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MAY 2017

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JUDGMENTS OF INTEREST IN THE MAY EDITIONS OF THE SALR AND THE SACR, AS WELL AS *THE NAMIBIAN LAW REPORTS 2017(1)*

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

SOUTH AFRICAN LAW REPORTS

Evidence under duress

A suspected criminal was given the option of making a statement regarding allegations of theft. He was told that refusal or lies would result in full criminal prosecution and adverse publicity. He elected to confess and the evidence was found to be admissible. *Hohne v Super Stone Mining (Pty) Ltd* 2017 (3) SA 45 (SCA)

Assisted suicide

The court surveys South African and foreign law on euthanasia and assisted suicide to decide the legality of a doctor administering or prescribing a lethal agent to end the life of a patient suffering from terminal illness. *Minister of Justice and Others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA)

The International Criminal Court

When South Africa withdrew from the Rome statute, the notice of withdrawal was procedurally irrational, because of the lack of prior consultation with Parliament, and also because of the unexplained haste apparent in the national executive's conduct in seeking approval consequent to lodging the notice of withdrawal, rather than allowing normal legislative processes to take their course. Parliament, having the power to determine whether an international agreement bound South Africa, must also retain the power to decide whether South Africa remained bound by it. Prior parliamentary approval was required and ex post facto approval could not cure the invalidity. *Democratic Alliance v Minister of International Relations and Cooperation and Others* 2017 (3) SA 212 (GP)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Spousal abuse and sentencing

In the case of rape of a partner in a situation of spousal abuse, the complainant did not wish to pursue prosecution. This did not amount to mitigation justifying a sentence less than the prescribed minimum sentence. It should rather be considered an aggravating factor. *S v Amerika* 2017 (1) SACR 532 (WCC)

Child offenders

The sixteen-year-old appellant embarked on a shooting spree in a tavern to which he had been refused entry. He was convicted of murder, two counts of attempted murder and firearm offences. The sentence of 19 years' imprisonment was found on appeal to leave him with little hope of a different life outside of crime. The sentence was reduced to 13 years. *S v Bruintjies* 2017 (1) SACR 553 (WCC)

Confession by rough handling

Confessions and pointings-out made after some slapping and rough handling by the police, which amounted to assault but not torture, were properly admitted. The trial judge had been aware of the accused's constitutional rights and the evidence had been examined in detail. *S v Bakane and Others* 2017 (1) SACR 576 (GP)

Objection to renaming of streets

A local authority conferred honours on meritorious persons by renaming streets. This was within its discretionary powers and the decision was one of policy and not an administrative one. Policy decision implementation did not require further notice to the public before renaming the streets. *Vaatz v Municipal Council of the Municipality of Windhoek* 2017 (1) NR 32 (SC)

Access to communal land

All communal land vested in the state. Such land was not capable of freehold ownership. Fencing off of communal land was therefore prohibited, unless prior approval had been obtained. The respondents were ordered to remove fencing that restricted the applicant's access to grazing, water and wood. *Naango and Others v Kalekela and Others* 2017 (1) NR 66 (HC)

Uniformity in sentencing

The principle of individualisation of sentences has to be balanced against uniformity. Similarity of crimes and circumstances require the imposition of uniform sentences. On review, the court looks at why one of the accused, who was also a first offender, received a harsher punishment than the three other first offenders. *S v Vos and Others* 2017 (1) NR 106 (HC)

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Kind Regards

The Juta Law Reports Team

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[2017] NAHCMD 5

Criminal procedure—Convictions—Duplication—What constitutes—Two separate acts committed—One criminal transaction—Single intent of escaping from custody—Duplication of charges—Conviction and sentence on fraud charge set aside.

STANDARD BANK NAMIBIA LTD v GASEB AND ANOTHER (LC)

VAN WYK AJ
2016 JULY 22; 2017 JANUARY 27
[2017] NALCMD 1

Labour court—Appeal—Against arbitrator's award—Right restricted to questions of law only—Court required to determine as question of law whether evidence such that no reasonable arbitrator could make such finding or whether evidence could not reasonably support finding—Labour Act 11 of 2007, s 89(1).

Labour law—Disciplinary sanctions—Consistency in—Part of law of Namibia—Like discipline for like misconduct—Justification and valid reasons for differentiation in disciplinary sanctions required.

VILJOEN v CHAIRPERSON OF THE IMMIGRATION SELECTION BOARD AND ANOTHER (HC)

PARKER AJ
2016 NOVEMBER 9; 2017 JANUARY 26
[2017] NAHCMD 13

Administrative law—Review—Misinterpretation of statute—Reviewable error in law—Misinterpretation resulted in administrative body not complying with statutory requirements of Immigration Control Act 7 of 1993, in violation of art 18 of Constitution—Board's decision unlawful and invalid.

Administrative law—Administrative action—Review—Duty to exhaust internal remedies—Unlawfulness of board's decision gravely material—Effect of undermining domestic remedies—Impugned decision set aside—Court exercising discretion to order respondents to issue permit within fixed period of time.

