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NOVEMBER 2014

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JUDGMENTS OF INTEREST IN THE NOVEMBER EDITIONS OF THE SALR, THE SACR AND THE NAMIBIAN LAW REPORTS 2014(3)

SOUTH AFRICAN LAW REPORTS

Affirmative action in the Police Service

A white female police officer's promotion was refused, on the basis that it would be inconsistent with the department's employment equity plan. The Constitutional Court decides whether or not this amounted to unfair discrimination. *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC)

Financial losses after arrest

A professional hunter was arrested, resulting in him losing a lucrative American contract. The Supreme Court of Appeal looks at the danger of indeterminate liability, and public policy, in the appeal against the High Court's award of R49 million. *Minister of Safety and Security v Scott and Another* 2014 (6) SA 1 (SCA)

Serious injury in Road Accident Fund claims

Under the new legislative regime the assessment of whether a claimant's injuries were serious was an administrative, not judicial, decision. The decision was that of the Fund, and it was not bound by its own expert's determination that the injury was 'serious'. Although a joint minute prepared by experts chosen by

both sides would in the past have been conclusive in deciding a claimant's injuries, this was no longer the case. Unless the RAF was satisfied that the injuries were serious, the claimant simply had no claim for general damages. *Road Accident Fund v Faria* 2014 (6) SA 19 (SCA)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Youth and clean record outweighed by severity of crimes

The accused was young, had a clean record, and spent time in custody awaiting trial. However, his lack of remorse and that he committed multiple counts of rape and murder, resulted in three life sentences, among others. *S v Makhakha* 2014 (2) SACR 457 (WCC)

Reasonable suspicion for arrest

There is no fifth jurisdictional fact requiring arrest to be the last resort. The question to be considered is not whether the police officer considered and applied his discretion in establishing reasonable suspicion; but rather whether, objectively, suspicion that a Schedule 1 offence was committed, and whether this suspicion rested on reasonable grounds. *Minister of Safety and Security and Another v Linda* 2014 (2) SACR 464 (GP)

Planned or premeditated murder

In the minimum sentencing legislation, heavier sentencing is prescribed for murder when it was 'planned or premeditated'. The court thoroughly examines these words and the impact on the accused in question. *S v PM* 2014 (2) SACR 481 (GP)

NAMIBIAN LAW REPORTS 2014(3)

A multitude of ingenious arguments

During the course of this judgment, covering issues of the duties of legal practitioners and duress in contracts, the court cautions that it is the duty of counsel not to advance a multitude of ingenious arguments in the hope that, out of a number of bad points, the court will be able to fashion a winner. *MB de Klerk & Associates v Gerschweiler and Another* 2014 (3) NR 609 (HC)

When do previous convictions not count?

The court has a discretion as to what weight to attached to a previous conviction, ten years or older, and may disregard such previous conviction and treat the accused as first offender. But in appropriate cases it may be regarded as aggravating factor. *S v Jackson and Others* 2014 (3) NR 637 (HC)

Culpable homicide and the chain of causation

The accused struck the deceased in the face with a glass, severing an artery. The deceased's initial refusal of medical treatment did not constitute a novus actus interveniens, in circumstances where the accused had inflicted a potentially lethal injury on the deceased. *S v Ananias* 2014 (3) NR 665 (HC)

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Kind Regards

The Juta Law Reports Team

SOUTH AFRICAN LAW REPORTS

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MINISTER OF SAFETY AND SECURITY v SCOTT AND ANOTHER (SCA)

NAVSA JA, SHONGWE JA, THERON JA, WILLIS JA and LEGODI AJA

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Motor vehicle accident—Compensation—Claim against Road Accident Fund—Limits—‘Serious injury’ threshold for general damages—RAF not bound by determination of its own expert that injury ‘serious’—Joint minute prepared by experts from both sides no longer conclusive in deciding seriousness of claimant’s injuries—Road Accident Fund Act 56 of 1996, s 17(1) and 17(1A).

EX PARTE VAN DEN STEEN NO AND ANOTHER (CREDIT SUISSE GROUP AG AND ANOTHER INTERVENING) (GJ)

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2013 FEBRUARY 27

Company—Business rescue—Resolution to begin rescue proceedings—Requirement that resolution be published to every affected person—Substantial compliance sufficient—Achieved if established that all affected persons had full knowledge of notice and its contents—Companies Act 71 of 2008, ss 6(9) and 129(3) (a).

Company—Business rescue—Business rescue practitioner—Appointment—Requirement that appointment be published to every affected person—Substantial compliance sufficient—Achieved if established that all affected persons had full knowledge of notice and its contents—Companies Act 71 of 2008, s 129(4).

