



JUTA'S ADVANCE NOTIFICATION SERVICE

MAY 2013

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

Herewith the cases of interest in the May reports. Also included below are the table of cases and flynotes.

Earlier this year the Namibian Law Reports celebrated its 30th edition of independent jurisprudence. Due to the increasing volume of reportable judgments being handed down by the Namibian courts, these reports will henceforth be published four times a year. The 2013(1) edition is now available. Please see below for the table of cases and flynotes.

JUDGMENTS OF INTEREST IN THE MAY EDITIONS OF THE SALR AND THE SACR

SOUTH AFRICAN LAW REPORTS

Swollen ankle claimed as a serious injury

A claim was made against the Road Accident Fund for R390 000, yet it emerged that the plaintiff had only sustained a swollen ankle. Judge Satchwell investigates how the expert witness and the lawyer could have supported and pursued such a claim. *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ)

Paternity test shows maintenance payments made in error

The child's constitutionally protected rights to family and parental care needed to be protected where a husband claimed the return of maintenance payments made in the mistaken belief that he was the father. *MN v AJ* 2013 (3) SA 26 (WCC)

Residents over-billed for substandard water supply

The residents complained that the shambles in the water supply and metering system meant that accurate billing was impossible, resulting in widespread over-billing and chronic water shortages. The municipality admitted that most of the billing accounts issued against the residents were inaccurate. Due to many water meter readings not being functional, the municipality was simply making estimates of what was due and owing. *South African National Civic Organisation v Capricorn District Municipality and Another* 2013 (3) SA 225 (GNP)

SOUTH AFRICAN CRIMINAL LAW REPORTS

How to pay legal fees when property under preservation order

Where his property was under a prevention-of-crime preservation order, the respondent requested that funds be released to cover his living expenses and legal fees. The court looks at the two preconditions: need and disclosure. The respondent claimed to be living on charity and loans from his friends, but did not provide any details of his liabilities in respect of the loans made to him. *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC)

Appeal goes badly wrong in drug dealing case

The two appellants were convicted in the high court for their part in trying to smuggle R2 million worth of cocaine into the country. They were each sentenced to 12 years and decided

to appeal their convictions. The Supreme Court of Appeal set aside their sentences and replaced them with 20 years. *S v Cwele and Another* 2013 (1) SACR 478 (SCA)

Ubuntu for petty thief

The accused had a long history of petty thefts and so when he stole packets of yeast from a supermarket, the magistrate sentenced him to three years' imprisonment. On review the court held that the magistrate should have been alive to the accused's socio-economic background, and applied the well-known principle of ubuntu and taken into consideration the reason for his being unable to pay a fine, and his sickly condition at the time of sentencing. Ordered that the accused be cautioned and discharged, and immediately released from prison. *S v Matiwane* 2013 (1) SACR 507 (WCC)

WE WELCOME YOUR FEEDBACK

Please forward any comments regarding *The South African Law Reports* and *The South African Criminal Law Reports* to lawreports@juta.co.za.

Kind Regards

The Juta Law Reports Team

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- Schweiger v Müller 2013 (1) NR 87 (SC)
- Van der Merwe v Director of the Law Society of Namibia and Others 2013 (1) NR 98 (HC)
- S v S 2013 (1) NR 114 (SC)
- Telecom Namibia Ltd v Regenstein (Pty) Ltd and Another 2013 (1) NR 128 (HC)
- S v Malumo and 111 Others 2013 (1) NR 152 (HC)
- Executive Properties CC and Another v Oshakati Tower (Pty) Ltd and Others 2013 (1) NR 157 (SC)
- Pinto v First National Bank of Namibia Ltd and Another 2013 (1) NR 175 (HC)
- Haimbili and Another v Transnamib Holdings Ltd and Others 2013 (1) NR 201 (HC)
- Swakopmund Airfield CC v Council of the Municipality of Swakopmund 2013 (1) NR 205 (SC)
- S v Hoabeb 2013 (1) NR 222 (HC)
- Municipal Council of Windhoek v Awaseb 2013 (1) NR 233 (HC)
- Mukapuli and Another v Swabou Investment (Pty) Ltd and Another 2013 (1) NR 238 (SC)
- Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others 2013 (1) NR 245 (HC)
- Kanguatjivi and Others v Shivororo Business and Estate Consultancy and Others 2013 (1) NR 271 (HC)
- Sebatane and Another v Mutumba and Others 2013 (1) NR 284 (HC)
- Brandt t/a Chris Brandt Attorneys v Windhoek Truck & Bakkie CC and Others 2013 (1) NR 295 (HC)

FLYNOTES

JT v AE (SC)

SHIVUTE CJ and MARITZ JA
2006 JULY 6; 2012 OCTOBER 12

Minor—Access—By non-custodian parent—Rights of access of fathers of minors born out of wedlock—Best interests of minor primary consideration when deciding upon rights of access—When making such decisions, courts should resort to oral evidence and evidence from experts—Court a quo making decision without hearing such evidence—Court remitting matter to court a quo.