FOUR THREE FIVE DEVELOPMENT COMPANIES (PTY) LTD v NAMIBIA AIRPORTS COMPANY AND OTHERS (HC)

PARKER AJ
2016 SEPTEMBER 20; OCTOBER 20, 31; 2017 FEBRUARY 2
[2017] NAHCMD 23

Review—Generally—Review grounds for administrative decisions to be founded on common-law and constitutional grounds—Heaping vituperations and calumnies on administrative body and making allegations of moral turpitude serving no purpose—Such conduct prejudicial to judicial process.

Administrative law—Review—Exhaustion of internal or domestic remedies before approaching courts—Legislative remedies provided immediate, cost effective, sufficient, practical relief and effective redress in respect of complaint in question—Airports Company Act 25 of 1998, s 12.

S v PIENAAR (SC)

SHIVUTE CJ, MAINGA JA and CHOMBA AJA
2016 OCTOBER 2; 2017 FEBRUARY 13

Criminal procedure—Bail—Leave to appeal against court a quo's refusal to grant bail—When to be granted—Court a quo finding no prospects of success on appeal—Leave to appeal granted based on irregularity in proceeding in court a quo—Court should have refused leave where prospects of success absent—Interests of justice militated against granting of bail—Appeal dismissed—Criminal Procedure Act 51 of 1977, s 61.

JACKSON v SHUUDIFONYA (NLD)

CHEDA J

2016 APRIL 25; JULY 18; SEPTEMBER 23; OCTOBER 7

[2016] NAHCNLD 83

Practice—Judgments and orders—Rescission—Default judgment applied for and granted by citing rule 31(2) instead of rule 15 of High Court Rules—Wrong rule cited—Judgment erroneously sought and granted—Judgment rescinded.

JURGENS v GEIXOB AND OTHERS (LC)

NARIB AJ

2016 SEPTEMBER 16, 28; 2017 JANUARY 27

[2017] NALCMD 2

Labour law—Dismissal—Unfair dismissal—Employer has onus of establishing both valid and fair reason for dismissal and that fair procedure had been followed—Employer conceding dismissal procedurally unfair—Finding of unfair dismissal unassailable—Labour Act 11 of 2007, s 33(1).

Labour law—Arbitrator's award—Appeal against—No distinction between procedural or substantive unfair dismissal in s 33 of Labour Act 11 of 2007—Once dismissal established, s 86(15) conferring discretion on arbitrator of making appropriate award—Award not limited to s 86(15)(a)–(f)—Arbitrator's discretion not fettered by finding there was valid and fair reason for dismissal—In absence of misdirection or irregularity, court of appeal would not interfere with exercise of arbitrator's discretion—Labour Act 11 of 2007, ss 33 and 86(15).

PROSECUTOR-GENERAL v PAULO AND ANOTHER (HC)

ANGULA DJP

2016 OCTOBER 19; 2017 FEBRUARY 17

[2017] NAHCMD 43

Practice—Applications and motions—Affidavits—Opposing affidavit deposed to by legal practitioner on behalf of client—Practice discouraged—Should only be done in exceptional cases where party for compelling reasons unable to depose to affidavit—Affidavit might contain factual evidence—Undesirable for legal practitioner to become witness in or align or associate himself with client's cause.

Practice—Applications and motions—Further affidavits—Court has discretion of allowing further affidavits when new matter raised or where information not available when founding affidavit was filed—Applicant required to give satisfactory explanation negating mala fides and culpable remissness—Interests of justice overriding consideration—Parties must be allowed full ventilation of real issues.

DU TOIT v DREYER AND OTHERS (SC)

SHIVUTE CJ, MAINGA JA and CHOMBA AJA

2016 APRIL 15; 2017 FEBRUARY 27

Appeal—Against costs order of trial court—Discretion of trial court whether to award costs or not—Limitation on power of appeal courts of interfering with trial court costs orders, unless orders were vitiated by misdirection or if trial judge acted capriciously or arbitrarily failing to exercise discretion judicially—Parties in pari delicto displaying reprehensible conduct—Both parties deprived of costs—Appellant's conduct militated against awarding him favourable costs order—Appeal dismissed.

S v EIGOWAS (NLD)

TOMMASI J and JANUARY J

2016 NOVEMBER 18; 2017 FEBRUARY 20

[2017] NAHCNLD 9

Criminal procedure—Sentence—Appeal against—Interference by court of appeal—Limited powers of interference—Sentencing within discretion of trial court—Interference only if material irregularity or misdirection on facts or law occurred, when sentence startlingly inappropriate or induced sense of shock or striking disparity in sentence which court of appeal would have imposed and when irrelevant factors were considered and relevant factors were not considered.

Criminal procedure—Sentence—Theft—Periodical imprisonment—Competent sentence for conviction of theft—Severe form of sentence with least interruption of family life—Maximum hours of periodic imprisonment imposed reflected seriousness of crime—Appeal dismissed—Criminal Procedure Act 51 of 1977, s 276(1)(c).

