



## JUTA'S ADVANCE NOTIFICATION SERVICE

AUGUST 2014

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

Herewith the cases in the August reports. Also available this month is the *Namibian Law Reports 2014(2)*, which reports are issued every three months.

**JUDGMENTS OF INTEREST IN THE AUGUST EDITIONS OF THE *SALR*, THE *SACR* AND THE *NAMIBIAN LAW REPORTS 2014(2)*.**

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

#### **Trusts and divorce**

The wife claimed that a family trust was the alter ego of her husband, and that its assets should be deemed to form part of his assets for the purpose of determining the accrual of his estate. It was not her case that the assets were his property, nor that the trust was a sham; it was simply that he had the power and the ability to use the assets for his sole benefit and that they should therefore be taken into account. *MM and Others v JM* 2014 (4) SA 384 (KZP)

#### **Sham trust?**

In this case the applicants applied to a court for it to 'go behind' a trust and to disregard its 'veneer' in order to give effect to what they said was the true situation. This they alleged was that it was the alter ego of one K. They The court held that 'going behind the trust form' and establishing that a trust was a sham, had to be distinguished. Here the applicants had failed to show that the trust was a sham or that K had used it as his alter ego. *Van Zyl and Another NNO v Kaye NO and Others* 2014 (4) SA 452 (WCC)

#### **Court's powers in dispute of fact**

May a court intervene regarding a referral of a dispute of fact to oral evidence? The court may do so to suggest an alternative approach or argument, but it remains for the parties to adopt it. If the parties wished to stand by the issues they had formulated, it was not open to the court to raise new ones or compel them to deal with matters other than those they had formulated in their pleadings or affidavits. *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA)

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

### **Intermediaries desirable for young children witnesses**

The need for, and procedure for appointing intermediaries for child witnesses, is discussed in *S v Peyani* 2014 (2) SACR 127 (GP), where the accused was facing numerous charges of serious sexual offences, and where the witnesses would have suffered undue stress without an intermediary.

### **Fraud to the world at large?**

The merits of the appeal turned on a question of law: whether a misrepresentation that had been made to the world at large, could constitute fraud. The court held that there was authority for the proposition that such a misrepresentation could constitute fraud. In the light of this, and the often difficult question whether silence or nondisclosure was criminally fraudulent, there was a reasonable prospect of success on appeal. *Director of Public Prosecutions, Western Cape v Malan* 2014 (2) SACR 146 (WCC)

### **Minimum sentence not to be lightly departed from**

Under the minimum sentencing legislation, the starting point is the prescribed minimum sentence, and this is not to be departed from for flimsy reasons. A sentence of an effective three years' imprisonment imposed on 19-year-old offender for participating in an attack on two women and a child in their home at night was woefully inadequate. The sentence was altered to an effective 12 years' imprisonment. *S v Nkunkuma and Others* 2014 (2) SACR 168 (SCA)

## ***THE NAMIBIAN LAW REPORTS 2014(2)***

### **The line between self-defence and murder**

In looking at the accused's intention, the court has to consider the cumulative conduct of the accused, the nature of the weapon used, as well as the location and number of the injuries inflicted. *S v Lukas* 2014 (2) NR 374 (HC)

### **Exceptio rei judicatae**

A judgment or order that does not have the effect of settling or disposing of the dispute between the parties with finality cannot found the *exceptio rei judicatae*. In order to determine whether the judgment and order does so, it must be carefully construed. *Fish Orange Mining Consortium (Pty) Ltd v !Gooseb and Others* 2014 (2) NR 385 (SC)

### **Family feud over grandmother's will**

In this bitterly-fought battle over the validity of a second will, various tests drawn from reported cases are set out and used in determining testamentary capacity in terms of s 4 of Wills Act 7 of 1953. The second will was challenged on the basis that the grandmother was suffering from Alzheimer's disease when she signed it. *Vermeulen and Another v Vermeulen and Others* 2014 (2) NR 528 (SC)

