



## JUTA'S ADVANCE NOTIFICATION SERVICE

JULY 2017

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

Herewith the cases in the July law reports

### JUDGMENTS OF INTEREST IN THE JULY EDITIONS OF THE SALR AND SACR LAW REPORTS

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

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

##### **Market value evidence not hearsay**

To prove market value the plaintiff called an expert valuer, one Falck, who relied on information given to her by one Edelson, another expert valuer. The information provided by Edelson was freely available on the market, and the notional informed buyer would have taken it into consideration. It was relevant and material irrespective of its truth. Any prejudice to the municipality would be cured by the opportunity to cross-examine Falck. *Pentree Ltd v Nelson Mandela Bay Municipality* 2017 (4) SA 32 (ECP)

##### **Contingency fee agreements**

Contingency fee agreements in respect of non-litigious matters were against public policy, and for broadly the same reasons that agreements in relation to litigious work were, namely: the undertaking of speculative actions for clients could give rise to conflicts of interest between the duty and the interests of legal practitioners. *Nash and Another v Mostert and Others* 2017 (4) SA 80 (GP)

##### **Once-and-for-all rule**

Staff at a provincial hospital failed to detect a disease at birth. In its 'plea in mitigation' the province undertook to provide all future medical care required for the impairment caused. The effect of the plea in mitigation was to deny the claimant any monetary award for future medical treatment. It offended against both the once-and-for-all rule and the rule that compensation in bodily injury matters must comprise a monetary award. *Premier, Western Cape v Kiewitz* 2017 (4) SA 202 (SCA)

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

### **Reconstructed trial record sufficient**

The applicants had had a fair trial, including a fair appeal, even though the lost record had been incompletely reconstructed. Although the record of the trial was improperly reconstructed, it was still more than adequate to ensure that the applicants were able to exercise their constitutional right of appeal. The judge's notes were unusually full and detailed and contained a complete narrative of the evidence including the cross-examination. *S v Schoombee and Another* 2017 (2) SACR 1 (CC)

### **Parole violator attacks again**

The plaintiff instituted action for damages against the defendant arising out of injuries she had suffered after being severely assaulted by a prisoner who had recently been released on parole. She alleged that the prison authorities had failed to act with reasonable care and diligence in taking the decision to release him, given his previous convictions (these included numerous counts of theft, multiple counts of assault and one count of murder) and previous violations of parole conditions. *Naidu v Minister of Correctional Services* 2017 (2) SACR 14 (WCC)

### **Adjudication of Road Traffic Offences Act 46 of 1998 (AARTO)**

The Agency, represented by its representations officers, had acted beyond the statutorily conferred powers by not following the AARTO process. Their actions amounted to irrational conduct: conflicting decisions were given in respect of identical representations, no reasons were given for the decisions, there was a refusal to disclose the identity of the representations officers and the actions of the deputy registrar of the Agency were patently biased and unreasonable. In short, they performed actions which offended the principle of legality. *Fines4u (Pty) Ltd and Another v Deputy Registrar, Road Traffic Infringement Agency, and Others* 2017 (2) SACR 35 (GP)

### **WE WELCOME YOUR FEEDBACK**

Please send any comments or queries to [lawreports@juta.co.za](mailto:lawreports@juta.co.za)

Kind Regards

**The Juta Law Reports Team**

# SOUTH AFRICAN LAW REPORTS

JULY 2017

## TABLE OF CASES

- Macassar Land Claims Committee v Maccsand CC and Another 2017 (4) SA 1 (SCA)
- Kaknis v Absa Bank Ltd and Another 2017 (4) SA 17 (SCA)
- Pentree Ltd v Nelson Mandela Bay Municipality 2017 (4) SA 32 (ECP)
- Booyesen v Jonkheer Boerewynmakery (Pty) Ltd and Another 2017 (4) SA 51 (WCC)
- Nash and Another v Mostert and Others 2017 (4) SA 80 (GP)
- Da Cruz and Another v Cape Town City and Another 2017 (4) SA 107 (WCC)
- Friedrich and Others v Smit NO and Others 2017 (4) SA 144 (SCA)
- Wishart NO and Others v BHP Billiton Energy Coal South Africa (Pty) Ltd and Others 2017 (4) SA 152 (SCA)
- Body Corporate of Empire Gardens v Sithole and Another 2017 (4) SA 161 (SCA)
- Bondev Midrand (Pty) Ltd v Madzhie and Others 2017 (4) SA 166 (GP)
- Baron and Others v Claytile (Pty) Ltd and Another 2017 (4) SA 180 (LCC)
- Loest v Gendac and Another 2017 (4) SA 187 (GP)
- Premier, Western Cape v Kiewitz 2017 (4) SA 202 (SCA)
- Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality and Others 2017 (4) SA 207 (GJ)
- Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC)
- Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2017 (4) SA 243 (GJ)
- Democratic Alliance v President of the Republic of South Africa 2017 (4) SA 253 (GP)
- Phepeng and Another v Estate Combrinck and Others 2017 (4) SA 266 (FB)
- Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd 2017 (4) SA 272 (SCA)
- University of the Free State v Afriforum and Another 2017 (4) SA 283 (SCA)
- Prince v Minister of Justice and Others 2017 (4) SA 299 (WCC)

