



## JUTA'S ADVANCE NOTIFICATION SERVICE

FEBRUARY 2015

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

Herewith the cases in the February law reports.

### JUDGMENTS OF INTEREST IN THE FEBRUARY EDITIONS OF THE *SALR* AND *SACR*.

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

##### **Crimes against humanity**

Is the South African Police Service obliged to investigate crimes against humanity, committed in a neighbouring state? The court looks across the border to Zimbabwe, where it is alleged that 100 citizens were tortured after a police raid on the opposition party headquarters. *National Commissioner of Police v Southern African Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC)

##### **Shoddy houses for the poor**

Though it is unacceptable for contractors to build shoddy houses for the poor, the constitutional right of access to adequate housing imposes obligations on the state only, not on the private sector. So, if the state engages private-sector contractors to build public housing, it must manage the process to ensure that applicable building standards and regulations are complied with and that the end result is fit for dignified human habitation. *City Of Cape Town v Khaya Projects (Pty) Ltd and Others* 2015 (1) SA 421 (WCC)

##### **Free speech and billboards**

In issue was the right to freedom of expression, and its horizontal application between private entities. A controversial advertisement was removed from an outdoor billboard before the expiration of the agreed period. Does a private entity have the same positive duty as the state to promote freedom of expression, or merely a negative duty not to interfere with it? *BDS South Africa and Another v Continental Outdoor Media (Pty) Ltd and Others* 2015 (1) SA 462 (GJ)

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

##### **In the interests of the client, a step too far?**

A legal practitioner is not entitled to wantonly or recklessly accuse another person of being responsible for the crime of his client. It is futile and unacceptable for counsel to try and hide behind client's instructions in this regard. Counsel is not a mere agent of the client; his duty to the court overrides his obligations to his client, subject to his duty not to disclose the confidences of his client. *S v DD* 2015 (1) SACR 165 (NCK)

##### **Diamond sorter gets jail time**

The accused was a first offender, 49 years of age, had a minor child, and suffered from hypertension and diabetes. But he showed no remorse, and had meticulously planned the

theft of diamonds from his workplace, circumventing elaborate security measures. He received an effective sentence of eight years. *S v Van Rensburg* 2015 (1) SACR 114 (NCK)

#### **Domestic violence**

The Domestic Violence Act added to the protection offered to a victim of an offence such as assault, by the common law and the Criminal Procedure Act, and did not detract from it. A policeman was entitled to arrest without a warrant, where the circumstances fell within those covered by the Criminal Procedure Act, regardless of whether a domestic violence protection order was in place or not. *Minister of Safety and Security v Kitase* 2015 (1) SACR 181 (SCA)

### **THE NAMIBIAN LAW REPORTS**

#### **Team misconduct in the workplace**

A large number of employees had been involved in the removal of products, and none were forthcoming with information on the perpetrators, despite repeated requests for such information. The dismissal of all the employees on that shift, in a single hearing, was justified. *Novanam Ltd v Absalom and Others* 2014 (4) NR 1009 (LC)

#### **No costs for successful party who insisted on litigation**

The successful respondent had without explanation rebuffed the applicant's attempts to settle the dispute and avoid litigation. Such was a suitable case for the successful respondent to be denied his costs. *MW v Minister of Home Affairs* 2014 (4) NR 1108 (HC)

#### **Keep a proper look-out**

A reasonable driver cannot take the road with blinkers on, and presume that all others on the road will diligently obey the rules. Keeping a proper look-out means continuously scanning the road ahead, from side to side, for potential obstructions, and includes awareness of what is happening in the immediate vicinity. *Gerber v Minister of Defence and Another* 2014 (4) NR 1147 (HC)

### **WE WELCOME YOUR FEEDBACK**

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Kind Regards

**The Juta Law Reports Team**

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[2014] NAHCMD 237

**Police**—Dismissal of employee from service—Fairness of—Employee subjected to inquiry into fitness to remain in employment after his acquittal at disciplinary inquiry concerning same charges—Distinction between two forms of inquiry—Fact that referral for disciplinary inquiry was one of recommendations which could be made at fitness inquiry did not mean that fitness inquiry could not be convened after disciplinary inquiry.

