



## JUTA'S ADVANCE NOTIFICATION SERVICE

MARCH 2014

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

Herewith the cases of interest in the March reports. The 2013(4) edition of the *Namibian Law Reports* will be available at the end of February. For the table of cases and flynotes, see further below.

### **JUDGMENTS OF INTEREST IN THE MARCH EDITIONS OF THE *SALR*, *SACR* AND THE *NAMIBIAN LAW REPORTS 2013(4)***

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

##### **Affirmative action and the best candidate**

A white female police captain was twice refused promotion, despite being the best candidate. The post was subsequently scrapped because it was 'non-critical' and that the vacancy 'would not affect service delivery'. The captain alleged that she was denied the position solely because she was white and that this amounted to unfair discrimination. *Solidarity obo Barnard v South African Police Service 2014 (2) SA 1 (SCA)*

##### **International issues in our courts**

The police have the power to investigate conduct perpetrated outside of South Africa, but the power to investigate is confined to within South Africa's borders. The Supreme Court of Appeal looks at the Rome Statute. *National Commissioner, South African Police Service and Another v Southern African Human Rights Litigation Centre and Another 2014 (2) SA 42 (SCA)*

A mother disregarded the terms of a divorce order granted in the Cape High Court and took her children to Zimbabwe. The court had jurisdiction, on the basis of the doctrine of continuance of jurisdiction, and ultimately it ordered that she was in contempt of the divorce order. *JC v DC 2014 (2) SA 138 (WCC)*

##### **Emotional shock from road accidents**

The exclusion in the Road Accident Fund Act, of liability for emotional shock, is to bar claims by persons who were not injured in the accident. The exclusion would not apply where the plaintiffs were spouses injured in an accident in which two of their children were killed, for in such a case it would be impossible to distinguish the psychological trauma and shock resulting from the accident itself from the emotional shock induced by the deaths of the children. *Fourie and Another v Road Accident Fund 2014 (2) SA 88 (GNP)*

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

##### **Duty of prosecutor to protect the public interest**

A man spent days detained in disgusting conditions, when there was exculpatory matter in the docket at the time of his first appearance in court. A prosecutor's function was not merely to

have the matter placed on the roll to then simply be postponed for further investigation. A prosecutor had to pay attention to the contents of his docket. He had to act with objectivity and protect the public interest: in the present case that had not been done. *Minister of Police and Another v Du Plessis* 2014 (1) SACR 217 (SCA)

#### **Police powers to search a vehicle**

An attorney sued the police for attempting to search his motor vehicle without a warrant, because it humiliated and degraded him, and invaded his constitutional rights to privacy. The court found that in circumstances, where effective and swift action was required by the police, following a robbery, the plaintiff's right to privacy was outweighed by state's duty to take action. *Tinto v Minister of Police* 2014 (1) SACR 267 (ECG)

#### **Accused must be informed of minimum sentence**

A life sentence was set aside on appeal because at his trial the accused was not informed of the possibility of a life sentence being imposed. The accused must be informed of fact that the provisions of the Amendment Act are to be applied and the consequences thereof. It could not be assumed that, because an accused was legally represented, the provisions of the Act had been pertinently brought to his attention. *S v Mabaso* 2014 (1) SACR 299 (KZP)

### **NAMIBIAN LAW REPORTS 2013(4)**

#### **Traditional medicine turns into crime**

A traditional healer applied ointment internally to his female patients, using his body parts. He told his patients that he would use his supernatural powers to curse them if they reported him. The law, however, caught up with him, and the court discusses the boundaries of traditional medicine. *S v BM* 2013 (4) NR 967 (NLD)

#### **Pack your Namibian law books before crossing the border**

A matter was struck from the roll because counsel had referred to South African case law, where Namibian case law was available on the issues. All practitioners are reminded of Practice Directive 37 of 2009 which requires practitioners relying on foreign authority, to certify that no Namibian authority could be found. *Westcoast Fishing Properties v Gendev Fish Processors Ltd and Another* 2013 (4) NR 1036 (HC)

#### **Labour hire companies being cramped?**

A labour amendment Act, it was argued, placed labour hire workers on a par with other employees, and this was an undue regulation on labour hire companies. But the court made it clear that these temporary workers were now employed on the same terms and conditions as the comparable employees already in the employment of the user enterprise—no discrimination between labour hire employees and other employees was allowed. *Africa Labour Services (Pty) Ltd v The Minister of Labour and Social Welfare and Another* 2013 (4) NR 1175 (HC)

#### **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](mailto:lawreports@juta.co.za)

Kind Regards

**The Juta Law Reports Team**

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**Labour law**—Payment of benefits to employees of local authorities—Section 27(1)(c)(ii) (bb) of Local Authorities Act 23 of 1992 requiring approval of minister for payment of such benefits—Section peremptory—Section presumably enacted to ensure uniformity among local authorities—Section not in conflict with Labour Act—Payment of benefits without ministerial approval accordingly invalid and *unenforceable*.

**THE PROSECUTOR-GENERAL v KANIME (HC)**

GEIER J  
2012 SEPTEMBER 20; DECEMBER 20

**Criminal law**—Statutory offences—Offences in contravention of Prevention of Organised Crime Act 29 of 2004 (POCA)—Provisional preservation order having been granted against respondent for having earned income derived from unlawful means—On return day, court setting out requirements for granting final preservation order.