Company—Notices—Prescribed manner of delivery—Substantial compliance with prescribed manner of delivery sufficient—Achieved if established that all affected persons had full knowledge of notice and its contents—Companies Act 71 of 2008, s 6(9).

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Company—Business rescue—Application for by affected person—Not possible after final liquidation order made unless liquidation order set aside on appeal—Companies Act 71 of 2008, s 131(1).

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Marriage—Divorce—Proprietary rights—Accrual system—Assets held in trust—Trust a sham—Husband in de facto control of assets and using them to acquire personal wealth—Whether assets to be included in accrual—Discretion of court—Where trust effectively alter ego of one of parties, assets to be included in accrual—Court not exercising discretion under Act but power under common law—Matrimonial Property Act 88 of 1984, ss 3 and 4.

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[2014] ZASCA 107

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S v PM (GP)

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2014 MARCH 28
[2014] ZAGPPHC 169

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Sexual offences—Sexual assault—Contravention of s 5 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007—Sentence—Aggravating circumstances present in sexual assault of vulnerable woman in presence of her 6-year-old child—Sentence of five years' imprisonment imposed.

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MB DE KLERK & ASSOCIATES v EGGERSCHWEILER AND ANOTHER (HC)

DAMASEB JP

2013 JUNE 25, 26; JULY 5; OCTOBER 16

[2013] NAHCMD 285

Practice—Pleadings—Issues—Defining of issues—Duty of parties and legal advisers to define issues by chronological, brief and consistent pleadings—Pleadings not to be inconsistent—Likewise duty of counsel not to advance multitude of ingenious arguments in hope that out of number of bad points court will be able to fashion a winner—Following correct procedure works well in nearly all cases.

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RH v NS (HC)

SMUTS J

2014 FEBRUARY 5, 21

[2014] NAHCMD 63

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S v MWANYEKELE (HC)

HOFF J and SHIVUTE J

2013 JUNE 28; SEPTEMBER 27; OCTOBER 25

[2013] NAHCMD 301

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Criminal law—Murder—Attempted murder—Intention—Court finding that accused acted negligently—Such finding excluding element of dolus (intention)—Accused should then be found not guilty—To find such accused guilty of attempted murder would amount to misdirection in law.

Criminal law—General principles of liability—Defences—Self-defence—Whether act of defence more harmful than necessary—Much depending on varying circumstances in determining this question—Court should adopt robust approach—Question not whether there were other methods which might have been successful in averting attack but whether method adopted can be justified in circumstances.

S v JACKSON AND OTHERS (HC)

SHIVUTE J

2013 OCTOBER 1, 17

[2013] NAHCMD 288

Criminal procedure—Sentence—Previous convictions—Previous conviction 10 years or more old—Court, at common law, having unfettered but judicial discretion to disregard such previous conviction—Court to determine what weight, if any, to be attached to such previous conviction—Court, in exercising its discretion, may disregard such previous conviction and treat accused as first offender—But common law not suggesting that such previous conviction must in all cases be disregarded—In appropriate cases it may be regarded as aggravating factor.

Criminal procedure—Sentence—Concurrent sentences—Two crimes arising from same incident—No crime should be completely ignored by taking both counts together for purpose of sentencing—But court should be alive to principle of double jeopardy that accused should not be punished twice for same offence—Solution is to order part of sentence to run concurrently.

MALETZKY v GASEB AND ANOTHER (HC)

VAN NIEKERK J

2010 SEPTEMBER 28; 2013 OCTOBER 21

[2013] NAHCMD 296

Practice—Summons—Irregularity—Summons signed by plaintiff as 'Legal Practitioner for Plaintiff'—Plaintiff not admitted legal practitioner—Plaintiff not properly explaining how summons came to be issued in that form nor applying for condonation or for leave to amend—Summons held to be irregular—Application in terms of rule 30 of High Court Rules for setting aside of summons granted—Legal Practitioners Act 15 of 1995, s 21(1)(b).

S v DAUSAB (HC)

SIBOLEKA J

2013 OCTOBER 8–11, 17–18, 21–23; 2014 JANUARY 15

[2014] NAHCMD 2

Criminal procedure—Evidence—Admissions and confessions—Admissibility of—Accused having right to legal representation at stage when arrested—Duty of police officer to inform accused of such right—Failure to inform of such right rendering statement inadmissible.

MARKUS v TELECOM NAMIBIA LTD (HC)

UEITELE J

2013 NOVEMBER 11,13; 2014 FEBRUARY 26

[2014] NAHCMD 51

Practice—Judicial case management—Orders made in case management—Finality of—Order made that matter had been settled—Parties subsequently approaching court and informing

court that order erroneously made and requesting court to decide whether matter had been settled or not—Original order of court not a final order and court not precluded from determining whether matter settled or not.

