



## JUTA'S ADVANCE NOTIFICATION SERVICE

MAY 2015

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

Herewith the cases in the May law reports.

### **JUDGMENTS OF INTEREST IN THE MAY EDITIONS OF THE SALR, SACR AND THE NAMIBIAN LAW REPORTS.**

- [Click on the case name to download the original judgment.](#)

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

##### **Perception or intention?**

Contractual repudiation depends on perception, not intention, and a reasonable person would not understand a demand for performance to be an indication of repudiation. *B Braun Medical (Pty) Ltd v Ambasaam CC* 2015 (3) SA 22 (SCA)

##### **Charge-sheet in disciplinary proceedings**

A charge-sheet in a disciplinary proceeding did not need to be drafted with the same formality as a charge in a criminal proceeding, but the facts supporting the charge had to be provided with the same level of particularity. The test was whether enough of the facts underlying the charge had been provided in order to answer it. *Coetzee v Financial Planning Institute of South Africa and Others* 2015 (3) SA 28 (SCA)

##### **Insurance, non-disclosure and claim repudiation**

Two judgments from the Supreme Court of Appeal give useful guidance on the issue of non-disclosure to an insurance company, whether such is material, and whether such non-disclosure affected the insurer's acceptance of the risk or the ensuing premium charged.

##### **Long-term insurance:**

*Visser v 1 Life Direct Insurance Ltd* 2015 (3) SA 69 (SCA)

##### **Short-term insurance:**

*Regent Insurance Co Ltd v King's Property Development (Pty) Ltd t/a King's Prop* 2015 (3) SA 85 (SCA)

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

##### **Witchcraft no excuse**

A trainee sangoma needed genital organs to complete his initiation, so he killed his younger sister and hacked out her private parts with an axe. The full bench on appeal examines other cases where the accused believed in witchcraft, and confirmed his sentence of life imprisonment. *S v Mogaramedi* 2015 (1) SACR 427 (GP)

##### **Severe sentence adjusted**

The accused broke into a home where a mother was sleeping with her son and daughter. The mother fought off his attempts to rape her, so the accused kidnapped her 3-year-old daughter

and then raped and killed the child. On appeal, the life sentence for the rape was confirmed, but two of the other sentences were adjusted. *S v Madiba* 2015 (1) SACR 485 (SCA)

#### **Parole and the prison party**

After the prisoner had been released on parole, it emerged that he had been to a party in a cell, where alcohol had been consumed. The festivities had been caught on video, which was released to the media. Past conduct of parolee brought to light subsequent to release could be taken into account. Revocation of his parole was appropriate. *Du Preez v Minister of Justice and Correctional Services and Others* 2015 (1) SACR 478 (GP)

### **NAMIBIAN LAW REPORTS**

#### **Settlement agreement and further proceedings**

Once the parties have entered into a settlement agreement, all issues previously in dispute become res judicata as the proceedings come to an end. *Government of the Republic of Namibia and Others v Katjizeu and Others* 2015 (1) NR 45 (SC)

#### **Judge sues government for alleged unfair trial**

A judge came to be prosecuted in the high court on certain charges. He was discharged at the end of the state case, but the state appealed and the Supreme Court ordered that he be tried. He was again acquitted, and sued the government, contending that the judges had committed certain acts which violated his common-law rights as well as his constitutional rights to a fair trial. *Teek v President of The Republic of Namibia and Others* 2015 (1) NR 58 (SC)

#### **A sweeter than expected retrenchment offer**

The employer was restructuring and offered the two employees retrenchment, which they accepted. But the employer discovered that it would also have to pay for enhancements to their pensions, and offered them re-employment, which they refused. The court found that once the offer had been accepted by the employee, a binding agreement came into being and employer then bound by that agreement. *Namibia Wildlife Resorts Ltd v Government Institutions Pension Fund and Others* 2015 (1) NR 88 (SC)

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**The Juta Law Reports Team**

## **SOUTH AFRICAN LAW REPORTS**

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### **STRATFORD AND OTHERS v INVESTEC BANK LTD AND OTHERS (CC)**

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[2013] NAHCMD 362

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[2014] NASC 17

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### **TEEK v PRESIDENT OF THE REPUBLIC OF NAMIBIA AND OTHERS (SC)**

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[2014] NASC 16

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**Constitutional practice**—Courts—Supreme Court—Undesirable for Supreme Court to sit as court of first and last instance on important constitutional questions without benefit of high court's views on those questions.

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MAINGA JA, MTAMBANENGWE AJA and HOFF AJA  
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[2014] NASC 18

**Labour law**—Retrenchment—What constitutes—Employee offered retrenchment package and accepted it—Employer changing its mind when it realised the cost implications and then offered employee re-employment—Employee rejecting offer—Once offer accepted by the employee, a binding agreement came into being and employer then bound by that agreement.

