



## JUTA'S ADVANCE NOTIFICATION SERVICE

AUGUST 2013

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

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

Further below are the table of cases and flynotes of the *Namibian Law Reports* 2013(2), which is now available.

### JUDGMENTS OF INTEREST IN THE AUGUST EDITIONS OF THE *SALR* AND THE *SACR*

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

##### **Court develops Tsonga customary law**

The Constitutional Court developed Tsonga customary law to include the rule that the husband must obtain the first wife's consent in order to enter into a further marriage, and that failure to do so will result in invalidity of further marriage. *MM v MN and Another* 2013 (4) SA 415 (CC)

##### **Huur gaat voor koop**

It is the occupation of the leased premises that confers on the tenant the protection of a real right afforded by the *huur gaat voor koop* rule. The rule is not applicable to short-term leases where the tenant has abandoned possession of the premises, unless the purchaser had prior knowledge of the lease. *Metcash Seven Eleven (Pty) Ltd v Pollev Property Holding and Investment CC* 2013 (4) SA 506 (GSJ)

##### **Public interest v Cancer drug patent**

An interdict was sought to prevent a cheaper generic cancer drug from infringing a patent. Raised against the granting of the interdict were the constitutional right to healthcare and also the public interest. The court conducts a wide-ranging examination of all the issues. *Cipla Medpro (Pty) Ltd v Aventis Pharma SA and Related Appeal* 2013 (4) SA 579 (SCA)

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

##### **Long-term imprisonment for parents who murdered their baby**

The parents were convicted of the murder of their two-month-old baby who had been cruelly tortured over period of two weeks. Despite having had dismal childhoods, and having been in dire straits when the baby was born, the mother was sentenced to 10 years' imprisonment and the father to 12 years' imprisonment. *S v Rudman and Another* 2013 (2) SACR 209 (GNP)

### **Father grooming adopted daughter over time guilty of rape**

The court found that the daughter had been induced by threats and rewards over a long period to have regular sexual intercourse with the adoptive father. Despite not displaying any particular conduct indicating a lack of consent, the court found that there was a lack of real consent to the acts. *S v SM* 2013 (2) SACR 111 (SCA)

### **Collateral harm for criminal's children not a barrier to jail term**

Incarceration causing collateral harm for the criminal's children was not considered by the court sufficient to render a sentence inappropriate when incarceration would otherwise have been appropriate. *S v Chetty* 2013 (2) SACR 142 (SCA)

### **All prisoners eligible for parole after 25 years**

The appellant was sentenced to a total of 275 years' imprisonment. He contended that, as he would only be considered for parole once he had served half of his sentence, this amounted to a cruel, inhuman and degrading punishment. The right to parole, whether the prisoner was sentenced to a determinate sentence, or to life imprisonment, was held to be the same. Accordingly, the appellant was entitled to be considered for parole once he had served 25 years of his term of imprisonment. *S v Mafoho* 2013 (2) SACR 179 (SCA)

### **WE WELCOME YOUR FEEDBACK**

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Kind Regards

**The Juta Law Reports Team**

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- Chief Executive Officer of Namibia Financial Institutions Supervisory Authority and Another v FIS Life Assurance Co Ltd and Others 2013 (2) NR 532 (HC)
- Cargo Dynamics Pharmaceuticals (Pty) Ltd v Minister of Health and Social Services and Another 2013 (2) NR 552 (SC)
- Iyambo v Minister of Safety and Security 2013 (2) NR 562 (HC)
- Wellmann v Hollard Insurance Co of Namibia Ltd 2013 (2) NR 568 (HC)
- S v Tjipetekera 2013 (2) NR 587 (HC)
- Rosh Pinah Zinc Corporation (Pty) Ltd v Muronga 2013 (2) NR 595 (LC)

## FLYNOTES

### **AYOUB v MINISTER OF JUSTICE AND OTHERS (SC)**

SHIVUTE CJ, MARITZ JA and MAINGA JA

2012 JULY 12; AUGUST 22

**Extradition**—Detention—Appeal—Appellant appealed against judgment and order of high court dismissing urgent application brought by him for his immediate release from detention and interdicting his arrest or detention in connection with pending extradition enquiry—Whether exercise of minister's discretion to proceed under s 10(1) of Extradition Act 11 of 1996 subject to judicial review—Issuance of such authority precursor to endorsement of external warrant—Minister must be satisfied that order for return of wanted person could be lawfully made—Once authority given and documents received, magistrate must be satisfied in terms of s 10(2) that external warrant accompanying request authenticated as contemplated in s 18(1)—Once so satisfied, magistrate obliged in peremptory terms to endorse warrant 'whereupon that warrant may be executed in terms of subsection (3) as if issued in court of that magistrate under the laws of Namibia relating to criminal procedure'—Next step was execution of warrant—Endorsement of duly authenticated external warrant was 'pure' administrative act not subject to review—Court holding that appellant entitled to question minister's decision at this early stage, since his liberty was at stake.