S v ANANIAS (HC)

PARKER AJ and UNENGU AJ
2014 MARCH 10
[2014] NAHCMD 82

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Criminal procedure—Plea—Plea of not guilty—Explanation of plea in terms of s 115 of Criminal Procedure Act 51 of 1977—Accused pleading he acted in self-defence—Presiding officer not entitled to regard plea explanation as evidential material in application for discharge of accused.

AP v PP (HC)

PARKER AJ
2014 FEBRUARY 18; MARCH 13
[2014] NAHCMD 84

Marriage—Divorce—Proprietary rights—Sale of immovable property—Plaintiff wanting for sentimental reasons to keep house in family and offering to buy out spouse's share rather than sell property to stranger—Defendant not justifying position that property should be sold to stranger—Property awarded to plaintiff on basis of his offer.

Marriage—Maintenance—Spousal maintenance—When ordered—Husband paying for all tuition and medical expenses for children and wife earning substantial income—Wife not proving that she was in need of maintenance—Unfair and unreasonable for court to award maintenance to wife.

PDS HOLDINGS (BVI) LTD v ZAIRE (HC)

PARKER AJ
2013 NOVEMBER 11 2014; FEBRUARY 14; MARCH 13
[2014] NAHCMD 83

Contract—Cancellation—Demand—What constitutes—To extent a demand is required, summons constitutes demand—Article 80(2) of Constitution not rendering that principle inoperative.

NAMIBIA DEVELOPMENT CORPORATION v UNIVERSAL WOOD INDUSTRIES AND OTHERS (HC)

VAN NIEKERK J
2010 MARCH 1 2014; FEBRUARY 14
[2014] NAHCMD 48

Practice—Pleadings—Exception—Waiver of right in event of non-fulfilment of suspensive condition—Particulars of claim not alleging that plaintiff had full knowledge of right it waived and that it had communicated abandonment of right to defendants—Pleading excipiable.

S v MALUMO AND OTHERS (IN RE NDALA) (HC)

HOFF J
2013 SEPTEMBER 18, 19
[2013] NAHCMD 262

Criminal procedure—Appeal—Reservation of question of law—Application for in terms of s 319 of Criminal Procedure Act 51 of 1977—Requirements—Court required to state question to be reserved, and to do so accurately—Court to direct that question of law be specially entered in record and then transmitted to registrar of Supreme Court—Must be certainty concerning

facts on which question of law dependent and such facts to be set out fully in record as part of question of law reserved—Not function of court reserving question of law to decide on merits of question raised—Such decision would be irregular and ultra vires s 319—Question of law may be raised only at conclusion of trial and not during course of trial—Application for reservation of question of law to be brought as soon as possible and within reasonable time after trial.

S v KIDO (HC)

SHIVUTE J

2013 SEPTEMBER 2, 3, 10

[2013] NAHCMD 253

Criminal procedure—Sentence—Concurrent sentences—Accused convicted of murder and theft and of assault with intent to do grievous bodily harm and assault by threat—Latter offences committed some three hours after murder and theft offences and evidencing separate intentions—Not appropriate to order that sentences for later offences should run concurrently with sentences for earlier offences.

HP v FP (HC)

UEITELE J

2013 MAY 21; SEPTEMBER 25

[2013] NAHCMD 266

Practice—Judgments and orders—Settlement agreement made order of court—Parties entitled to amend or vary terms of such agreement, after it has been made order of court, without formally having to apply for amendment or variation to be made order of court.

Practice—Pleadings—Amendment—General principles reiterated and set out.

S v ARIBEB (HC)

DAMASEB JP and HOFF J

2013 OCTOBER 4

[2013] NAHCMD 273

Criminal procedure—Presiding officer—Recusal of—Mero motu recusal of magistrate—May be done only in certain circumstances—Duty to recuse him/herself arising when appearing judicial officer has interest in case or where there is reasonable ground for believing that likelihood of bias on part of judicial officer exists—But magistrate must afford state and defence opportunity to address court on the question.

Criminal procedure—Record—Part-heard case—Record going astray—Court of review not empowered to order re-trial de novo—Record to be administratively compiled afresh by magistrate or clerk of the court—At resumption of trial thereafter, magistrate entitled to recall any witness to give evidence thereon and to lay reconstructed record before witness to enquire whether it tallies with evidence he/she originally gave at trial—Witness subject to cross-examination by defence thereon—Court thereafter to resume its normal course.