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Kind Regards

**The Juta Law Reports Team**

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**Mines and minerals**—Exclusive prospecting licence—Application for in terms of s 47 of Minerals (Prospecting and Mining) Act 33 of 1992—Notice in terms of s 122(1) of Act prohibiting indefinitely new applications for licences for prospecting or mining of nuclear fuel group minerals—Application for order compelling ministry to accept applications for EPLs— Refusal by ministry to accept application—Effect of notice in terms of s 122(1) was to preclude receipt of applications for licences in respect of mineral or group of minerals affected by prohibition as long as restriction was in place unless prohibition was accompanied by invitation to make applications for licences in respect of affected minerals—Appeal against refusal of application dismissed.

**Mines and minerals**—Exclusive prospecting licence—Application for in terms of s 47 of Minerals (Prospecting and Mining) Act 33 of 1992—Notice in terms of s 122(1) of Act prohibiting indefinitely new applications for licences for prospecting or mining of nuclear fuel group minerals—Application for order compelling ministry to accept applications for EPLs— Refusal by ministry to accept application—Notice not infringing appellant's right in terms of s 21(1)(j) of Constitution 'to practise any profession, or carry on any occupation, trade or business'—Such right not implying that persons may carry on trade or profession free of regulation—Mining par excellence a business requiring regulation to protect range of interests—Issue of notice in terms of s 122(1) not disregarding appellant's right in terms of s 21(1)(j) of Constitution.

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SHIVUTE CJ, MARITZ JA and MAINGA JA  
2013 JUNE 26; 2014 MARCH 26

**Sale**—Of member's interest in close corporation—Legality—Close corporation owner of commercial agricultural land—Purchasers entitled to take possession of land on signature of agreement—Parties clearly intending to sell and buy 50% ownership of close corporation and for purchasers to occupy immovable property as soon as possible—As purchasers foreign nationals, agreement in conflict with s 58 of Agricultural (Commercial) Land Reform Act 6 of 1995 and thus illegal—Action for return of part of price paid failing—Clause in agreement that purchasers entitled to possession of property on signature of agreement a material term— Clause not severable from rest of agreement.

### **LUNGAMENI AND OTHERS v HAGEN AND ANOTHER (LC)**

SMUTS J  
2013 MARCH 27  
[2013] NALCMD 15

**Labour law**—Labour court—Powers of—Power in terms of rule 15 of Rules of Labour Court to condone non-compliance with Rules of Labour Court—Such power conferred only in respect of non-compliance with rules of court and not in respect of non-compliance with peremptory provisions of Labour Act 11 of 2007.

**Labour law**—Labour court—Powers of—Power to condone non-compliance with s 89(4) of Labour Act 11 of 2007 in respect of time periods for bringing applications for review of arbitration proceedings—No power to condone such non-compliance contained in Act—Court accordingly having no power to condone such non-compliance—Rule of court cannot confer such power on Labour Court in respect of peremptory provision of s 89(4) of Act.

### **PUMA CHEMICALS v LABOUR COMMISSIONER AND ANOTHER (LC)**

GEIER J  
2014 FEBRUARY 7, 10  
[2014] NALCMD 09

**Labour law**—Labour Court—Powers of—Power in terms of rule 15 of Rules of Labour Court to condone non-compliance with Rules of Labour Court—Such power conferred only in respect of non-compliance with rules of court and not in respect of non-compliance with peremptory provisions of Labour Act 11 of 2007—Earlier decision of Labour Court to this effect approved.

**Labour law**—Labour Court—Powers of—Power to condone non-compliance with s 89(4) of Labour Act 11 of 2007 in respect of time periods for bringing applications for review of arbitration proceedings—No power to condone such non-compliance contained in Act—Deliberate intention of legislature to limit by statute period within which labour reviews to be brought—Provisions of s 89(4) peremptory, court accordingly having no power to condone such non-compliance.