**MINISTER OF EDUCATION AND OTHERS v FREE NAMIBIA CATERERS (PTY) LTD (SC)**

MARITZ JA, CHOMBA AJA and MTAMBANENGWE AJA  
2011 OCTOBER 17; 2013 JULY 15

**Administrative law**—Application to review and set aside administrative decisions—Such review intending to secure justice where there had been failure of justice—Failure must be necessary component of, and intrinsic to, decision-making process itself—Should not be on

basis of what happens either prior or subsequent to decision-making process—Burden to prove grounds resting on applicant for review.

**Administrative law**—Review of administrative actions—Trial court setting aside administrative decision on grounds that administrative body not giving reasons and abdicating statutory responsibility—Neither factor intrinsic to administrative decision—Factors relied on by trial court, taking place either before or subsequent to decision—Trial court setting aside decision on erroneous grounds.

**Tenders**—Award of tenders—First and second appellants awarding tender to third appellant—Respondent dissatisfied with award of tender—Trial court upholding respondent's application to set aside tender—Court on appeal upholding trial court's decision, but on different grounds—Court finding certain irregularities in tender process—Third appellant initially disqualified and respondent qualifying for award of tender—Subsequent interventions causing a reversal of fortune—Court on appeal holding interventions resulting in reversal of tender process to be irregular—Court dismissing appeal by appellants—Matter referred back to Tender Board.

### **ELISENHEIM PROPERTY DEVELOPMENT CO (PTY) LTD v GUEST FARM ELISENHEIM AND ANOTHER (HC)**

SMUTS J

2013 JUNE 17; JULY 5

**Trade and trademark**—Application for expungement of trademark 'Elisenheim' from trademark register—First respondent registering trademark in 2010—Under common law, trademark would only become form of property in consequence of use by trader who could claim to have acquired repute in mark—Would entail establishing that mark had become distinctive in minds of purchasing public in distinguishing goods or services from other similar goods or services—Existence of trademark requiring evidence of its use from trade as to its distinctiveness and documentary evidence to establish that mark had become distinctive—Applicant adducing evidence of its own use and acquisition of right in mark 'Elisenheim'—Body of advertising and promotional material serving to demonstrate use of mark 'Elisenheim' by applicant—Use not disputed by first respondent—Applicant thus establishing repute in use of mark 'Elisenheim'—Registration by first respondent of trademark in conflict with s 16(1) of Trade Marks in South West Africa Act 48 of 1973—Section prohibiting registration of trademark which would deceive or cause confusion—Application for expungement of trademark accordingly granted.

### **SHAANIKA AND OTHERS v THE WINDHOEK CITY POLICE AND OTHERS (SC)**

MARITZ JA, MAINGA JA and O'REGAN AJA

2012 NOVEMBER 8; 2013 JULY 15

**Practice**—Applications and motions—Doctrine of 'unclean hands'—When applicable—Appellants admitting unlawful occupation of respondents' land—However, no evidence of dishonesty, fraud or mala fides—Not appropriate to apply doctrine of 'unclean hands' in such circumstances.

**Constitutional law**—Constitutional validity of ss 4(1) and (3) of Squatters Proclamation 21 of 1985—Sections, inter alia, excluding access to courts—Article 12 of Namibian Constitution protecting right of access to courts—Such right not absolute, but no basis in present case for limiting such right—Proclamation authorising demolition of structures without prior notice or recourse to court—Homes important to human beings and right to invasion of privacy should be protected—Requiring a local authority to seek court order prior to demolishing homes, not precluding them from preventing illegal occupation of land—However, ss 4(1) and (3) couched in very broad terms and violating rights entrenched in art 12 of Constitution—Sections accordingly declared to be unconstitutional.

**AFRIKANER v THE MASTER OF THE HIGH COURT OF NAMIBIA AND OTHERS (HC)**

GEIER J

2013 MARCH 20; JULY 29

**Will**—Validity of will—Section 2(1)(a)(v) of Wills Act 7 of 1953—Section requiring that where signed by mark or thumbprint, each page must be certified by notary—In present case, notary only certifying last page—Court not prepared to condone oversight by notary—Certificate cannot be placed on other pages of will by notary post-mortem the testator.

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

SHIVUTE CJ, MARITZ JA and STRYDOM AJA

2012 MARCH 23; 2013 JULY 15

**Judge**—Recusal—Under what circumstances—Appellants challenging jurisdiction of court—Judge rejecting challenge and making certain credibility findings—Appellants' application for his recusal dismissed—On appeal, court holding that credibility findings at that stage had bearing on trial as a whole—Impartiality of judge fundamental to fair trial—Judge ought to have recused himself—Refusal to do so constituting gross irregularity such as to vitiate whole proceedings—Appeal accordingly allowed—Matter remitted to trial court to start de novo before another judge.

**AFRICA LABOUR SERVICES (PTY) LTD v THE MINISTER OF LABOUR AND SOCIAL WELFARE AND ANOTHER (HC)**

LIEBENBERG J and GEIER J

2012 SEPTEMBER 27; 2013 JUNE 27

**Labour law**—Labour hire—Section 128 of Labour Amendment Act 2 of 2012 regulating labour hire—Applicant contending that section creating material barrier to its business—Section placing employees of labour hire companies on par with other employees—Court holding that such regulation not constituting undue regulation or material barrier to labour hire companies—Application accordingly dismissed with costs.