**PREMIER CONSTRUCTION CC v CHAIRPERSON OF THE TENDER COMMITTEE OF THE NAMIBIA POWER CORPORATION BOARD OF DIRECTORS AND OTHERS (HC)**

PARKER AJ

2014 AUGUST 22; SEPTEMBER 17

[2014] NAHCMD 270

**Interdict**—Interim interdict—Requisites—Urgent interim relief on basis that there had been prima facie infringement of rights under art 18 of Constitution—Onus of proof—Distinction between basic human rights and legal rights—No burden of proof on respondent who had awarded tender—Would be wrong and unjust for court to accept that applicant's rights had been violated until proven otherwise—Application for interdict refused.

**Practice**—Parties—Citation of—Citation of administrative officials involved in decision-making on behalf of respondent who was also cited in application for review—Incorrect citation of parties having fatal consequences for application.

**NOVANAM LTD v ABSALOM AND OTHERS (LC)**

SMUTS J

2014 FEBRUARY 14; APRIL 30

[2014] NALCMD 19

**Labour law**—Contract of employment—Duties of employee—Implied duty not to work against employer's interest and not abuse confidence of employer and to protect employer's interest in respect of matters entrusted to employee—Large-scale unauthorised removal of fish from fish processing plant during one shift—In circumstances where it was clear that large number of employees had been involved in removal and none were forthcoming with information on identity of perpetrators despite repeated requests for such information, dismissal of all employees on shift in single hearing, justified.

**Labour law**—Dismissal—Misconduct—Team misconduct—When whole team can be held responsible for unlawful act—Much depending on circumstances of individual case—Large-scale unauthorised removal of fish from fish processing plant during one shift—In circumstances where it was clear that large number of employees had been involved in removal and none were forthcoming with information on identity of perpetrators despite repeated requests for such information, dismissal of all employees on shift in single hearing, justified.

**Labour law**—Labour arbitration tribunal—Arbitration and Conciliation Rules—Application of rule 13—Rule 13 could never be used as shield to preclude statements made by arbitrator, when acting as conciliator, which demonstrated bias or gave rise to reasonable apprehension of bias by expressing predisposition on merits of matter.

**Labour law**—Labour arbitration tribunal—Arbitrator—Recusal of—Important that public (both employees and employers) have confidence in tribunals established to adjudicate disputes as contemplated under art 12 of Constitution—Arbitrator should not express predisposition in matter to be determined by him—Test for disqualifying bias not actual bias but reasonable apprehension of bias.

**S v BEYER (HC)**

HOFF J and SIBOLEKA J  
2014 APRIL 14; JUNE 3  
[2014] NAHCMD 172

**Criminal procedure**—Appeal—Notice of appeal—Grounds of appeal—Grounds of appeal not grounds at all but merely conclusions of drafter of notice—Notice of appeal fatally defective and could not be amended—Appeal struck from roll.

**NATIONAL HOUSING ENTERPRISE v HINDA-MBAZIRA (SC)**

MAINGA JA, DAMASEB AJA and HOFF AJA  
2014 MARCH 24; JULY 4  
[2014] NASC 9

**Labour law**—Labour dispute—Referral of dispute to Labour Commissioner in terms of s 86(2)(a) of Labour Act 11 of 2007—Six-month time limit provided for in s 86(2)(a) beginning to run after all reasonable or internal remedies exhausted and having failed to resolve dispute—Such interpretation not violating intention of legislature in its use of words ‘dispute’ and ‘date of dismissal’ in section.