**Extradition**—Detention—Appeal—Appellant appealed against judgment and order of high court dismissing urgent application brought by him for his immediate release from detention and interdicting his arrest or detention in connection with pending extradition enquiry—Appellant convicted in France in 1997 in absentia—Appellant contending that s 5 of Extradition Act 11 of 1996 precluding his extradition—Apparent from evidence that appellant's conviction and sentence would be revoked and that he would be tried de novo—Court holding that minister acting reasonably in ordering extradition enquiry—Appeal against refusal of appellant's release accordingly dismissed.

### **EX PARTE CHINGUFO: IN RE SEMENTE v CHINGUFO (HC)**

PARKER AJ

2012 SEPTEMBER 15, 25

**Medicine**—Medical treatment—Consent to treatment—Adult patient—Right to refuse medical treatment—Adults have right to refuse medical treatment—However, when making such decisions they need to be compos mentis and have sufficient mental capacity to do so.

**HOUSE AND HOME (A TRADING DIVISION OF SHOPRITE (PTY) LTD) v MAJIEDT AND ANOTHER (LC)**

HOFF J

2012 FEBRUARY 17; AUGUST 22

**Labour law**—Dismissal—Fairness of—Section 33(4) of Labour Act 11 of 2007 containing presumption that employee unfairly dismissed—Employer bearing onus to prove fairness of dismissal—In present case, employee, branch manager of furniture store, dismissed, after disciplinary hearing, for serious stock losses in his store—First respondent's explanation for stock losses implausible—Court finding that no arbitrator acting reasonably could have found dismissal unfair—Court upholding appeal from appellant that first respondent's dismissal not unfair.

**S v SAKARIA (HC)**

HOFF J and SIBOLEKA J

2011 SEPTEMBER 23; 2012 MAY 28

**Criminal procedure**—Appeal—Withdrawal of appeal by appellant—Where court gave notice of possible increase in sentence, appellant could only withdraw appeal with leave of appeal court.

**Criminal procedure**—Appeal—Against sentence—Increase of sentence on appeal—Court would order increase of sentence where trial court misdirected itself—Misdirections including over- or under-estimation of relevant factors—However, court on appeal could not impose sentence beyond jurisdiction of trial court—In present case, appellant sentenced in magistrates' court for attempted murder—Court finding sentence too lenient—Court referring matter to regional court for sentence.

**HANGULA v MOTOR VEHICLE ACCIDENT FUND (HC)**

DAMASEB JP

2011 SEPTEMBER 20; 2012 APRIL 18

**Practice**—Pleadings—Exception—On ground that particulars of claim not disclosing cause of action—Rule 18(10) of High Court Rules—Plaintiff claiming for bodily injury required to provide certain particulars—Bald statements not sufficient—Plaintiff must provide details to enable defendant to quantify damages—Plaintiff failing to give detail as to quantification of future medical expenses and other services—Plaintiff also not responding adequately to request for further particulars—Plaintiff's particulars of claim accordingly excipiable.

**S v PAULO AND ANOTHER (ATTORNEY-GENERAL AS AMICUS CURIAE) (SC)**

SHIVUTE CJ, MARITZ JA and MAINGA JA

2012 APRIL 11; NOVEMBER 30

**Constitutional law**—Legislation—Validity—Generally undesirable that attack on validity should be raised for first time on appeal—Parties should raise constitutional issues in trial court, before argument stage.

**Criminal law**—Drug offences—Cocaine—Dealing in contravention of Abuse of Dependence-Producing Substances and Rehabilitation Centres Act 41 of 1971—Appellants driving vehicle in which secret compartment containing 30,1 kg cocaine—On appeal—Appellants' version that they had been driving someone else's vehicle and that they had not known that cocaine had been concealed in vehicle, was improbable—Sufficient evidence on part of state witnesses—It had not been necessary to invoke presumptions in s 10 of Act—Court on appeal upholding conviction of trial court of dealing in cocaine.

**TUMAS GRANITE CC v MINISTER OF MINES AND ENERGY AND ANOTHER (HC)**

PARKER AJ

2012 NOVEMBER 26; DECEMBER 6

**Administrative law**—Administrative act—Duty to act—Mandamus—Nature of—Mandamus not concerned with reasons why administrative body not carried out its duty—Instead, concerned with allegation that administrative body has failed or refused to exercise a statutory power.

