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NOVEMBER 2016

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JUDGMENTS OF INTEREST IN THE NOVEMBER EDITIONS OF THE SALR, SACR AND THE NAMIBIAN LAW REPORTS

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SOUTH AFRICAN LAW REPORTS

Google Adwords and competition

If you search the internet via Google for a certain company, but its competitor has paid to have its website feature in the search results, is this passing off or unlawful competition? The appeal court delves into what goes on behind your internet searches. *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another* 2016 (6) SA 1 (SCA)

Street names and a sense of belonging

A city's decision to change street names resulted in opposition from citizens who contended that the process lacked sufficient public participation. Because of their strong emotional connection to the old names, they feared losing their sense of place and belonging if the old names were removed. However, the city had the constitutional and statutory power to run its affairs, and public participation could not be elevated to co-governance. *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC)

Abuse of dominant position in the market

Nationwide Airlines sued the national carrier and dominant firm, South African Airways, for damages it alleged it suffered due to anticompetitive conduct. The judgment lays out the complex procedure for calculating the damages of reduced profits, by estimating the lost passengers. *Nationwide Airlines (Pty) Ltd (In Liquidation) v South African Airways (Pty) Ltd* 2016 (6) SA 19 (GJ)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Arrest of children

The Constitution requires that best interests of child be accorded paramount importance, so there had to be no other, less invasive, means than arrest to secure the attendance of the child at court. The police, when arresting a child, had to do so through the lens of the Bill of Rights and pay special attention to the best interests of the child. *MR v Minister of Safety And Security* 2016 (2) SACR 540 (CC)

Evidence of accomplice

A witness who testifies against his accomplices can only be granted a section 204 discharge from prosecution if he answers all questions frankly and honestly. The nature and procedure of the enquiry whether to discharge the witness is laid out in this judgment. *S v Kuyler* 2016 (2) SACR 563 (FB)

Indigenous languages for trials

The government programme for elevating the use of indigenous languages was not yet sufficiently advanced that it should be used where the exigencies of the matter did not demand such use. A delay of two and a half years in preparing the record because of translation difficulties led to the compromise of the accused's fundamental rights. *S v Feni* 2016 (2) SACR 581 (ECB)

THE NAMIBIAN LAW REPORTS**Dolus eventualis and a gruesome murder**

That the accused's intent to murder was dolus eventualis was not a mitigating factor for sentencing, when an elderly person was killed in a cruel and gruesome manner. The court was aghast at the cowardliness and brutality of the assault. *S v Gariseb* 2016 (3) NR 613 (SC)

Security for costs

When considering the security for costs to be furnished by a foreigner, the position of honour and integrity of the first plaintiff's position as a judge in Italy counted in the plaintiffs' favour. The quantum that would actually be determined should not serve to effectively close the portals of the courts of Namibia to the plaintiffs, particularly where two minors were involved. *Martucci and Others v Mountain View Game Lodge (Pty) Ltd* 2016 (3) NR 789 (HC)

Counselling and training before dismissal

This case is a cautionary tale for dismissal of an employee on poor performance. The employer should attempt to assist the employee with advice and guidance, to overcome his shortcomings. The employer needed to identify the causes of the employee's underperformance, and institute remedial action in the form of training and counselling, to enable him to perform to his optimum. *Tow-In Specialist CC v Urinavi* 2016 (3) NR 829 (LC)

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DAMASEB DCJ, SMUTS JA and O'REGAN AJA
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Constitutional law—Citizenship—By birth—In terms of art 4(1)(d) of Namibian Constitution—Citizenship by birth extended to be granted to as varied classes of people as possible as exemplified by extension of citizenship by birth—Article 4(1)(d) to be given generous and purposive interpretation advancing interests of child born in Namibia rather than limiting such interests—Parents resident in Namibia in terms of employment permits—Such parents 'ordinarily resident' in Namibia within meaning of art 4(1)(d).