**Labour law**—Labour dispute—Appeal to Labour Court—Disciplinary proceedings commencing six years earlier—On appeal against arbitration award under Labour Act 11 of 2007, Labour Court referring dispute back for arbitration before different arbitrator—Such referral resulting in unnecessary delay, would be highly prejudicial to parties and might strain employee’s resources in order to fund legal representative—Proper for Labour Court, or Supreme Court on appeal to it, to determine dispute between parties in terms of s 89(10)(a) of Labour Act.

**Labour law**—Arbitration award—Award made in terms of Labour Act 11 of 2007—Award becoming order of court on mere filing thereof in Labour Court—Application for award to be made order of court not necessary—Where party unnecessarily makes such application, not necessary for such order to be set aside before appeal against arbitrator’s award can be pursued.

**DM v SM (HC)**

PARKER AJ  
2013 JULY 1, 5; OCTOBER 3; NOVEMBER 14  
[2013] NAHCMD 332

**Contract**—Oral agreement—Validity—Oral agreement made seriously and deliberately with intention that lawful obligation should be established and having well-grounded reason for its conclusion which was not immoral or forbidden, was valid and enforceable—Oral agreement valid and enforceable where, as in present case, intending to attain cessation of hostilities between parties since their divorce which was injurious to parties and their children.

**Novation**—What constitutes—Oral agreement intended to replace parties’ rights and obligations under certain judgments of court—Such amounting to valid novation of rights and obligations under those judgments.

**INDEPENDENCE CATERING (PTY) LTD AND OTHERS v MINISTER OF DEFENCE AND OTHERS (HC)**

CHEDA J  
2013 OCTOBER 7; NOVEMBER 19  
[2013] NAHCMD 347

**Practice**—Parties—Joinder—Application for order setting aside contracts concluded by Minister of Defence pending adjudication of tenders for supply of food and services—Chief of Defence Force interested party in such proceedings and should be joined as party.

**Defence force**—Contracts—Minister of Defence—Minister having right in terms of s 14(1) of Defence Act 1 of 2002 to exercise his executive powers to make contracts with any party for supply of food and services pending adjudication of tenders for such supplies—No legitimate expectation by parties tendering for contracts for such supply that they were entitled to remedy preventing minister concluding contract pending adjudication of tenders.

**KANDETU v KARIBIB TOWN COUNCIL (LC)**

UNENGU AJ

2014 FEBRUARY 7; APRIL 16

[2014] NALCMD 15

**Local authority**—Officers and employees—Dismissal—Dismissal in terms of s 29(4)(a) of Local Authorities Act 23 of 1992—Absence from duty for period exceeding 30 days without permission deemed to be discharge from service—Termination of employment in terms of s 29(4)(a) constituting termination for fair and valid reason was in accordance with fair procedure—Disciplinary hearing unnecessary.

**KANDJII v AWASEB AND OTHERS (HC)**

UEITELE J

2013 DECEMBER 12; 2014 JUNE 11

[2014] NAHCMD 177

**Practice**—Trial—Consolidation of actions—Application for—Onus on applicant to satisfy court that consolidation of actions favoured by balance of convenience and no possibility of prejudice to any of parties existing—Necessary to put sufficient information before court to enable it to assess convenience of consolidation—Such application can only be considered when actions ready to go to trial—Impossible to consider such application when pleadings in one or both actions not closed—Rules of High Court, rule 11.

**MW v MINISTER OF HOME AFFAIRS (HC)**

PARKER AJ

2014 APRIL 3; MAY 22

[2014] NAHCMD 160

**Citizenship**—By birth—Child born to parents in Namibia—Parents resident in Namibia in terms of employment permit issued in terms of s 24(b), read with s 27, of Immigration Control Act 7 of 1993—Such parents not ‘ordinarily resident’ in Namibia within meaning of art 4(1)(d) of Namibian Constitution—Objective proof of being ‘ordinarily resident’ in Namibia provided by being in possession of permanent residency permit issued in terms of s 26 of Immigration Control Act—Child accordingly not qualifying for Namibian citizenship by birth and not entitled to ‘Full Birth Certificate (Namibian)’.