**NAMIBIA ESTATE AGENTS BOARD v LIKE AND ANOTHER NO (LC)**

GEIER J  
2013 OCTOBER 4, 30  
[2013] NALCMD 36

**Estoppel**—Res judicata—When applicable—Arbitration award under Labour Act 11 of 2007 set aside on appeal by Labour Court—No order made referring back to arbitration by another arbitrator—Party in later review application seeking order for referral back to arbitration—Order in appeal setting aside arbitration award rendering issue of referral back res judicata—Once award set aside on appeal, nothing left to set aside or refer back—Merits of review having become moot—Order for referral back declined.

**Labour law**—Arbitration—Review—Costs—Arbitration award under Labour Act 11 of 2007 set aside on appeal by Labour Court—Court finding award tainted by bias and malice on part of arbitrator—In application for review of award, aggrieved parties seeking award of costs de bonis propriis on attorney and client scale against arbitrator—Arbitrator opposing such order and filing affidavit in support of opposition—By so doing, arbitrator losing protection against civil liability afforded by s 134 of Labour Act 11 of 2007 by bringing herself within ambit of s 118 of Act—Bias and malice of arbitrator also removing shield of immunity conferred by s 134 of Act—Order granted that arbitrator pay costs of aggrieved parties de bonis propriis on attorney and client scale.

**LE ROUX v MINISTER OF JUSTICE AND OTHERS (HC)**

VAN NIEKERK J  
2010 MARCH 23; 2014 FEBRUARY 20  
[2014] NAHCMD 60

**Magistrate**—Misconduct—Dismissal—Review—Competency of—Appeal procedure provided for in s 21(4) of Magistrates Act 3 of 2003 is appeal in ordinary sense—Such procedure not mandatory to exclusion of review procedure.

**Magistrate**—Misconduct—Investigation of misconduct in terms of s 26 of Magistrates Act 3 of 2003—Presiding officer conducting investigation may make finding without having transcribed record of proceedings—Not necessary to provide reasons for finding at time they are made—

But written reasons to be provided in terms of s 26(12) of Act to Magistrates Commission within seven days after conclusion of investigation.

**Magistrate**—Misconduct—Dismissal—Letter of dismissal by Minister of Justice—Letter to be printed on letterhead of minister—Erroneous printing of letter on letterhead of Magistrates Commission not vitiating dismissal where clear that minister followed recommendation of Magistrates Commission and had signed letter of dismissal—Minister obliged to follow recommendation of commission and having no discretion not to dismiss magistrate—Magistrates Act 3 of 2003, ss 21(3)(a).

**S v SHIPANGA AND ANOTHER (SC)**

SHIVUTE CJ, MARITZ JA and MAINGA JA  
2012 OCTOBER 31; 2014 OCTOBER 31  
[2014] NASC 22

**Criminal procedure**—Evidence—Identification—Identification parade—Failure to hold identification parade—Witness making dock identification—Sufficiency of—Sufficient additional circumstantial evidence supporting identification.

**Criminal procedure**—Evidence—Admissions and confessions—Confession—Admissibility of—Confession not admissible only where repeated under oath.

**Criminal procedure**—Evidence—Admissions and confessions—Confession—Admissibility of—Lack of legal representation when accused made confession where accused had already appeared in court and had indicated that he wanted legal aid representation—Accused subsequently voluntarily indicating that he wanted to make confession—Confession admissible.

**Criminal law**—Murder—Sentence—Particularly callous and premeditated murder of foreign tourist committed out of avarice and greed by robbing tourists—Sentence of 30 years' imprisonment appropriate sentence.

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA v LM AND OTHERS (SC)**

SHIVUTE CJ, MARITZ JA and MAINGA JA  
2014 MARCH 17; NOVEMBER 3  
[2014] NASC 19

**Medicine**—Consent to treatment—Plaintiffs (respondents), all HIV positive, all sterilised during Caesarean section—Plaintiffs claiming unlawful sterilisation—Signed consent form that had been signed while women at height of labour not amounting to informed consent in circumstances—Claim for damages upheld.

**Medicine**—Consent to treatment—Plaintiffs (respondents), all HIV positive, all sterilised during Caesarean section—Plaintiffs claiming unlawful sterilisation—Plaintiffs not having given informed consent—Semble: Attitude of medical practitioners smacked of medical paternalism—There could be no place in this day and age for medical paternalism when it came to the important decision whether or not to undergo sterilisation.

**WOKER FREIGHT SERVICES (PTY) LTD v COMMISSIONER FOR CUSTOMS AND EXCISE AND OTHERS (HC)**

UEITELE J  
2013 MARCH 25, 26; 2014 FEBRUARY 12  
[2014] NAHCMD 38

**Revenue**—Customs and excise—Customs duty—Liability for—Applicant, a clearing agent, agreeing that its multi-purpose general bond, executed in favour of Namibian government in terms of s 73 of Customs and Excise Act 20 of 1998, could be used to assist importer of goods to clear consignment of goods imported into Namibia for further export into Angola—Goods never exported from Namibia but as result of fraudulent conduct of official of Ministry of Finance remaining in Namibia—Such use of applicant's multi-purpose general bond creating valid accessory surety obligation for applicant—Applicant liable as surety under multi-purpose general bond for payment of duties on consignment of goods.

