



## JUTA'S ADVANCE NOTIFICATION SERVICE

MAY 2016

**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 AND THE SACR, AS WELL AS THE NAMIBIAN LAW REPORTS 2016(1)

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

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

##### **House transferred by loan scam**

The homeowners thought they were getting a secured loan, but their house was actually sold to an 'investor', to whom the bank granted a home loan secured by a mortgage bond. When the 'investor' defaulted on his loan, the bank attached the property, still occupied by the homeowners. *Absa Ltd v Moore and Another* 2016 (3) SA 97 (SCA)

##### **Garden leave**

After the employee's resignation, the company sought to enforce his 'garden leave' which required him to spend a whole or part of the notice period at home, thus allowing confidential information to which the employee had access to become stale, and keeping the employee out of the clutches of a competitor. *Vodacom (Pty) Ltd v Motsa and Another* 2016 (3) SA 116 (LC)

##### **Province behaving badly**

This case is about a provincial government behaving unconscionably. The province conducted itself without any integrity and failed to be transparent and accountable as enjoined by our Constitution. It awarded a tender in relation to a road-infrastructure programme and after the work had been completed, refused to pay on the spurious basis that the work had not been budgeted for. *Free State Province v Terra Graphics (Pty) Ltd and Another* 2016 (3) SA 130 (SCA)

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

### **A gun, a diary and a plan**

Documents had been seized from the detainee's cell, after numerous items had been found, including a firearm and items that could be used in an escape, as well as a diary indicating the existence of an escape plan. Public-policy considerations prevailed over the return of the documents. *Krecjir v Minister of Correctional Services and Others* 2016 (1) SACR 452 (GP)

### **To protect and serve**

There was a duty on members of the police to render assistance to victims of domestic violence by receiving and investigating the complaint. They should not shirk this responsibility by directing the complainant to seek other means. *Naidoo v Minister of Police and Others* 2016 (1) SACR 468 (SCA)

### **Diversion and child offenders**

The court deals with two cases of juvenile offenders and irregularities in the diversion process. The correct procedures are explained. *S v XM and Another* 2016 (1) SACR 500 (KZP)

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### **Habeas corpus**

An habeas corpus mandamus was issued mero motu against the prison authorities to produce prisoners before court, to enforce their rights to right to appear in court to challenge their convictions and sentences. *Lomboleni and Ten Other Appeal Cases v The State and Others* 2016 (1) NR 22 (NLD)

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A truck owner applied to court to have its truck released from the lien held by the towing company, because the towing charge was alleged to be exorbitant. The court found that that it was equitable to deprive the towing company of possession of the truck, and to substitute security for the lien. *Blaauw's Transport (Pty) Ltd v Auto Truck & Coach CC and Another* 2016 (1) NR 132 (HC)

### **Illegal contract**

Where the legislature criminalised certain behaviour or conduct, any contract entered into in violation of the statute became unlawful and unenforceable, despite inequities resulting therefrom. To give effect to a contract concluded in violation of the legislation would facilitate or encourage the very act or conduct that parliament proscribed and rendered a criminal offence. *Kondjeni Nkandi Architects and Another v Namibian Airports Company Ltd* 2016 (1) NR 223 (HC)

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Kind Regards

**The Juta Law Reports Team**

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**Criminal procedure**—Sentence—Minimum sentences—Stock theft—Effect of striking down of minimum sentence provisions in Stock Theft Act 12 of 1990—Court’s ordinary sentencing jurisdiction restored—Lengthy custodial sentence must be considered as deterrence—Wholly suspended sentence contrary to purpose of Stock Theft Amendment Act 19 of 2004.

**BUHRMANN & PARTNERS CONSULTING ENGINEERS v GARBADE (SC)**

SHIVUTE CJ, DAMASEB AJA and HOFF AJA  
2014 MARCH 19; 2015 OCTOBER 27

**Contract**—Parties—Identity of parties to commercial relationship—Factual issue—Value judgment in line with common business sense—Onus on party raising misjoinder to prove material facts in support of special plea of misjoinder.

**BLAAUW’S TRANSPORT (PTY) LTD v AUTO TRUCK & COACH CC AND ANOTHER (HC)**

PARKER AJ  
2015 SEPTEMBER 29; NOVEMBER 12  
[2015] NAHCMD 268

**Lien**—Salvage lien—Substitution of security for—Court having discretion to order substitution on considerations of justice and equity—Genuine and bona fide dispute between parties about amounts charged—Applicant entitled to have its rights and obligations determined by court.

### **KAMUHANGA NO v MASTER OF THE HIGH COURT AND OTHERS (SC)**

DAMASEB DCJ, STRYDOM AJA and O'REGAN AJA  
2015 JUNE 16; NOVEMBER 13

**Administration of estates**—The master—Decision of—Review—Master must act fairly and reasonably and in compliance with law—Master expert in field of administering estates—Court will only interfere if decision unfair or unreasonable in circumstances—Administration of Estates Act 66 of 1965, s 35(10).

**Administration of estates**—Accounts—Liquidation and distribution account—Objections—Cannot challenge process of decision under s 47 of Administration of Estates Act 66 of 1965 by objecting to liquidation and distribution account—Separate review must be lodged for decisions under s 47—Section 35(10) reviews reserved for unsuccessful objections to liquidation and distribution accounts and not general mechanism for heirs' complaints about conduct of executor.