**Costs**—Generally—Successful respondent having without explanation rebuffed applicant’s attempts to settle dispute and avoid litigation—Such constituting suitable case for successful respondent to be denied his costs.

**NAMIBIA DAIRIES (PTY) LTD v ALFEUS AND ANOTHER (LC)**

PARKER AJ

2014 JUNE 27; SEPTEMBER 18

[2014] NALCMD 36

**Appeal**—Notice of appeal—Requirements of—Notice of appeal required to have both questions of law and grounds of appeal in terms of rule 17(2) of Labour Court Rules and rule 23(2)(d) of Rules Relating to Conduct of Conciliation and Arbitration before Labour Commissioner—Notice of appeal not complying with rules a nullity.

**LIFE OFFICE OF NAMIBIA LTD (NAMLIFE) v AMAKALI AND ANOTHER (LC)**

SMUTS J

2014 JULY 25; AUGUST 8

[2014] NALCMD 34

**Labour law**—Arbitration—Arbitrator’s award—Time within which award to be handed down—Failure to comply with 30-day limit in s 86(18) of Labour Act 11 of 2007—Effect of—Award not a nullity.

**Labour law**—Arbitrator’s award—Appeal against—Conclusions reached by arbitrator were so unsupported by any proper analysis and evaluation of evidence that they were tantamount to arriving at no conclusions or findings at all and certainly amounted to findings that no

reasonable court or tribunal could have reached—Appeal against award was upheld and first respondent's dismissal was confirmed.

**Labour law**—Sexual harassment—Seriousness with which legislature views sexual harassment indicated by its presence in provisions of ch 2 of Labour Act 11 of 2007 along with prohibition of discrimination in employment setting.

**S v AMEB (HC)**

HOFF J and SIBOLEKA J  
2013 OCTOBER 11; NOVEMBER 8  
[2013] NAHCMD 324

**Criminal procedure**—Appeal—Generally—Findings on credibility and fact—Trial court having advantages which court of appeal cannot have, namely seeing and hearing witnesses and being steeped in atmosphere of trial—Also having advantage of observing demeanour of witnesses and personality of witnesses—Where trial court influenced by demeanour of any witness and says so, appeal court as a rule guided by trial court—Court of appeal will not reject credibility findings of trial court in absence of irregularities or misdirections—Trite that function of deciding acceptance or rejection of evidence falling primarily on trial court.

**S v KAMBATUKU (HC)**

SHIVUTE J and SIBOLEKA J  
2013 NOVEMBER 12; 2014 FEBRUARY 12  
[2014] NAHCMD 41

**Criminal procedure**—Accused—Legal representation—Right to legal representation enshrined in art 12(1)(e) of Constitution a fundamental right to ensure accused afforded fair trial—Whether failure to afford accused opportunity to be legally represented results in failure of justice is question of fact, depending on circumstances of each case—Not sufficient for court to explain right to legal representation—Accused to be afforded reasonable opportunity to exercise this right—On facts, court holding that failure to afford accused second opportunity to obtain legal representation resulting in unfair trial—Conviction and sentence set aside on appeal.

**GERBER v MINISTER OF DEFENCE AND ANOTHER (HC)**

UEITELE J  
2013 JANUARY 28; AUGUST 23  
[2013] NAHCMD 250

**Motor vehicle accident**—Duty of driver—Driver having right of way—But driver not having right to assume that all other drivers on road would observe their duties and always act reasonably and diligently—Reasonable driver should base conduct on knowledge that drivers are not infrequently guilty of negligence or breaches of the law—Driver should allow for possibility that other drivers may act in manner that is dangerous.

**Motor vehicle accident**—Duty of driver—Proper look-out—Such entailing continuous scanning of road ahead from side to side for potential obstructions—Includes awareness of what is happening in immediate vicinity—Driver cannot drive virtually with blinkers on—Such inconsistent with standard of reasonable driver—Driver colliding with vehicle reversing out of parking bay, not having seen it until collision occurred—Driver driving at 40 kph on road busy with traffic and pedestrian—Driver negligent.