## FLYNOTES

### **MACASSAR LAND CLAIMS COMMITTEE v MACCSAND CC AND ANOTHER (SCA)**

MAYA AP, WALLIS JA, FOURIE AJA, SCHOEMAN AJA and DLODLO AJA  
2016 NOVEMBER 7, 23

**Land**—Land reform—Land Claims Court—Jurisdiction—Claimant seeking restitution of commonage over land—Mining right over land granted to third party under Mineral and Petroleum Resources Development Act 28 of 2002—Whether Land Claims Court can order expropriation and expungement of mining right—LCC may only order acquisition or expropriation of particular land, or particular right in land, where that land, or right in land, also subject of claim for restitution—LCC may not grant expropriation of mining right—Restitution of Land Rights Act 22 of 1994, s 35(1)(a).

**Land**—Land reform—Expropriation—Claimant seeking restitution of commonage over certain land—In respect of land, mining right having been granted to third party in terms of Mineral and Petroleum Resources Development Act 28 of 2002—Claimant also seeking expropriation and expungement of mining right—Claimant cannot demand that right be free from impact of MPRDA and free from rights properly granted under it—Court dismissing expropriation claim in respect of mining rights.

**Land**—Land reform—Restitution—Claim for restitution of right in land—Power of Land Claims Court to 'adjust the nature of right previously held by the claimant'—LCC may not, when restitution was sought of particular right in land, adjust right so as to alter its essential nature and restore something different from that which was taken away—Claim for restitution arising from dispossession of right in land other than ownership, not giving rise to claim for restitution of land—Restitution of Land Rights Act 22 of 1994, s 35(4).

**KAKNIS v ABSA BANK LTD AND ANOTHER (SCA)**

SHONGWE JA, WILLIS JA, MATHOPO JA, VAN DER MERWE JA and NICHOLLS AJA  
2016 NOVEMBER 11; DECEMBER 15

**Credit agreement**—Consumer credit agreement—Section 126B(1)(b) of National Credit Act 34 of 2005, inserted by National Credit Amendment Act 19 of 2014—Retrospectivity—Section having no retrospective application.

**PENTREE LTD v NELSON MANDELA BAY MUNICIPALITY (ECP)**

EKSTEEN J  
2016 OCTOBER 26; NOVEMBER 17

**Expropriation**—Compensation—Calculation—Expert valuation—Approach of court—Valuer may adduce evidence of information provided by third parties—Not hearsay—Court to decide what weight to attach to evidence—Expropriation Act 63 of 1975, s 12(1); Constitution, s 23(5).

**Expropriation**—Compensation—Calculation—Market value still at heart of enquiry—Constitution providing additional factors that may justify adjustment to market-based compensation—Constitution, s 23(5).

**BOOYSEN v JONKHEER BOEREWYNMAKERY (PTY) LTD AND ANOTHER (WCC)**

SHER AJ  
2016 OCTOBER 13; DECEMBER 15

**Company**—Business rescue—Moratorium on legal proceedings against company—Leave to institute proceedings—Whether to be obtained by way of formal and substantive application, instituted separately from and prior to main proceedings instituted against company—Or whether leave might be sought as part of main proceedings—Answer depending on particular facts of matter—Court to exercise judicial discretion—Companies Act 71 of 2008, s 133(1)(b).

**Company**—Business rescue—Moratorium on legal proceedings against company—Whether 'general moratorium' provisions applicable to legal proceedings with regard to business rescue plan adopted by company— Companies Act 71 of 2008, s 133(1).

**Company**—Business rescue—Business rescue plan—Whether business rescue practitioners may reserve for themselves right to amend business rescue plan unilaterally, after it had been adopted—Such conduct prohibited by business rescue provisions of Companies Act 71 of 2008, in terms of which control over rescue proceedings exercised by democratic majority vote of creditors and affected parties.