S v FM (NLD)

JANUARY J and TOMMASI J
2016 APRIL 8; JUNE 13
[2016] NAHCNLD 39

Criminal procedure—Evidence—Witnesses—Competence of—Young complainant—Court has duty to follow provisions of s 164 of Criminal Procedure Act 51 of 1977—Court must be satisfied that witness appreciated meaning of telling the truth and was capable of giving intelligible evidence—Proper admonishment to be truthful required by court—Failure by court to properly admonish witness constituted an irregularity.

S v MIGUEL AND OTHERS (HC)

LIEBENBERG J
2016 JUNE 1, 20
[2016] NAHCMD 175

Criminal procedure—Bail—Appeal against magistrate's refusal to grant bail—New ground, challenging jurisdiction of court a quo, raised for first time during appeal—New ground must be raised before trial court for consideration—Not in interests of justice to allow argument pertaining to jurisdiction on appeal.

Criminal procedure—Bail—Appeal against magistrate's refusal to grant bail—Court may only overturn decision if satisfied that court a quo exercised judicial discretion wrongly—Court bound by provisions of Criminal Procedure Act 51 of 1977, s 65(4)—Not every irregularity committed resulting in overturning court a quo on appeal.

VAN STRATEN NO AND ANOTHER v NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY AND ANOTHER (SC)

SHIVUTE CJ, SMUTS JA and HOFF AJA
2016 MARCH 15; JUNE 8

Practice—Pleadings—Exception—Exception as disclosing no cause of action—Allegations in pleading must be taken as correct—Pleading only excipiable if no possible evidence led on pleadings could disclose a cause of action.

Practice—Pleadings—Exception—Exception as being vague and embarrassing—Pleading must contain statement of material facts in compliance with High Court Rule 45 subject to overriding objective of judicial case management—Determination whether pleading lacking particularity resulting in vagueness and whether vagueness causing prejudice.

Company—Directors—Duties—Knowledge of directors or board of directors who were particeps criminalis was not imputed to company

Delict—Lex Aquilia—Extension of—Pure economic loss—At exception stage, plaintiffs must allege wrongfulness and plead facts in support of these essential allegations—Matter should then be left to trial court to decide these issues.

Delict—Liability for—Pure economic loss—Statutory body—Duty of enforcing regulatory provisions governing financial institutions—Failure of enforcing peremptory regulations and properly supervising institutions in terms of powers under Namibia Financial Institutions Act 3 of 2001 undermining rule of law and value of accountability—Foreseeable that members of public entrusting investments to those institutions could be at risk of losing their investments.

Delict—Liability for—Pure economic loss—Breach of statutory duties and obligations imported into contractual relationship—Delictual liability for loss resulting from breach of duties arising from Public Accountants' and Auditors' Act 51 of 1951 and related legislation and standards—Trial court might find, based on policy considerations that there was need to extend Aquilian action to avoid claimants being remediless in cases of professional negligence if limited to claim under contract.

Delict—Liability for—Pure economic loss—Investors suffering loss—Whether omission wrongful and actionable by investors against auditors, were questions for determination by trial court, also taking into account policy considerations, the limits of fairness, reasonableness and justice.

MARTUCCI AND OTHERS v MOUNTAIN VIEW GAME LODGE (PTY) LTD (HC)

MASUKU J

2016 JUNE 28; JULY 22

[2016] NAHCMD 217

Costs—Security—Furnishing of—High Court Rule 59—Court must determine liability of providing security for costs—Amount and manner of providing security for costs to be determined by registrar and not by court.

Costs—Security—Furnishing of—Factors to be taken into account—Character of foreigner—Nature of primary claim—Amount of security should not close doors of courts in Namibia.

FIRE TECH SYSTEMS CC v NAMIBIA AIRPORTS CO LTD AND OTHERS (HC)

UEITELE J

2016 APRIL 19; JULY 22

[2016] NAHCMD 220

Review—Administrative body—Citation of administrative body—Requirements of High Court Rule 76(1)—Chairman of board must be cited in his representative capacity in review proceedings irrespective of whether administrative body was juristic person or not—Separate citation of board—Unnecessary proliferation of parties.