**Labour law**—Labour Court—Powers of—Power to condone non-compliance with s 89(4) of Labour Act 11 of 2007 in respect of time periods for bringing applications for review of arbitration proceedings—Labour Court having no power to condone such non-compliance—Sembler: May well be need for parliament to include in s 89(3) of Act provision clothing Labour Court with jurisdiction and power to entertain reviews outside time periods set in s 89(4), in deserving cases, in order to avoid hardship and injustice.

### **S v NANGAKU AND ANOTHER (HC)**

PARKER AJ and UNENGU AJ  
2013 DECEMBER 3  
[2013] NAHCMD 368

**Criminal law**—Possession of housebreaking implements—Contravention of s 9 of Police Offences Proclamation 27 of 1920—Sentence—Sentence of community service imposed in addition to suspended sentence of fine with alternative of imprisonment imposed in terms of Proclamation read with s 297(1)(a) and (b) of Criminal Procedure Act 51 of 1977—Such additional sentence not in accordance with Proclamation and accordingly ultra vires.

### **S v NDAKOLO (NLD)**

CHEDA J and MILLER AJ  
2013 DECEMBER 5  
[2013] NAHCNLD 57

**Criminal procedure**—Sentence—Minimum sentences—Combating of Rape Act 8 of 2000—‘Substantial’ and ‘compelling’ circumstances—None found where 19-year-old perpetrator raped 9-year-old boy—Retributive and deterrent aspects of sentence to be afforded more weight than the personal circumstances of the accused—17 years’ imprisonment confirmed on appeal.

**S v LUKAS (HC)**

SHIVUTE J

2013 JULY 16–31; NOVEMBER 1

[2013] NAHCMD 313

**Criminal law**—Persons, liability of—Self-defence—Requirements for—Reiterated that attack must be unlawful; attack must be directed at interest legally deserving of protection; and attack must be imminent but not yet completed.

**Criminal law**—Murder—Mens rea—Intention—Type of intention—Determination of—Court to consider cumulative conduct of accused, nature of weapon used, position on body where injuries inflicted and number of times injuries inflicted.

**FISH ORANGE MINING CONSORTIUM (PTY) LTD v !GOASEB AND OTHERS (SC)**

SHIVUTE CJ, MARITZ JA and MAINGA JA

2013 JUNE 28; 2014 MARCH 28

**Estoppel**—Res judicata—Requirements for—Judgment or order not having effect of settling or disposing of dispute between parties with finality cannot found exceptio rei judicatae—In order to determine whether judgment and order does so, it must be carefully construed—Parties to two suits the same and factual background to sustain relief sought in both suits the same, but could not be said that same thing claimed in two suits nor was reliance placed on same cause of action—Mere fact that common elements present in allegations made in both suits not justifying exceptio rei judicatae—If it appears that differences between first and second suits so wide and obvious that it could not be said that same thing claimed in both suits or were brought on same cause of action, exceptio rei judicatae should not be upheld.

**S v SS (HC)**

DAMASEB JP and SHIVUTE J

2013 NOVEMBER 15; 2014 JANUARY 31

**Criminal procedure**—Accused—Unrepresented—Duty of court—Decision not to enlist services of lawyer not to be used as some kind of punishment—Insufficient to merely give formulaic explanations of procedural rights—Assistance to be of substance and meaningful—Trier of fact to be vigilant throughout trial—Duty of presiding officer to direct accused's attention to any evidence pointing to his innocence or throwing doubt on state's case.

**Criminal procedure**—Evidence—Documents—Medical report in form of J88 form—Doctor other than doctor who compiled form testifying and explaining contents of form—That an accepted practice but improper for doctor to give explanation about word which suggested that disputed fact had been finding of absent doctor.

**S v BEYER (HC)**

GEIER J

2013 DECEMBER 2, 3; 2014 JANUARY 31

**Criminal procedure**—Bail—Pending appeal—When to be granted—More lenient approach to be adopted in line with fundamental right to liberty—As long as appeal not doomed to failure courts should grant bail to avoid prejudice to appellant.