ROLAND AND OTHERS v CHAIRPERSON OF THE COUNCIL OF THE MUNICIPALITY OF WINDHOEK AND OTHERS (HC)

MILLER AJ
2012 MARCH 14; JULY 31

Local authority—Town planning—Building regulations—Regulations providing that buildings in residential area may not exceed two storeys without permission of council—When approving such plans council to consider impact on neighbouring properties—Court setting aside council's approval of building plans where building exceeding two storeys.

NATIONAL HOUSING ENTERPRISE v HINDA-MBAZIIRA AND OTHERS (LC)

PARKER J

2012 MARCH 2; APRIL 3

Labour law—Labour Act 11 of 2007, s 86(2)(a)—Interpretation of—Dispute which concerns dismissal may be referred to Labour Commissioner in terms of subsection—Dismissal not necessarily leading to dispute.

S v MERORO AND ANOTHER (HC)

HOFF J and NDAUENDAPO J

2012 MARCH 15

Criminal procedure—Trial—Presiding officer—Role of—Presiding officer not to descend into arena of cross-examination—However, does not mean that presiding officer must be content with inadequate and incomplete cross-examination.

SS v YS (HC)

UEITELE AJ

2012 MARCH 27; APRIL 10

Court—Jurisdiction—Doctrine of continuance of jurisdiction—Plaintiff and defendant foreign nationals ordinarily resident in Namibia when divorce summons served—Defendant subsequently leaving Namibia, taking minor child with her—Continuance of jurisdiction not applicable where minor child beyond territory of court's jurisdiction—Court accordingly lacking jurisdiction to entertain plaintiff's custody claim.

MERLUS SEAFOOD PROCESSORS (PTY) LTD v MINISTER OF FINANCE (HC)

GEIER AJ

2011 MARCH 29; NOVEMBER 11

Revenue—Income tax—Meaning of 'manufacture' in s 5A of Income Tax Act 24 of 1981—Applicant, fishing company, cleaning and packing fish ready for sale—In widest sense, 'manufacture' could be said to mean making of any sort of article by physical labour or mechanical power—Element of 'transformation', expressly written into Namibian statute—Different thing was to be end-result of 'manufacturing activity', whether by 'physical' or 'chemical process'—Act laying down that degree of 'transformation' required that at end of 'physical' or chemical 'transformation', of materials, process should result in 'new product'.

Revenue—Income tax—Meaning of 'manufacture' in s 5A of Income Tax Act 24 of 1981—Applicant, fishing company, cleaning and packing fish ready for sale—Applicant employing 'raw materials' processed in Namibia by various production lines in applicant's factory—Final product packed and priced for consumer market.

S v CANDIMBA AND OTHERS (HC)

MAINGA J and SHIVUTE J

2010 FEBRUARY 15; APRIL 9

Criminal procedure—Search and seizure—Seizure of foreign currency—Forfeiture order—Court must be satisfied that accused owner of foreign currency before ordering such forfeiture.

PAULO v SHOPRITE NAMIBIA (PTY) LTD AND OTHERS (LC)

DAMASEB JP

2011 OCTOBER 12; 2012 JUNE 1

Labour law—Dismissal—Unfair dismissal—Arbitrator making award in favour of employee—Employer noting appeal and court granting suspension of arbitrator's award—Employer's appeal subsequently dismissed—Applicant employee seeking compensation from time of arbitrator's award until dismissal of appeal—Employee, however, not invoking s 89(9)(b)(ii) of Labour Act 11 of 2007 which empowers court to grant such order of compensation—Court accordingly dismissing application for compensation.

SCHWEIGER v MÜLLER (SC)

SHIVUTE CJ and CHOMBA AJA
2005 OCTOBER 11; 2012 OCTOBER 12

Contract—Legality—Illegal contract—Parties entering into illegal agreement—Court a quo ordering repayment of capital plus interest from date when agreement entered into—Court on appeal holding that par delictum rule to be relaxed—However, such relaxation not to amount to enforcing of illegal agreement—Court ordering interest to run from date of Supreme Court judgment to date of payment.

VAN DER MERWE v DIRECTOR OF THE LAW SOCIETY OF NAMIBIA AND OTHERS (HC)

VAN NIEKERK J
2012 MARCH 2, 6

Legal practitioner—Fidelity Fund—Fidelity fund certificate—Applicant practising in partnership with fourth respondent—Partnership dissolving—Applicant and fourth respondent disputing name under which applicant wishing to practise—Court ordering first respondent to issue certificate—Focus in issuing certificate whether legal practitioner or partnership was strictly complying with provisions of ss 25 and 26 of Legal Practitioners Act 15 of 1995—Dispute regarding name was side issue having no bearing on issuing of certificate.