**NASH AND ANOTHER v MOSTERT AND OTHERS (GP)**

TUCHTEN J  
2017 APRIL 5, 6

**Attorney**—Fees—Contingency fees—Contingency fee agreement—In respect of non-litigious matters—Common law—For same reasons contingency fee agreements in respect of litigious matters prohibited by common law, so too are those in respect of non-litigious matters—Agreements contrary to public policy and invalid.

**DA CRUZ AND ANOTHER v CAPE TOWN CITY AND ANOTHER (WCC)**

BINNS-WARD J

2016 OCTOBER 20; 2017 JANUARY 13

**Local authority**—Buildings—Building plans—Approval—Duties of decisionmaker—Must consider, in addition to building's compliance with technical and regulatory restrictions and prescriptions, contextual effect of finished product—Must consider effect on existing and future development of neighbouring properties—National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(b)(ii).

**Local authority**—Buildings—Building plans—Approval—Building plan's compliance with zoning scheme and building regulations not excluding existence of disqualifying factors set out in s 7(1)(b)(ii) of Building Act—Question of presence of disqualifying factors a substantial enquiry, discrete from enquiry into compliance with applicable planning and building laws under s 7(1)(a)—National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(b)(ii).

**FRIEDRICH AND OTHERS v SMIT NO AND OTHERS (SCA)**

2017 MARCH 23

[2017] ZASCA 19

**Administration of estates**—Accounts—Liquidation and distribution account—Objections—Master refusing to sustain objection—Appeal against his decision—Nature of appeal given by s 35(10)—Administration of Estates Act 66 of 1965, s 35(10).

**WISHART NO AND OTHERS v BHP BILLITON ENERGY COAL SOUTH AFRICA (PTY) LTD AND OTHERS (SCA)**

LEWIS JA, CACHALIA JA, MATHOPO JA, MOCUMIE JA and MAKGOKA AJA

2016 NOVEMBER 16

[2016] ZASCA 164

**Company**—Winding-up—Claims—Late proof—Part of s 44(1) allowing court or master to give leave for late proving of claim, applying in winding-up—Insolvency Act 24 of 1936, s 44(1).

**Company**—Winding-up—Claims—Expungement—Whether person may bypass s 407 and approach court directly to expunge claim—Companies Act 61 of 1973, s 407.

**BODY CORPORATE OF EMPIRE GARDENS v SITHOLE AND ANOTHER (SCA)**

TSHIQI JA, WALLIS JA, PETSE JA, MBHA JA and NICHOLLS AJA

2017 MARCH 6, 27

[2017] ZASCA 28

**Insolvency**—Compulsory sequestration—Provisional sequestration—Facta probanda—Advantage to creditors—Application by body corporate of sectional title scheme for compulsory sequestration of members in arrears with levy payments—Body corporate must prove pecuniary benefit to general body of creditors—Insolvency Act 24 of 1936, s 10(c).

**BONDEV MIDRAND (PTY) LTD v MADZHIE AND OTHERS (GP)**

CR JANSEN AJ

2016 AUGUST 19; DECEMBER 19

**Constitutional law**—Human rights—Socioeconomic rights—Right to adequate housing—Whether infringed by contractual repurchase clause entitling developer to claim retransfer of unimproved land if purchaser not building residential dwelling thereon within 18 months—Constitution, s 26(1).

**Contract**—Legality—Constitutionality—Importation of constitutional principles into law of contract—Fairness—Role of pacta sunt servanda—Public policy tending to protect party against unfair term infringing constitutionally protected interest—If so, enforcing unfair term would be against public policy.

**Contract**—Legality—Contracts contrary to public policy—Specific instances—Repurchase clause entitling developer to claim retransfer of unimproved land if purchaser not building residential dwelling within 18 months—Public policy tending to protect party against unfair term infringing constitutionally protected interest—Where, as in present case, contractual

clause grossly unfair to purchaser intending to build residential home and infringing his or her constitutional right to adequate housing, enforcing it would be against public policy—Constitution, s 26(1).

**BARON AND OTHERS v CLAYTILE (PTY) LTD AND ANOTHER (LCC)**

MEER AJP and CARELSE J

2016 MARCH 23

**Land**—Land reform—Eviction—Statutory eviction—Occupiers of cottages on privately owned land—Whether just and equitable to evict under ESTA if state unable to provide alternative accommodation—Extension of Security of Tenure Act 62 of 1997, ss 10(3) and 11(3).