**VAN STRATEN NO AND OTHERS v NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY AND OTHERS (HC)**

CHEDA J

2013 OCTOBER 8; 2014 JANUARY 31

**Practice**—Exception—Claim against Namibia Financial Institution Supervisory Authority alleging dereliction of duty by registrar of stock exchanges—Failure to cite registrar as party to claim—Registrar a distinct statutory entity in terms of s 4(1)(f) of the Stock Exchanges Control Act 1 of 1985—Claim excipiable.

**DE BEERS MARINE NAMIBIA (PTY) LTD v LANGE NO AND OTHERS (HC)**

GEIER J

2013 OCTOBER 18

**Practice**—Judicial case management—Compliance of parties and legal practitioners with rule 37 of High Court Rules—Effect of pre-trial orders—Such orders are of binding nature and courts will not readily or lightly vary their own simple interlocutory orders.

**FACTCROWN LTD v NAMIBIA BROADCASTING CORPORATION (SC)**

MAINGA JA, STRYDOM AJA and CHOMBA AJA  
2013 OCTOBER 24; 2014 MARCH 17

**Principal and agent**—Authority of agent—Ostensible authority—Such authority not open-ended—Limited to what would fall within ordinary powers of that particular agent in that particular business—Ostensible authority may be wider than actual authority—When agent's authority limited, such limitation falls within internal arrangements of principal—People doing business with agent who are unaware of limitation not bound thereby—Where events leading to conclusion of agreement so patently irregular that it cannot be said to fall within ordinary powers of agent, cannot be found that agent had implied or ostensible authority to bind principal to agreement.

**Practice**—Trial—Absolution from the instance at close of plaintiff's case—To survive absolution from instance, plaintiff to make out prima facie case, ie present evidence relating to all elements of claim—Without such evidence no court could find for plaintiff.

**WITVLEI MEAT (PTY) LTD v AGRICULTURAL BANK OF NAMIBIA (SC)**

MAINGA JA, STRYDOM AJA and CHOMBA AJA  
2013 OCTOBER 28; 2014 MAY 27

**Lease**—Renewal of—Whether collateral issues carried forward into new lease—Where renewal governed by an express contract between the parties would depend on interpretation of renewal contract and in this regard it was relevant whether what was renewed was only lease simpliciter or whether intention was to renew document containing lease which would then include all terms contained in such document, also collateral issues such as option to purchase—Terms of agreement as well as conduct of parties indicating that option to purchase carried forward.

**Land**—Agricultural land—Agricultural Land Bank—Powers of—Power to alienate or encumber land—Ministerial approval not required by bank—Agricultural Bank of Namibia Act 5 of 2003, s 6(1)(b).

**Land**—Agricultural land—Agricultural Land Bank—Sale of land by—Offer of land by bank indicating terms of loan that bank would offer—Acceptance of offer by purchaser without simultaneous acceptance of terms of loan constituting valid offer and acceptance as purchaser entitled to seek alternative sources of funding.

**SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD v AGGRESSIVE TRANSPORT CC AND ANOTHER (HC)**

SMUTS J  
2014 JANUARY 17, 22  
[2014] NAHCMD 19

**Practice**—Pleadings—Amendment—Amendment of plea in order to introduce new defence sought at late stage of trial—Case the subject of judicial case management—Parties having agreed upon issues of fact and law to be resolved during trial and such agreement made order of court—Agreement binding on parties and parties cannot resile from it unless upon good cause shown—High Court Rules, rule 37(14)—Explanation for such amendment must be compelling and persuasive.

**MEYER v FELISBERTO (HC)**

MILLER AJ  
2014 FEBRUARY 10–13; MARCH 14  
[2014] NAHCMD 85

**Delict**—Malicious prosecution—Requirements—Not sufficient to attract liability that defendant did no more than place facts or information before police as result of which proceedings are instituted—Defendant must have gone further and actively assist and identify himself with prosecution.