**S v KALUNDU (HC)**

VAN NIEKERK J and HOFF J

2012 NOVEMBER 30

**Criminal procedure**—Review—In what cases—Review proceedings only applicable where accused convicted and sentenced—Where prosecution applying for conversion from criminal proceedings to maintenance enquiry, order in criminal proceedings for payment of maintenance not reviewable in terms of Criminal Procedure Act 51 of 1977.

**RALLY FOR DEMOCRACY AND PROGRESS AND OTHERS v ELECTORAL COMMISSION OF NAMIBIA AND OTHERS (HC)**

DAMASEB JP and PARKER J

2010 MARCH 1, 2; SEPTEMBER 20; 2011 FEBRUARY 14

**Practice**—Security for costs—Furnishing of—Election applications—Application declaring general election void due to irregularities—Section 116 of Electoral Act 24 of 1992 (EA) requiring filing of application within 30 days of outcome of election—EA also requiring applicants to furnish security—Applicants seeking to file ‘amplifying papers’ after filing original application—Respondents applying to strike out ‘amplifying papers’—Court striking out such papers—Security having been furnished on original papers—Applicants should have approached court for leave to file ‘amplifying papers’—Furnishing of security important jurisdictional fact.

**Election law**—Elections—Application challenging outcome of general election—EA frowning upon irregularities—However, such irregularities not every irregularity imaginable—Nature of irregularity must affect outcome of election—Applicants raising numerous irregularities—Court holding that evidence adduced by applicants not sufficient to substantiate claims of irregularities—Nevertheless, court finding that electoral officials not following guidelines contained in election manual—Court also finding contradictions in first respondent’s answering affidavit—Court emphasising that irregularities in elections would not be tolerated—Application dismissed—Court not awarding costs to first respondent for its opposition, due to previously mentioned circumstances.

**KAMATI v NAMIBIA RIGHTS AND RESPONSIBILITIES INC (LC)**

VAN NIEKERK J

2012 JANUARY 2; 2013 JANUARY 13

**Court**—Labour Court—Jurisdiction—Labour Court not having jurisdiction to resolve disputes relating to basic conditions of employment—Labour Court not court of first instance—Disputes relating to basic conditions of employment must be resolved in terms of Labour Act 11 of 2007.

**MBAMBUS v MOTOR VEHICLE ACCIDENT FUND (HC)**

VAN NIEKERK J

2011 NOVEMBER 17; 2013 JANUARY 14

**Compromise**—Validity of—Validity of agreement of compromise not generally dependent on validity of any contract it replaces—Nevertheless, for it to be binding contract, compromise agreement must have been properly concluded.

**MARTIN v DIROYAL MOTORS NAMIBIA (PTY) LTD t/a NOVEL FORD AND OTHERS (HC)**

UEITELE J

2012 AUGUST 1; 2013 JANUARY 28

**Practice**—Parties—Joinder—Of party under common law—Court has discretion to join party for convenience and to save costs—Such discretion can be exercised even if party to be joined not necessary party.

**PURITY MANGANESE (PTY) LTD v SHIKONGO NO AND OTHERS (LC)**

MILLER AJ

2011 OCTOBER 11; NOVEMBER 4; 2012 JUNE 15

**Arbitration**—Award—Appeal against—Section 89 of Labour Act 11 of 2007 not allowing appeal against factual finding—However, applicant can take such finding on review.

**IN RE OUTJO INQUEST 30 OF 2012; IN RE OUTJO INQUEST 48 OF 2012 (HC)**

VAN NIEKERK J

2013 JANUARY 7

**Births and deaths**—Deaths—Inquest finding—Review of—Instances in which inquest record to be submitted for review set out.

**JACK'S TRADING CC v MINISTER OF FINANCE AND ANOTHER (HC)**

SMUTS J

2012 AUGUST 15, 31

**Revenue**—Customs and excise—Amendment of duties—Notice to impose additional duties on Portland cement in terms of s 65 of Customs and Excise Act 20 of 1998—Minister tabling proposal for such increase in National Assembly on 15 April 2012—Notice of increase promulgated on 27 July 2012—Applicant seeking order to declare notice invalid—Procedure in s 65 contemplating notice in Gazette to precede tabling in National Assembly—Such procedure couched in peremptory terms—Minister must adhere to principle of legality—Notice invalid by reason of non-compliance with s 65.

**JACK'S TRADING CC v MINISTER OF FINANCE AND ANOTHER (OHORONGO CEMENT (PTY) LTD INTERVENING) (HC)**

SMUTS J

2012 OCTOBER 4, 29

**Practice**—Applications and motions—Interlocutory application—Application to execute judgment pending appeal—Court setting aside notice in terms of Customs and Excise Act 20 of 1998—Minister subsequently admitting notice to be nullity—Court dismissing application, since minister would in any event, not act on impugned notice.