ZS v ES (HC)

VAN NIEKERK J

2012 APRIL 23; 2013 AUGUST 30; SEPTEMBER 13, 16

[2013] NAHCMD 257

Marriage—Divorce—Conflict of laws—Domicile—Matrimonial matter—Division of joint estate—Whether provisions of s 7(3)(a) of Divorce Act 70 of 1979 (RSA) applicable where parties married in South Africa where they were both domiciled—Community of property, profit and loss excluded as well as accrual system—No-fault principle in divorce actions as opposed to tighter system in Namibia not sufficient ground for ignoring normal rule that proprietary consequences of marriage regulated by husband's domicile and no injustice and inconvenience caused—Section 6 of Matrimonial Causes Jurisdiction Act 22 of 1939 not to be interpreted in a way that it amended the common law choice of law rules.

S v SANKWASA (HC)

UEITELE J and UNENGU AJ
2013 FEBRUARY 22; AUGUST 23
[2013] NAHCMD 249

Criminal procedure—Evidence—Admissions and confessions—Statements made by suspect to police officer—Admissibility—Accused employed at diamond mine and required in terms of employment contract to exit mine through x-ray scanning facility—At time when he passed through scanning facility he was not a suspect and only became a suspect when police official arrived and saw image of an object concealed on his body—Accused voluntarily surrendering parcel concealed in his nether regions and not being asked to make any incriminating statement or do any pointing out but merely asked if he wanted to remove anything—No duty on police at that stage to explain his rights in terms of Constitution.

S v MALUMO AND OTHERS (IN RE KAMWI) (HC)

HOFF J
2013 OCTOBER 7, 9, 14, 16
[2013] NAHCMD 286

Criminal procedure—Trial—Proceedings in absence of accused—Provisions of s 160(1) of Criminal Procedure Act 51 of 1977 as to examination of witnesses by accused when present in court again—Such applicable even where accused had misbehaved in court and had absented themselves from proceedings—Section 160 clear and unambiguous—To deny such accused opportunity to cross-examine witnesses who testified in their absence would amount to gross irregularity which might vitiate proceedings against them.

Criminal procedure—Trial—Proceedings in absence of accused—Provisions of s 160(1) of Criminal Procedure Act 51 of 1977 as to examination of witnesses by accused when present in court again—Section 160(1) cannot be interpreted to mean that accused may examine all witnesses who testified in his absence—Court having duty to discourage and curtail irrelevant cross-examination—Accused may examine only those witnesses who implicated them in commission of offence or from whom favourable evidence may be elicited—Necessary to identify witnesses who testified in absence of accused and who would be giving relevant testimony.

Criminal procedure—Evidence—Witness—Cross-examination—Purpose and importance of set out—Purpose is to test veracity of evidence of witness and to elicit favourable evidence—Important tool to discover truth—Also vital component of fair trial guaranteed by art 12 of Namibian Constitution—Grossly irregular not to allow cross-examination of witnesses.

STRAUSS v NAMIBIA INSTITUTE OF MINING & TECHNOLOGY, ARANDIS CAMPUS AND OTHERS (LC)

UEITELE J
2013 MARCH 19; NOVEMBER 6
[2013] NALCMD 38

Labour law—Arbitration—Review—On ground of gross irregularity by arbitrator in conduct of arbitration—Labour Act 11 of 2007, s 89(5)(a)(ii)—Arbitration having to be postponed—Applicant and arbitrator agreeing that applicant would telephone arbitrator at later date in order to arrange date for arbitration hearing—On making such telephone call, applicant informed by arbitrator that her case dismissed due to her absence and her representative's absence at earlier date—Such conduct by arbitrator amounting to gross irregularity by arbitrator resulting in applicant's case not having been fully and fairly determined as contemplated in s 89(5)(a)(ii) of Act—Decision of arbitrator set aside.

DR MATTI KIMBERG PRACTICE v MWAUFUYA-SHIKONGO NO AND OTHERS (LC)

HOFF J
2013 SEPTEMBER 6, 27; OCTOBER 4
[2013] NALCMD 32

Practice—Applications and motions—Urgency—Application for leave to dispense with forms and service and compliance with time limits prescribed in rules of court—Court may in its discretion decline to grant such relief where applicant has created urgency either mala fide or

through own culpable remissness or inaction—Where neglect or remissness of legal or other representative the cause of urgency, court may hold that litigant may not in circumstances hide behind conduct of representative.