**LOEST v GENDAC AND ANOTHER (GP)**

MANAMELA AJ

2016 DECEMBER 7; 2017 MARCH 3

**Company**—Shares and shareholders—Shareholders—Appraisal rights of dissenting shareholders—Demand for payment of fair value for shares—Determination of fair value—Access to information via PAIA, while not specifically precluded, would add unnecessary parallel process to s 164 procedure—Companies Act 71 of 2008, s 164; Promotion of Access to Information Act 2 of 2000, s 50.

**Company**—Shares and shareholders—Shareholders—Appraisal rights of dissenting shareholders—Exercise of rights, while stripping him of certain rights associated with shares, not depriving him of status as shareholder—Companies Act 71 of 2008, s 164.

**PREMIER, WESTERN CAPE v KIEWITZ (SCA)**

LEACH JA, TSHIQI JA, MAJIEDT JA, SWAIN JA and NICHOLLS AJA

2017 FEBRUARY 22; MARCH 30

[2017] ZASCA 41

**Damages**—Bodily injuries—Future medical expenses—Impermissible to tender services in lieu of monetary award.

**FIDELITY SECURITY SERVICES (PTY) LTD v MOGALE CITY LOCAL MUNICIPALITY AND OTHERS (GJ)**

KATHREE-SETILOANE J

2016 JULY 8

**Appeal**—Leave to appeal—Application—Effect—Suspension of decision—Whether competent to institute application for order that decision operate, on mere indication of intention to apply for leave to appeal—Superior Courts Act 10 of 2013, ss 18(1), (3) and (5).

**CAPE TOWN CITY v AURECON SA (PTY) LTD (CC)**

NKABINDE ACJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MADLANGA J, MBHA AJ, MHLANTLA J, MUSI AJ and ZONDO J

2016 NOVEMBER 3; 2017 FEBRUARY 28

[2017] ZACC 5

**Administrative law**—Administrative action—Review—Application—When to be brought—From when 180-day time limit starts running—From date on which reasons for administrative action became known (or ought reasonably to have become known) to applicant—Court rejecting submission that time limit starts running only from date when party seeking review first becoming aware administrative action tainted by irregularity—Promotion of Administrative Justice Act 3 of 2000, s 7(1).

**MOHAMED'S LEISURE HOLDINGS (PTY) LTD v SOUTHERN SUN HOTEL INTERESTS (PTY) LTD (GJ)**

VAN OOSTEN J  
2016 NOVEMBER 4

**Contract**—Enforceability—Whether implementing of lease's cancellation clause would offend constitutional values of ubuntu and fairness, and so be precluded.

**DEMOCRATIC ALLIANCE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA (GP)**

VALLY J  
2017 MAY 4, 9

**Constitutional law**—State President—Prerogatives—Appointment and dismissal of ministers—Review—Whether President obliged to furnish record of and reasons for decisions called for under Uniform Rule 53(1)(b)—Constitution, s 91(2).

**Review**—Procedure—Furnishing of record of and reasons for decision in terms of rule 53(1)(b) of Uniform Rules—Applicable mutatis mutandis to review of executive decisions—Applicant for review of President's decisions to dismiss and replace ministers therefore entitled to utilise rule 53(1)(b) to obtain reasons for and record of such decisions.

**PHEPENG AND ANOTHER v ESTATE COMBRINCK AND OTHERS (FB)**

NICHOLSON AJ  
2017 MARCH 16, 23

**Land**—Sale—Contract—Conditions—Suspensive condition that purchasers obtain loan offer together with quotation and pre-agreement—Whether fulfilled where purchasers obtained and accepted loan offer but quotation and pre-agreement not obtained—Wording of clause not requiring purchasers to furnish seller with such documents—In discretion of purchasers, for whose protection suspensive condition included, to regard it as fulfilled or not—Purchasers effectively waived further documents from bank as condition precedent—Suspensive condition fulfilled.

**NELSON MANDELA BAY MUNICIPALITY v AMBER MOUNTAIN INVESTMENTS 3 (PTY) LTD (SCA)**

CACHALIA JA, THERON JA, DAMBUZA JA, MOCUMIE JA and MOLEMELA AJA  
2017 MARCH 7, 29  
[2017] ZASCA 36

**Local authority**—Municipal service charges—When payable—Meaning of 'rates payable as from start of . . . financial year' in Local Government: Municipal Property Rates Act 6 of 2004, s 13(1)(a).

**Local authority**—Municipal service charges—When due and payable—Payable at start of financial year in sense that obligation to pay fixed then but only due when municipality advising payee by way of written account what portion thereof due—Local Government: Municipal Property Rates Act 6 of 2004, ss 12, 13(1)(a) and 26–28.