S v S (SC)

MARITZ JA, MAINGA JA and O'REGAN AJA
2012 JULY 6; NOVEMBER 15

Husband and wife—Divorce—Proprietary rights—Forfeiture of benefits of marriage in community of property—Dissolution of joint estate an inevitable consequence of divorce—Where defendant committing adultery, court having no discretion to refuse forfeiture of benefits.

Husband and wife—Divorce—Proprietary rights—Forfeiture of benefits of marriage in community of property—Constitutional validity of forfeiture order—Marriage in community of property requiring court to deal with joint estate at termination of marriage—Ordinary contractual principles governing disentangling joint estate—Forfeiture order not constituting violation of constitutional right to property.

TELECOM NAMIBIA LTD v REGENSTEIN (PTY) LTD AND ANOTHER (HC)

GEIER AJ
2011 MARCH 28; 2012 FEBRUARY 16

Servitude—Praedial servitude—Right of access to servitude road—Applicant owning portions of land surrounded by first respondent's land—Access road registered servitude—Respondents erecting locked gates manned by security guards—Gates constituting unlawful interference with applicant's access—Section 48 of Roads Ordinance 17 of 1972 prohibiting such restrictions—Applicant and its tenants entitled to access to servitude road.

S v MALUMO AND 111 OTHERS (HC)

HOFF J
2011 JUNE 21, 27–29; JULY 5, 11, 19, 25

Criminal procedure—Evidence—Confession—Admissibility of—Accused writing statement amounting to confession—No indication on statement that accused given customary warnings—State cannot produce statement as documentary evidence, thereby avoiding the more onerous duty of proving admissibility of confession in terms of s 217 of Criminal Procedure Act 51 of 1977—Statement ruled inadmissible.

EXECUTIVE PROPERTIES CC AND ANOTHER v OSHAKATI TOWER (PTY) LTD AND OTHERS (SC)

MARITZ JA, MAINGA JA and STRYDOM AJA
2012 MARCH 19; AUGUST 13

Practice—Applications and motions—Oral evidence—In what cases—Court will refer matter for oral evidence where there are prospects of tipping balance in favour of applicant—If on affidavits probabilities were evenly balanced, court more inclined to allow oral evidence—More scales depressed against applicant the less likely court would be to exercise discretion in his favour—In present case, oral evidence important for resolving dispute between parties regarding validity of sale of certain property—Court on appeal satisfied that hearing of oral evidence should be granted—Court reversing refusal of court a quo to refer matter for oral evidence.

PINTO v FIRST NATIONAL BANK OF NAMIBIA LTD AND ANOTHER (HC)

GEIER J
2012 JULY 24; OCTOBER 31

Banker—Relationship between banker and client—Based on contract—Applicant winning money in lottery—Applicant depositing money into bank account—First respondent bank reversing payment—Second respondent requesting first respondent to do such reversal, on basis that lottery constituting suspicious transaction—Applicant seeking order reversing debiting of his account—Respondents acting in terms of Prevention of Organised Crime Act 29 of 2004 (POCA) and Financial Intelligence Act 3 of 2007 (FIA)—Question whether legislation altered contractual relationship between banker and client—Purpose of legislation to combat money laundering and other suspicious transactions—Court concluding that FIA and POCA are to be regarded as terms imposed by law on traditional banker–client relationship and contractual bond existing between them—Respondents accordingly entitled to reverse payment into applicant’s bank account—Application dismissed with costs.

HAIMBILI AND ANOTHER v TRANSNAMIB HOLDINGS LTD AND OTHERS (HC)

MILLER AJ
2012 APRIL 27; MAY 14

Court—Jurisdiction—High court—Labour related matters—Applicants bringing urgent application for immediate reinstatement by employer—Court not having jurisdiction in this matter—High Court’s jurisdiction to grant urgent relief in labour matters confined to instances where dispute was lodged in terms of ch 8 of Labour Act 11 of 2007 and was awaiting resolution.

SWAKOPMUND AIRFIELD CC v COUNCIL OF THE MUNICIPALITY OF SWAKOPMUND (SC)

MARITZ JA, MAINGA JA and STRYDOM AJA
2012 JUNE 25; DECEMBER 13

Practice—Particular defences—Defence of *lis alibi pendens*—In what cases—Respondent’s urgent application struck from roll for lack of urgency—Respondent bringing fresh application with new affidavits—Merits of application not dealt with in urgent application—Subsequent application constituting fresh *lis* between parties—Defence of *lis alibi pendens* accordingly dismissed.