HV v SV (1) (HC)

DAMASEB JP

2013 OCTOBER 2, 11

[2013] NAHCMD 281

Marriage—Divorce—Restitution order granted—Onus on deserter defendant, not deserted plaintiff, to show that offer to return is genuine—Must be bona fide offer obliging deserted spouse to receive deserter back—Not reasonable to expect deserted spouse to welcome deserter back unless deserter demonstrates that that which drove deserted spouse away has passed and that normal married life has thereby become feasible—Change of heart and commitment to reform by deserter are essential elements of bona fides of offer to return.

S v ROUX (HC)

VAN NIEKERK J

2006 FEBRUARY 27; AUGUST 2; SEPTEMBER 13

2013 NOVEMBER 5

[2013] NAHCMD 319

Criminal procedure—Forfeiture—Banknotes given to complainants by accused with aim of persuading them not to report him to authorities—Such done with intention of defeating or obstructing course of justice—Banknotes clearly concerned in commission of offence of attempting to defeat or obstruct course of justice within meaning of s 20(a) of Criminal Procedure Act 51 of 1977—Banknotes also affording evidence of commission of offence—Complainants, as parties to illegal transaction, not legally entitled to claim back such banknotes—Banknotes forfeited to state in terms of s 34(1)(c) of Criminal Procedure Act.

Criminal procedure—Forfeiture—Items purchased by complainants with money given to them by accused with aim of persuading them not to report him to authorities—Money given to complainants with intention of defeating or obstructing course of justice—Anything purchased with proceeds of crime cannot be forfeited under Criminal Procedure Act 51 of 1977—Such items to be returned to complainants.

S v PIETERS (HC)

HOFF J and GEIER J

2013 OCTOBER 4

[2013] NAHCMD 272

Criminal procedure—Plea—Guilty—Questioning in terms of s 112(1)(b) of Criminal Procedure Act 51 of 1977—Unhelpful to ask whether accused admits being negligent without indication that he understood meaning of negligence—Presiding officer should appreciate that single 'yes' to question 'do you agree or disagree' takes matter no further.

Criminal procedure—Plea—Guilty—Questioning in terms of s 112(1)(b) of Criminal Procedure Act 51 of 1977—Change of plea to one of not guilty in terms of s 113—Once questioning of accused discloses a defence to charge presiding officer should change plea to one of not guilty.

S v KATEMA (HC)

HOFF J and MILLER AJ

2013 OCTOBER 18

[2013] NAHCMD 293

Firearms—Machine gun—Possession of in contravention of s 29(1)(a) of the Arms and Ammunition Act 7 of 1996—Sentence—Accused sentenced to minimum sentence of ten years' imprisonment as prescribed by statute—But such minimum sentence struck down by court as unconstitutional—Charge-sheet used containing reference to such minimum sentence—Semble: Prosecutor-General requested to ascertain whether such chargesheet used generally and, if so, to take remedial measures.

S v EISEB (SC)

SHIVUTE CJ, MAINGA JA and DAMASEB AJA
2014 APRIL 15; JULY 21
[2014] NASC 12

Criminal procedure—Evidence—Affidavits and certificates in terms of s 212(4)(a) and 212(8)(a) of Criminal Procedure Act 51 of 1977—Requirements for—Legislature having relaxed strict evidential rules by means of s 212(7A)(a).

HV v SV (2) (HC)

DAMASEB JP
2013 JUNE 3–6, 24
[2013] NAHCMD 176

Marriage—Divorce—Grounds for—Semble: Requirement of fault, in particular that a spouse who had been deserted and wanted to end marriage had to accept deserter back if offer to return was genuine, arguably in conflict with right to dignity enshrined in art 8 of Constitution of Namibia—Divorce law of Namibia archaic and demonstrably in need of reform.

HOLLARD INSURANCE COMPANY OF NAMIBIA LTD v DE NEYSCHEN t/a GECKO GUEST HOUSE (HC)

GEIER J
2013 NOVEMBER 12
[2013] NAHCMD 325

Costs—Party and party—Attorney's fees—For taking instructions to institute or defend proceedings—Not permissible to assimilate fee for taking instructions under item A1 into a time charge allowed for necessary consultations under item A2.

Costs—Party and party—Attorney's fees—For reporting to client—Particularly in case management attendances important that legal practitioners informed their clients—To be determined whether costs reasonably incurred in relation to claim.

Costs—Party and party—Attorney's fees—Filing notice—Practice of utilising unnecessary filing notices deprecated.

Costs—Party and party—Attorney's fees—For heads of argument—Required by exigency of modern practice and development of case management system.

Costs—Party and party—Attorney's fees—For drawing bill of costs—Employment of costs consultant—Such fees and disbursements should not come at expense of unsuccessful litigant.

Costs—Taxation—Review of taxation—Costs of review—Applicant denied costs where it was not substantially successful and where papers were disorganised.