Meaning of 'civil proceedings' as used in s 39—Applicant being granted interdictory relief against inter alia, third respondent Minister—Interdictory relief not falling under 'civil proceedings'—Such interpretation would render section unconstitutional—Inclusion of urgent interdictory relief under 'civil proceedings' would deny litigant immediate access to court as of right.

**PETRUS v ROMAN CATHOLIC ARCHDIOCESE (SC)**

MAINGA JA, LANGA AJA and O'REGAN AJA  
2011 APRIL 7; JUNE 9

**Church**—Excommunication of priests—Court has no jurisdiction to adjudicate on such matter—Matter of excommunication is prerogative of church.

**Appeal**—Application for condonation for late filing of notice of appeal—Appellant showing flagrant disregard for court rules—Even though appellant had prospects of success on part of order, court would not condone late lodging of appeal.

**DE WAAL v DE WAAL (HC)**

DAMASEB JP  
2011 JULY 28

**Practice**—Judicial case management—Compliance of parties and legal practitioners with rule 37 of High Court rules—Court would impose sanctions contemplated in rule 37(16) where parties failed to comply—System cannot work efficiently if practitioners and parties fail to comply.

**S v PAULUS (HC)**

SHIVUTE J and GEIER AJ  
2011 JANUARY 31; MAY 19

**Criminal law**—Statutory offences—Offence created by s 35(1) of the Anti-Corruption Act 8 of 2003—Section not creating strict liability, ie punishing innocent violations of section—Mens rea an element of crime—Form of mens rea was *dolus*—Mens rea in form of *culpa* only in exceptional circumstances—Offence created by s 35(1) requiring mens rea in form of *dolus*.

**MWEB NAMIBIA (PTY) LTD v TELECOM NAMIBIA LTD AND OTHERS (SC)**

SHIVUTE CJ, STRYDOM AJA and CHOMBA AJA  
2008 OCTOBER 21; 2011 AUGUST 22

**Constitutional law**—Fundamental rights—Equality before the law guaranteed by art 10(1) of Namibian Constitution—Right of equality before the law not absolute—Section 2(2) of the Post and Telecommunications Act 19 of 1992 requiring that no person other than Telecom can provide telecommunication services without licence—Telecom required by Act to provide countrywide communication services—Telecom created as organ of State—Purpose of Act to redress past imbalances—Telecom cannot choose area of operation—Appellant as private company out to make profit could choose such operational area—Appellant and Telecom not equal—Article 10(1) accordingly not found to have been violated by s 2(2).

**Constitutional law**—Fundamental rights—Right to practise any business or profession in art 21(1)(j) of Constitution—Fact that appellant requiring licence for telecommunication services not precluding it from practising business or profession—Appellant not proving that could not do business as a result—Enactment of Telecom Act amounting to affirmative action policy in terms of art 23 of Constitution.

**Constitutional law**—Fundamental rights—Freedom of speech and expression in terms of art 21(1)(a) of Constitution—Requirement that appellant must have licence to provide telecommunication services not amounting to violation of art 21(1)(a)—Appellant still able to provide such services—Fact that appellant required to pay licence fees not limiting right to freedom of speech and expression.

#### **BELLA VISTA INVESTMENTS v POMBILI AND ANOTHER (HC)**

DAMASEB JP

2011 JUNE 21; AUGUST 10

**Land**—Possession of land—First respondent making improvements to applicant's land which first respondent had occupied—First respondent bona fide possessor until applicant proving legal title—First respondent entitled to compensation for period of lawful occupation—First respondent, however, not entitled to right of retention.

#### **ROADS CONTRACTOR COMPANY v NAMBAHU AND OTHERS (LC)**

MULLER J

2011 JULY 8; AUGUST 12

**Labour law**—Labour arbitration tribunal—Aim of labour tribunal hearings not to require strict procedure of court of law, but rather to make it more flexible—Arbitrator empowered to determine procedure to be followed, how evidence must be presented and where onus rests—Arbitrator must be independent, neutral and impartial.

#### **TRUSTCO LTD t/a LEGAL SHIELD NAMIBIA AND ANOTHER v DEEDS REGISTRIES REGULATION BOARD AND OTHERS (SC)**

SHIVUTE CJ, LANGA AJA and O'REGAN AJA

2011 APRIL 4; JULY 15

**Practice**—Parties—Locus standi—Citizens in constitutional State entitled to come to Court where there is legal uncertainty—First appellant entering into agreement with second appellant to provide conveyancing services at hourly rate—Appellants seeking order declaring conveyancing tariffs infringement of arts 21(1)(j) and art 18 of Constitution—First appellant entitled to approach Court.

**Constitutional law**—Right to practise business or profession in terms of art 21(1)(j)—Appellants challenging conveyancing tariffs—Regulation of practice of profession not necessarily infringement of art 21(1)(j)—Regulation should be rational—However, such regulation should not be so invasive as to constitute barrier to practising profession—Court satisfied that purpose of conveyancing tariffs is to create certainty to purchasing and mortgaging of property—Tariffs accordingly not infringing art 21(1)(j).

**Constitutional law**—Fair administrative justice in terms of art 18—Enquiry regarding reasonableness is contextual—Factors to be considered: nature of administrative conduct, identity of decision-maker, range of factors relevant to decision and nature of any competing interests involved—At core of concept of reasonableness was most reasonable course among many—Judges not to impose course of conduct they would have chosen—Judges must decide whether course selected by decision-maker was one of the courses within range of reasonable courses available—Appellants not proving that laying down of conveyancing tariffs constituting infringement of art 18.

**ASHIPALA v NASHILONGO AND ANOTHER (HC)**

SMUTS J

2011 MARCH 1, 2; JULY 21, 28

**Contract**—Specific performance—Plaintiff purchasing immovable property from first defendant—First defendant raising defence of impossibility of performance—Property registered in name of second defendant—First defendant not proving why transfer could not be passed to her and then to plaintiff—Court ordering first defendant to arrange for transfer from second defendant to first defendant and then to plaintiff.

**ROSTOCK CC AND ANOTHER v VAN BILJON (HC)**

HEATHCOTE AJ

2011 JUNE 14; AUGUST 5

**Words and phrases**—*Res litigiosa*—Concept of *res litigiosa* part of Namibian law—Court setting out and discussing general principles applicable to concept of *res litigiosa*.