Landlord and tenant—Ejectment—Lien over leased property as result of improvements—Question was whether improvements constituting useful or necessary improvement by which respondent was unjustly enriched at appellant’s expense—Appellant relying on improvement of runway on leased property—Common cause that runway had fallen into disrepair—Improvement thus not enhancing property—Appellant could accordingly not rely on lien over property.

S v HOABEB (HC)

HOFF J and MILLER AJ
2012 JULY 18

Criminal procedure—Review—Criminal proceedings not finalised—Review of unterminated proceedings—Court will only deal with unterminated cases on review under rare circumstances—Court in present case setting aside entry in terms of s 113 of Criminal Procedure Act 51 of 1977 (Act)—There had been no basis for such entry—Court referring decision back to magistrate's court to be dealt with in accordance with s 275 of Act.

MUNICIPAL COUNCIL OF WINDHOEK v AWASEB (HC)

NDAUENDAPO J
2011 FEBRUARY 4; 2012 NOVEMBER 12

Insolvency—Compulsory sequestration—Acts of insolvency—Disposition of property to prejudice of creditors—Bald statement was not sufficient and creditor must explain why such disposition was prejudicial—Court must be satisfied that inference that disposition was prejudicial, was reasonable one in circumstances of case—Requirements of s 8(b) and (c) of Insolvency Act 24 of 1936 explained.

MUKAPULI AND ANOTHER v SWABOU INVESTMENT (PTY) LTD AND ANOTHER (SC)

MARITZ JA, MAINGA JA and NGCOBO AJA
2012 APRIL 2; AUGUST 13

Practice—Judgments and orders—Final orders—Judge of high court no jurisdiction to review constitutionality of high court judgment—Remedy for litigants who allege such violation lies in appeal to Supreme Court.

WITVLEI MEAT (PTY) LTD AND OTHERS v DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS AND OTHERS (HC)

SMUTS J
2012 JANUARY 23; FEBRUARY 20

Legal practitioner—Disciplinary procedure—Appeal against decision by disciplinary committee of law society—Disciplinary committee entitled to dismiss complaint without a hearing if no prima facie case on papers—Legal Practitioners Act 15 of 1995, s 35(2).

Legal practitioner—Disciplinary procedure—Appeal against decision by disciplinary committee of law society—Appeal procedure laid down in s 35(3) of Legal Practitioners Act 15 of 1995—Such procedure in nature of appeal—Court would rehear merits, limited to evidence placed before disciplinary committee—Applicants presenting material not serving before disciplinary committee—Court not inclined to take cognisance of new material—Court satisfied that disciplinary committee correct in dismissing complaint.

Legal practitioner—Legal professional privilege—What constitutes—Deponent to answering affidavit legal practitioner—Deponent, a trustee, disclosing certain confidential information regarding trust—Deponent acting as trustee in personal capacity—Information accordingly not subject to attorney-client privilege.

KANGUATJIVI AND OTHERS v SHIVORO BUSINESS AND ESTATE CONSULTANCY AND OTHERS (HC)

VAN NIEKERK J
2012 AUGUST 23; OCTOBER 16; DECEMBER 3

Administration of estates—Accounts—Liquidation and distribution account—Inspection of—Administration of Estates Act 66 of 1965, s 35(4)—Section providing that accounts 'shall' lie for inspection for 21 days—In present case, account lying for only 20 days—Court holding that provision directory and not peremptory—Applicants not showing that they suffered prejudice—Court satisfied that objectives of legislature would be achieved by substantial compliance with s 35(4) and that in present case there was such substantial compliance.

SEBATANE AND ANOTHER v MUTUMBA AND OTHERS (HC)

SHIVUTE J (AS HE THEN WAS)

2003 MARCH 18; 2012 OCTOBER 4

Constitutional law—Human rights—Right of access to courts—Constitutional validity of s 2(1)(a) of Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970—Section requiring creditor to serve notice on debtor within 90 days of knowledge of claim—Purpose of section to allow authorities to investigate claims as early as possible—Limitation having legitimate purpose—Right of access to courts not absolute—Impugned section not infringing right of access to court—Section merely providing formalities and limitations within which rights to be exercised—Section accordingly not unconstitutional.

BRANDT t/a CHRIS BRANDT ATTORNEYS v WINDHOEK TRUCK & BAKKIE CC AND OTHERS (HC)

CORBETT AJ

2011 NOVEMBER 15; 2012 APRIL 5

Practice—Judgments and orders—Summary judgment—Liquidated amount—What constitutes—Payment of legal practitioner's fees and disbursements not liquidated amount—Amount not easily ascertainable by mere calculation—Taxing master required to examine reasonableness of services rendered and fees charged—Application for summary judgment dismissed.