**Delict**—Malicious prosecution—Damages—Measure of—General damages for contumelia, deprivation of freedom and discomfort—Plaintiff, 58 years old, never before arrested, arrested and spending one day in custody in unhygienic conditions in crowded cell—Plaintiff humiliated and suffering depression—Awarded N\$25 000 damages.

**KAMWI v NAMIBIA NATIONAL VETERANS ASSOCIATION (LC)**

SMUTS J

2013 NOVEMBER 1; DECEMBER 20

[2013] NALCMD 46

**Labour law**—Arbitration—Appeal from award in terms of s 84 of Labour Act 11 of 2007—Section 89(1) confining appeals from such awards to questions of law alone—Issue whether person has on facts established whether he or she is an employee or not, not amounting to question of law alone as intended in s 89(1)(a), but would ordinarily entail question of fact.

**Labour law**—Arbitration—Applicant for arbitration needing to establish employment relationship where such disputed—Section 128A of Labour Act 11 of 2007 aiding applicant in establishing employment relationship—Section not confined to cases involving labour hire, but is of general application—Once applicant shows that he or she works for or renders services to respondent and can show presence of one or more factors listed in s 128A(a)–(h), presumption contained in section comes into effect—Onus then shifting to respondent to show that applicant not an employee.

**CHINA HENAN INTERNATIONAL COOPERATION (PTY) LTD v DE KLERK AND ANOTHER (HC)**

GEIER J

2013 OCTOBER 30; NOVEMBER 26

[2013] NAHCMD 356

**Practice**—Pleadings—Required averments—Action based on contract—Pleadings silent on where and by whom the oral contract had been agreed upon—Non-compliance with rule 18(6) of the Rules of High Court in these respects not fatal to summons.

**VERMEULEN AND ANOTHER v VERMEULEN AND OTHERS (SC)**

SHIVUTE CJ, MAINGA JA and MTAMBANENGWE AJA

2013 JUNE 5; 2014 MARCH 3

**Will**—Validity—Testamentary capacity—In proceedings for determination of testamentary capacity, court to assess evidence as a whole, ie from facts disclosed by entire body of evidence—Facts to be taken into account including manner in which instructions given, content of instructions, setting in which instructions given and outcome of enquiries made by attorney acting in matter—Where matter to be decided without scientific evidence, court to take what evidence put before it, and decide issue on probabilities—Where evidence reveals great change of testamentary disposition, by departure from previous testamentary intentions, that requiring explanation.

**Will**—Validity—Testamentary capacity—In proceedings for determination of testamentary capacity—Standard of proof—Court to be satisfied affirmatively that testator/testatrix had capacity to make valid will—Standard of proof same as in all civil cases, ie upon balance of probabilities—But court to exercise caution appropriate to issue by vigilant examination of whole of relevant evidence—If such process results in court being satisfied that necessary testamentary capacity present, then order that will valid should be made—Such approach not applying higher standard of proof—On proper approach choice or preference of one version above the other ought to be preceded by evaluation and assessment of credibility of witnesses, their reliability and probabilities.

**Will**—Validity—Testamentary capacity—In proceedings for determination of testamentary capacity—Tests for—Various tests drawn from reported cases set out and held to be applicable in determining testamentary capacity in terms of s 4 of Wills Act 7 of 1953.



**NEW ERA INVESTMENT (PTY) LTD v ROADS AUTHORITY AND OTHERS (HC)**

PARKER AJ

2014 JANUARY 31; FEBRUARY 20

**Practice**—Applications and motions—Urgency—Requirements for—Application by unsuccessful tenderer contesting award of tender—Harm that aggrieved party could suffer if review application were to be heard in ordinary course sufficient to constitute urgency—Rule 6(12)(b) of Rules of High Court.

**Review**—Tender—Application to review decision of Tender Board—In what cases—Requirements of audi alteram partem rule—Fairness in shape of audi principle a variable concept—Unsuccessful tenderer not entitled to be afforded opportunity of commenting on application of factors to be applied by Tender Board or on adverse comments received by board on previous construction work undertaken by applicant.