**NGUVAUVA v MINISTER OF REGIONAL AND LOCAL GOVERNMENT AND HOUSING AND RURAL DEVELOPMENT AND OTHERS (HC)**

PARKER AJ

2014 JULY 14; OCTOBER 2

[2014] NAHCMD 290

**Administrative law**—Administrative action—Duty to act—Power of minister to designate chief in terms of s 5(2) of Traditional Authorities Act 25 of 2000—Once minister satisfied that applicant has met requirements in paras (i) to (vi) of s 5(1) of Act he has no further discretion and is obliged to appoint applicant as chief—In case where one applicant had died and there was only one other applicant who met all requirements, minister obliged to appoint that applicant as chief.

**SCHÜTZ v PIRKER AND ANOTHER (HC)**

UEITELE J

2014 OCTOBER 30; NOVEMBER 12

[2014] NAHCMD 341

**Practice**—Applications and motions—Condonation—Late filing of heads of argument—Such application not requiring formal notice of motion.

**Costs**—Security—Furnishing of—When ordered—Peregrinus instituting action against Namibian citizen—Proof of assets in Namibia—Assets that peregrinus claimed to have were subject of main application and court not informed of value thereof—Security ordered.

**NEDBANK NAMIBIA LTD v TILE AND SANITARY WARE CC AND OTHERS (HC)**

MILLER AJ

2014 AUGUST 21; SEPTEMBER 25

[2014] NAHCMD 279

**Practice**—Judicial case management—Delay in seeking amendment of pleadings—Such applications at advanced stage of proceedings frustrated overriding principle of judicial case management—Managing judge should be slow to allow any late interlocutory proceedings which might delay final determination of case.

**MUNICIPAL COUNCIL OF WINDHOEK v CLAUDIA PROPERTIES CC AND ANOTHER (HC)**

NDAUENDAPO J

2011 JANUARY 31—FEBRUARY 4; 2014 NOVEMBER 14

[2014] NAHCMD 344

**Practice**—Applications and motions—Fresh material—Applicant placing reliance in heads of argument on legislation not mentioned in founding affidavit—No bar to placing reliance on legal arguments provided that they were from the facts alleged.

**SOUTH AFRICAN POULTRY ASSOCIATION AND OTHERS v MINISTRY OF TRADE AND INDUSTRY AND OTHERS (HC)**

DAMASEB JP

2014 SEPTEMBER 29; NOVEMBER 7

[2014] NAHCMD 331

**Practice**—Applications and motions—Discovery and inspection in motion proceedings—Discovery only allowed in motion proceedings in exceptional circumstances.

**Practice**—Discovery and inspection—Access to discovered documents and information—Party seeking order that opponent, a competitor in same market or industry, not have access to discovered documents and information and access restricted only to such party's legal practitioner—Such gagging order could have undesirable consequences for credibility of justice system—Such order would only be rarely granted.

**Practice**—Discovery and inspection—Discovery—International treaties alleged by party to prohibit administrative action that caused such party financial harm—Opposing party entitled to discovery of such documents evidencing existence of treaties.

**PRIMEDIA OUTDOOR NAMIBIA (PTY) LTD v KAULUMA (LC)**

VAN NIEKERK J

2012 SEPTEMBER 28; 2014 OCTOBER 17

[2014] NALCMD 41

**Labour court**—Rules of court—Procedure on noting of appeal—Appeal from a decision of arbitrator—Labour Court Rules and Conciliation and Arbitration Rules to be read together when determining procedure to be followed on noting appeal—Procedure somewhat confusing and consideration could be given to creating greater harmony between different sets of rules—Noting of appeal from arbitrator's award to be done in terms of Conciliation and Arbitration Rules.

**Labour court**—Rules of court—Notice of appeal—Delivery of—Meaning of 'delivery'—In Labour Court Rules meaning to serve copies on all parties and file original with registrar.

**Labour court**—Appeal—Condonation and re-instatement—When available—Application for condonation to be brought as soon as party becomes aware of failure to comply with rules—Implications and consequences of timing of application was matter to be dealt with on facts of each particular case.

**MUNICIPAL COUNCIL OF GOBABIS v SMITH t/a BERTIE SMITH CONTRACTOR SERVICES (HC)**

PARKER AJ

2014 OCTOBER 28; NOVEMBER 27

[2014] NAHCMD 361

**Practice**—Applications and motions—Notice of opposition—To counter-application—Party required to set out question of law to be determined—Failure to do so rendering notice defective.

**Administrative law**—Administrative bodies—Duty to act—Failure to act where administrative body under duty to act entitles person affected by failure to a mandamus