Administrative law—Fair administrative justice—Administrative officials were subject to constitutional values of accountability, transparency and openness—Officials were obliged to record and justify reasons for decisions and to provide reasons upon request—Failure to consider tenders—Officials acting capriciously, irrationally and unfairly in contravention of art 18 of Constitution—Decision unlawful and invalid.

Constitutional practice—Enforcement of rights—Impractical to set aside tender award—Contract had run its course—Court in its discretion not setting aside award—Court exercised power under art 25(3) of Constitution to make appropriate order to secure enjoyment of rights and freedoms conferred by Constitution—Leave granted to applicant to recover damages from respondent if so advised.

TOW-IN SPECIALIST CC v URINAVI (LC)

UEITELE J

2015 MAY 22; JUNE 12; 2016 JANUARY 20

[2016] NALCMD 3

Labour law—Dismissal—Fairness of—Poor work performance by employee—Requirement for lawful dismissal—Substantive fairness—Employer must conduct assessment of employee's performance—Value judgment of performance had to be objective and reasonable—Coaching and training essential for proper assessment.

SWART v TUBE-O-FLEX NAMIBIA (PTY) LTD AND ANOTHER (SC)

SHIVUTE CJ, DAMASEB DCJ and CHOMBA AJA
2016 MARCH 31; JULY 25

Labour law—Employee—What constitutes—Appellant, retired erstwhile managing director of first respondent, appointed as sales director earning commission on sales instead of salary—Absence of control strong indication that relationship not one of employment—Rebuttable presumption of factors in s 128A of Labour Act 11 of 2007 as amended—Onus on person wanting to avoid employer/employee relationship—Onus discharged on facts of case.

SKORPION MINING CO (PTY) LTD v ROAD FUND ADMINISTRATION (HC)

MASUKU J
2015 JUNE 15–17, 19; JULY 24; 2016 JULY 12
[2016] NAHCMD 201

Administrative law—Administrative bodies—Road Fund Administration—Administrative body exercising administrative functions within meaning of art 18 of Namibian Constitution—Required to act fairly and reasonably, not unduly harsh, free from bias and prejudice, impartial, rational and considerate—Procedure adopted in rejecting claims not fair and reasonable within meaning of art 18—Statutory regime must comply with audi principle unless expressly excluded by Parliament.

HAYLEY FAY t/a HAYLEY FAY PROPERTIES v UPTOWN PROPERTY INVESTMENT CC AND OTHERS (HC)

MASUKU J
2016 JUNE 21; JULY 12
[2016] NAHCMD 202

Practice—Pleadings—Exception—Particulars of claim vague and embarrassing—Two stage approach—Notice to remove cause of complaint within ten days failing which, filing of exception proper—High Court Rules 57(2) and (3).

Sale—Land—Statutory requirements of Formalities in Respect of Contracts of Sale of Land Act 71 of 1969, s 2—Applicability of requirement for contract to be in writing—Statutory requirements of s 2 of Act not applicable to contracts of mandate orally concluded to find a purchaser for land—Exception dismissed.

KATJIVENA AND OTHERS v PRIME MINISTER OF THE REPUBLIC OF NAMIBIA AND OTHERS (HC)

PARKER AJ
2016 APRIL 20; MAY 18
[2016] NAHCMD 146

Practice—Applications and motions—Locus standi—Challenge to locus standi must be raised in answering affidavit—Respondent must give applicant fair opportunity of meeting challenge in replying affidavit—Point in limine not properly before court and was rejected.

Practice—Parties—Locus standi—Applicant applying for interdict and declaratory order on her own behalf and on behalf of fellow employees—Actio popularis not part of Namibian law—Application did not constitute actio popularis—Right applicant sought to enforce available to her and her fellow employees—Respondents' point in limine dismissed.