**STANDARD BANK OF NAMIBIA LTD v ATLANTIC MEAT MARKET (SC)**

SHIVUTE CJ, MARITZ JA and CHOMBA AJA  
2006 APRIL 7; 2014 OCTOBER 17  
[2014] NASC 14

**Practice**—Applications and motions—Postponement—Refusal of—Whether refusal amounted to irregularity in proceedings contemplated in s 16(1) of Supreme Court Act 15 of 1990 or violated right to fair hearing as aspect of rights to fundamental justice in common law or to fair trial guaranteed by art 12(1)(a) of Constitution—Refusal in context of urgent application for interdict—No irregularity having occurred—Doubtful that refusal involved 'determination of

civil rights and obligations' as envisaged by threshold requirements of art 12(1)(a) of Constitution.

**CATERPLUS NAMIBIA (PTY) LTD t/a BLUE MARINE INTERFISH v HALLIE INVESTMENT 142 CC t/a WIMPY MAERUA AND ANOTHER (HC)**

HOFF J

2014 APRIL 15; JUNE 20

[2014] NAHCMD 192

**Contract**—Legality—Illegal contract—Cession contrary to public morality and unconstitutional in that it allegedly infringed cedent's right of access to court—Contract in question providing that certificate of indebtedness only prima facie proof of defendant's liabilities; did not provide for plaintiff's retention of money exceeding indebtedness; and set-off operated automatically—Cession not contrary to public morality or unconstitutional.

**EN v SN (HC)**

PARKER AJ

2013 NOVEMBER 25; 2014 FEBRUARY 14

[2014] NAHCMD 47

**Marriage**—Matrimonial property regime—Marriages governed by Native Administration Proclamation 15 of 1928—Marriage presumed to be out of community of property unless parties within one month before marriage declared that they desired marriage to be in community of property—Proc 15 of 1928, s 17(6)—View of third parties that marriage nevertheless in community of property not binding court as such view offensive to law, namely s 17(6) of Proc 15 of 1928.

**OFFSHORE DEVELOPMENT CO (PTY) LTD v FIRST NATIONAL BANK OF NAMIBIA LTD (HC)**

VAN NIEKERK J

2008 MARCH 31; 2013 OCTOBER 2

[2013] NAHCMD 269

**Company**—Directors—Chief executive officer—Powers of—Claim by company against its banker for losses suffered as result of unauthorised transfers from its bank account—Transfer effected on instructions of chief executive officer of company but which were contrary to company's mandate to bank—Bank excepting to claim on basis that a chief executive officer had authority to act on behalf of company which was bound by his actions—Such defence one that should be pleaded and not subject of exception—If bank believed chief executive officer was authorised to amend company's mandate to bank, bank should plead these facts as part of its defence—Such amendment to mandate would be tacit amendment which would have to be pleaded and proved—Cannot be said that it is always within powers of managing director of company to change terms of mandate to bank—Such dependent on terms of mandate to bank—Whether chief executive officer and managing director one and the same a question of fact—If not, most of argument on exception would fall away.

**S v LANG (HC)**

SMUTS J and MILLER AJ

2013 OCTOBER 28; NOVEMBER 18

[2013] NAHCMD 342

**Criminal law**—Culpable homicide—Sentence—Accused shooting and fatally wounding poacher on his farm—Accused sentenced to five years' imprisonment of which two years conditionally suspended—Principles applicable in appeal against sentence reiterated—Trial court misdirecting itself on facts in regard to interests of society and whether accused taking law into own hands—Also misdirecting itself on law in regarding evidence on sentence of psychologist/social worker as hearsay—Custodial sentence in circumstances entirely inappropriate—Sentence altered to one of fine or imprisonment plus additional term of imprisonment conditionally suspended.