S v SHILAMBA (NLD)

TOMMASI J

2017 FEBRUARY 13, 21

[2017] NAHCNLD 12

Criminal law—Murder—Sentence—Monstrous murder without plausible explanation for conduct followed by unprovoked attack on another person—Escalation of violent crimes in Namibia—Consistency required in punishment for violent crimes—Facts of case required lengthy custodial sentences consistent with punishment in similar cases.

PROSECUTOR-GENERAL AND OTHERS v MWANANYAMBE AND 19 OTHER CASES (HC)

ANGULA DJP

2016 OCTOBER 24; 2017 FEBRUARY 24

Practice—Stay of proceedings—Grounds—Prosecutor-General appealing judgment of criminal court seeking stay of proceedings pending finalisation of condonation application, application for leave to appeal and appeal—Criminal proceedings terminated upon acquittal of respondents—Lodging of condonation application and application for leave to appeal not reinstating criminal proceedings.

Practice—Stay of proceedings—Discretion of court—Discretion sparingly exercised on strong grounds, with great caution and in exceptional circumstances—Granting of order severely prejudicial to adjudication of respondents' rights—Prosecutor-General failing to prove exceptional circumstances for granting stay—Application dismissed.

PROSECUTOR-GENERAL v KENNEDY (HC)

ANGULA DJP

2016 SEPTEMBER 13; 2017 FEBRUARY 6

[2017] NAHCMD 26

Criminal law—Organised crime—Forfeiture order—Forfeiture of vehicle used during commission of alleged crimes of kidnapping and rape—Act aimed at removing incentive for crime, deterring use of property in crime, eliminating means by which crime could be committed and advancing ends of justice by depriving those involved in crime of property—Required proof on balance of probabilities that property an instrumentality concerning sch 1 crimes of kidnapping and rape—Prevention of Organised Crime Act 29 of 2004, s 61(1).

Practice—Judicial case management—High Court Rules, rule 53(1)(a)—Failure by legal practitioner to attend planning, management, additional management or pre-trial conferences and status hearings—Party affected by non-compliance entitled to remedy—Management judge may make just and fair order—Respondent deprived of one third of its costs.

SOMAEB v STANDARD BANK NAMIBIA LTD (SC)

SHIVUTE CJ, MAINGA JA and HOFF AJA

2016 MARCH 16, 30; 2017 FEBRUARY 27

Appeal—Condonation—Lapsing of appeal—Defective record and failure to provide security for costs—Non-compliance with rules 5(5) and 8(3) of Supreme Court Rules caused lapsing of appeal—Appellant failing to apply for reinstatement of appeal—Appellant's conduct glaring, flagrant and inexplicable—No prospects of success—Appeal struck from roll.

GOIKE v VON ZELEWSKI AND OTHERS (HC)

UEITELE J

2016 JUNE 1; 2017 FEBRUARY 7

[2017] NAHCMD 28

Close corporation—Members—Cessation of membership—Application for cessation of membership of first respondent in terms of s 36 of Close Corporations Act 26 of 1988—Required proof of justifiable lack of confidence, proof that first respondent unreasonably and/or dishonestly conducted herself towards applicant in regard to the conduct and management of the close corporation's affairs—Lack of confidence must be shown in first respondent's conduct regarding business of close corporation and not regarding her private life or affairs.

Close corporation—Members—Cessation of membership—Court has power under s 49 of Close Corporations Act 26 of 1988 and at common law of settling disputes amongst members—Practical and equitable solution according to substantive principles of law of *actio communi dividundo* available—Court ordering appointment of referee, that property be sold or liquidated and that net proceeds be equally divided between parties.

MAHUPELO v MINISTER OF SAFETY AND SECURITY AND OTHERS (HC)

CHRISTIAAN AJ

2016 NOVEMBER 3, 4, 7–9; 2017 FEBRUARY 10

[2017] NAHCMD 25

Police—Actions against—Notice in terms of s 39(1) of Police Act 19 of 1990—Sufficiency of—Claim for damages amended by including alternative claim—Alternative claim based on same facts—Facts sufficient to allow investigation of claim.

Criminal procedure—Prosecutor-General—Powers and duties—Prosecutor-General has power of withdrawing charges before accused pleads and power of stopping proceedings thereafter—Prosecutor-General has constitutional duty of acting in interest of community, to protect public and to honour and express community's sense of justice—Failure to terminate prosecution when appropriate showed elements of malicious prosecution—Persisting with prosecution and failing to advise court on issue of bail with knowledge that there was no case against plaintiff, constituted ill-will and spite towards plaintiff—Common law extended—Tort of continuing or maintaining malicious prosecution recognised—Criminal Procedure Act 51 of 1977, s 6.

Delict—Malicious prosecution—Elements of—Institution of proceedings *animus iniuriandi* without reasonable and probable cause—Common law extended to include claim for malicious continuation of prosecution—Same elements applicable to this cause of action—Proof required that defendant was acting pursuant to improper purpose inconsistent with office of Prosecutor-General—Dereliction of prosecutorial duties proved.