**Practice**—Judgments and orders—Rescission of judgment—Application in terms of rule 44(1)(a)—Intervening party applying for judgment to be set aside—Absence of party not necessarily rendering judgment erroneous—Intervening party failing to establish prerequisites



for setting judgment aside—Court in this instance *functus officio*—Party could appeal if not agreeing with judgment.

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

SHIVUTE CJ, MARITZ JA and MAINGA JA  
2010 OCTOBER 7, 8 2012 AUGUST 13

**Criminal procedure**—Trial—Presiding officer—Recusal of—In what cases—Judge to recuse himself if reasonable person suspects bias on judge's part which would result in unfair trial—Judge's 'interference' in cross-examination where cross-examiner belabouring irrelevant points, not justifying judge's recusal.

**Criminal procedure**—Evidence—Admissibility—Computer-generated documents—Admissibility of computer print-outs governed by s 221 of Criminal Procedure Act 51 of 1977—Appellants objecting to admissibility of printouts emanating from mobile telecommunications company—Print-outs having been handed in by agreement—Objection to admissibility of printouts dismissed.

**CHIEF EXECUTIVE OFFICER OF NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY AND ANOTHER v FIS LIFE ASSURANCE CO LTD AND OTHERS (HC)**

SMUTS J  
2012 OCTOBER 17; NOVEMBER 7

**Financial institution**—Placing under curatorship—Whether appropriate—Application to place long-term insurer under curatorship in terms of s 6(1) of Financial Institutions (Investment of Funds) Act 39 of 1984—First applicant, registrar of long-term insurers, conducting investigations into affairs of first respondent—Investigation revealing certain irregularities and unsatisfactory corporate governance—Court satisfied that first applicant establishing jurisdictional facts in terms of s 6(1)—Court granting application for curatorship.

**CARGO DYNAMICS PHARMACEUTICALS (PTY) LTD v MINISTER OF HEALTH AND SOCIAL SERVICES AND ANOTHER (SC)**

MARITZ JA, MAINGA JA and O'REGAN AJA  
2011 NOVEMBER; 2012 SEPTEMBER 12

**Appeal**—Application for condonation—Late filing of notice of appeal—Appellant's application dismissed in *ex tempore* judgment—Appellant subsequently seeking further written reasons—Appellant filing notice of appeal seven days late—Appellant's explanation for late filing being that was awaiting reasons—On appeal court holding that further reasons unnecessary—Judgments can only be supplemented in exceptional circumstances—Present case not falling within such circumstances—Appellant also not having prospects of success—Condonation refused—Appeal struck from roll with costs.

**IYAMBO v MINISTER OF SAFETY AND SECURITY (HC)**

PARKER AJ  
2013 JANUARY 29, 30; FEBRUARY 12

**Delict**—Specific forms—Wrongful arrest and detention—Defendant conceding unlawfulness of arrest and detention—Court awarding damages for such unlawful arrest and detention—However, defendant not liable for further detention ordered by magistrate—Magistrate acting as judicial officer—Defendant, member of Executive, not liable for actions of judicial officers.

**WELLMANN v HOLLARD INSURANCE CO OF NAMIBIA LTD (HC)**

GEIER J

2012 JUNE 5, 6; JULY 13; AUGUST 15

**Principal and agent**—Knowledge of agent—When imputable to principal—Defendant informing plaintiff's broker of repudiation of insurance claim—Plaintiff alleging that he did not receive such notification—Such notification can be imputed to principal if agent received notification in course of duty as agent—Court satisfied that within agent's authority to communicate repudiation to plaintiff—Court satisfied that in present case broker had received valid notification—Immaterial whether or not plaintiff himself received such notification.

**S v TJIPETEKERA (HC)**

VAN NIEKERK J and MULLER J

2010 MAY 31; 2012 SEPTEMBER 11

**Criminal procedure**—Plea—Plea of guilty on alternative count—Plea of not guilty on main count—Accused must be questioned in terms of s 115 of Criminal Procedure Act 51 of 1977 on main count and s 112(1)(b) of Act on alternative count—Admissions in plea of guilty must not be used to convict accused on plea of not guilty.

**ROSH PINAH ZINC CORPORATION (PTY) LTD v MURONGA (LC)**

MILLER AJ

2012 SEPTEMBER 21; 2013 JANUARY 24

**Labour law**—Dismissal—Incapacity—Respondent's employment terminated on grounds of incapacity—Respondent injured in accident while off duty—Respondent unable to perform former job—Appellant offering respondent lower graded job with lower remuneration—Respondent dissatisfied with lower remuneration—Appellant not acting unfairly in offering alternative employment, albeit at lower remuneration—Appellant cannot be expected to offer lower post at higher grade remuneration—Respondent's termination of employment accordingly not unfair.