### **SWARTBOOI AND ANOTHER v MBENGELA NO AND OTHERS (SC)**

DAMASEB DCJ, SMUTS JA and CHOMBA AJA  
2015 OCTOBER 19; NOVEMBER 24

**Labour Court**—Review—Arbitration award—Powers of review confined to defects in arbitration proceedings defined in s 89(5)(a) and (b) of Labour Act 11 of 2007—Onus of establishing category of defects in proceedings on applicant.

**Labour law**—Labour arbitration tribunal—Tribunals established in s 85 of Labour Act 11 of 2007 were tribunals contemplated in art 12 of Constitution—Article 18 of Constitution applied only to decisions amounting to administrative action—Adjudicative function of tribunal under art 12 not constituting act of an administrative body—Article 18 could not be invoked for review proceedings of tribunals established under s 85 of Act.

### **VON WEIDTS v GOUSSARD AND ANOTHER (HC)**

DAMASEB JP  
2012 JUNE 26–28; 2013 NOVEMBER 11–15; 2014 JANUARY 17  
2015 MARCH 16  
[2015] NAHCMD 57

**Contract**—Breach—Remedies for—Specific performance—Party seeking specific performance had to be ready, willing and able to perform and had onus to prove compliance with agreement unless unlawfully prevented from doing so.

**Evidence**—Parol evidence rule—Scope—Claim based on written contract—Integrated contract with non-variation clause—Not allowed to contradict, add to or modify written instrument by reference to extrinsic evidence in absence of misrepresentation, duress, undue influence, illegality, failure to comply with the terms of a statute, and mistake.

### **TJAMUAHA AND ANOTHER v MASTER OF THE HIGH COURT AND OTHERS (HC)**

SCHIMMING-CHASE AJ  
2015 JUNE 19; OCTOBER 12  
[2015] NAHCMD 245

**Will**—Construction—Clear language—Power to sell farm if necessary given—Irrespective of what testator intended—General presumption against creation of fideicommissum—Reliance on implied fideicommissum failing.

**Curator**—Appointment of—Curator ad litem—Necessity of appointing curator for minor children—Validity of redistribution agreement concluded without appointing curator—Minor children benefitting from agreement—Absence of curator ad litem not affecting validity of agreement—Agreement valid.

**Prescription**—Extinctive prescription—Debt—Vindictory claim not constituting debt—Acquisitive period of thirty years constituting extinctive prescription period for vindictory claims—Prescription Act 68 of 1969, ss 1 and 10.

**CV v JV (HC)**

MASUKU AJ

2015 MAY 7, 26

[2015] NAHCMD 117

**Practice**—Applications and motions—Interlocutory application—Application in terms of High Court Rule 61 interlocutory—Non-compliance with rule 32(9) and (10) rendering application fatally defective.

**Practice**—Irregular proceedings—Requirements—Applicant must identify irregularity with clarity and precision—Applicant must show prejudice if irregularity not addressed—Failure to comply with requirements rendering application liable to fail—High Court Rules, rule 61.

**KONDJENI NKANDI ARCHITECTS AND ANOTHER v NAMIBIAN AIRPORTS COMPANY LTD (HC)**

MASUKU AJ

2015 JULY 1; SEPTEMBER 11

[2015] NAHCMD 223

**Contract**—Legality—Illegal contract—Legislature criminalised certain conduct—Contract in violation of statutory prohibitions unlawful and unenforceable despite inequities resulting therefrom—Architects' and Quantity Surveyors' Act 13 of 1979, s 13(1)(a) and (b).

**USAKOS TOWN COUNCIL v JANTZE AND OTHERS (HC)**

UEITELE J

2015 SEPTEMBER 2, 16

[2015] NAHCMD 225

**Court**—Jurisdiction—High Court—Labour related matters—Enforcement of arbitrator's award by attachment of assets—Applicant seeking setting aside of attachment and interdicting sale in execution—High Court not having jurisdiction—Labour Court having exclusive jurisdiction—Application dismissed—Labour Act 11 of 2007, s 117(1)(a)-(i).

**Labour court**—Jurisdiction—Labour court has exclusive jurisdiction in respect of all matters necessary or incidental to court's functions under Act—Labour Act 11 of 2007, s 117(1)(a)-(i).

**S v HANGUE (SC)**

SHIVUTE CJ, MARITZ JA and CHOMBA AJA

2004 OCTOBER 19; 2015 DECEMBER 15

**Constitutional law**—Commonlaw—Changes to common law prior to independence form part of Namibian Law—Namibian courts responsible for interpretation and pronouncement on content and development of common law after independence—Constitution, art 66(1).

**Criminal law**—Mens rea—Proof of—Murder and attempted murder—Mental element had to bear on actus reus of crime perpetrator was charged with—Prosecution had onus of proving mental element of mens rea when crime committed.

**Criminal law**—Criminal capacity—Defence of temporary non-pathological criminal incapacity—Person's liability—Intoxication—Such defence available—Duty on accused to establish proper basis for defence.

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

DAMASEB DCJ, SMUTS JA and CHOMBA AJA

2015 OCTOBER 22; DECEMBER 7

**Court**—Precedent and stare decisis—Decision of foreign courts—Not binding on Namibian Courts—Foreign authority only applicable if justified—Guidelines for citation of foreign and local authorities—Decisions of inferior foreign courts not persuasive authority in Supreme Court until new approach settled law—Foreign law subject to appeal not to be cited—Excessive citation of authorities discouraged—Citation of one Supreme Court case suffice.

**Practice**—Pleading—Exception—Exception successful—Opportunity to amend pleading should be given—Invariable practice in Namibian Courts.