**Local authority**—Rates—Municipal clearance certificate—Only applying to rates due for two years preceding application—Local authority not entitled to withhold rates-clearance certificate until payment of rates for remainder of financial year after application for such certificate—Local Government: Municipal Systems Act 32 of 2000, s 118(1).

**UNIVERSITY OF THE FREE STATE v AFRIFORUM AND ANOTHER (SCA)**

CACHALIA JA, SWAIN JA, MATHOPO JA, FOURIE AJA and SCHIPPERS AJA  
2017 MARCH 28  
[2017] ZASCA 32

**Education**—University—Language policy—Decision to adopt policy that English primary language of instruction—Whether decision administrative action—Whether decision infringing principle of legality—Constitution, 1996, s 29(2); Higher Education Act 101 of 1997, s 27(2).

## **PRINCE v MINISTER OF JUSTICE AND OTHERS (WCC)**

DAVIS J, SALDANHA J and BOQWANA J  
2017 MARCH 31

**Criminal law**—Drug offences—Dagga—Possession, purchase or cultivation for personal consumption by adult in private dwelling—Statutory prohibition of such conduct constituting unjustified limitation of right to privacy—Impugned provisions declared unconstitutional and invalid—Declaration suspended to give Parliament opportunity to correct defect—Prosecutions, falling within provisions declared unconstitutional, stayed—Constitution, ss 14 and 36(1); Drugs and Drug Trafficking Act 140 of 1992, ss 4(b) and 5(b) read with part III of sch 2; Medicines and Related Substances Control Act 101 of 1965, s 22A(9)(a)(i) read with sch 7.

# **SOUTH AFRICAN CRIMINAL LAW REPORTS**

**JULY 2017**

## **TABLE OF CASES**

- S v Schoombee and Another 2017 (2) SACR 1 (CC)
- Naidu v Minister of Correctional Services 2017 (2) SACR 14 (WCC)
- S v Mukuyu 2017 (2) SACR 27 (GJ)
- Fines4u (Pty) Ltd v Deputy Registrar, Road Traffic Infringement Agency 2017 (2) SACR 35 (GP)
- S v Mathe 2017 (2) SACR 63 (GJ)
- S v Hewu and Others 2017 (2) SACR 67 (ECG)
- Mohan v Director of Public Prosecutions, KwaZulu-Natal and Others 2017 (2) SACR 76 (KZD)
- Stow v Regional Magistrate, Port Elizabeth and Others 2017 (2) SACR 96 (ECG)

## **FLYNOTES**

### **S v SCHOOMBEE AND ANOTHER (CC)**

NKABINDE ACJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MADLANGA J, MBHA AJ, MHLANTLA J, MUSI AJ and ZONDO J  
2016 DECEMBER 15  
[2016] ZACC 50

**Appeal**—Record—Lost, destroyed or incomplete—Where adjudication of appeal on imperfect record does not prejudice appellant, conviction need not be set aside solely on basis of error or omission in record or improper reconstruction process.

### **NAIDU v MINISTER OF CORRECTIONAL SERVICES (WCC)**

MEER J  
2017 FEBRUARY 6; MARCH 9

**Prisoner**—Parole—Release on—Case management committee—Role of —Committee not providing board with reports on prisoner's mental state; likelihood of relapsing into crime and risk to community; or progress with correctional plan—Decision to release taken by parole board without those reports—Negligence in decision leading to liability arising when prisoner assaulted complainant.



**S v MUKUYU (GJ)**

MASHILE J and KUNY AJ  
2016 OCTOBER 18; 2017 JANUARY 26

**Sentence**—Prescribed minimum sentences—Criminal Law Amendment Act 140 of 1992—Application of by state—Semble: where facts relied upon place offence within ambit of Act, state duty-bound to invoke provisions to prevent aims and objects of Act being undermined.

**Drugs**—Cocaine—Dealing in in contravention of s 5(b) of Drugs and Drug Trafficking Act 140 of 1992—Sentence—Young mother of 8-year-old child bringing 3,076 kg into country—Sentence of 12 years' imprisonment imposed.

**FINES4U (PTY) LTD AND ANOTHER v DEPUTY REGISTRAR, ROAD TRAFFIC INFRINGEMENT AGENCY, AND OTHERS (GP)**

PRINSLOO J  
2016 SEPTEMBER 7; 2017 FEBRUARY 24

**Traffic offences**—Adjudication of Road Traffic Offences Act 46 of 1998—Adjudication of offences under Act—Provisions of Act regarding sending of courtesy letters and infringement notices peremptory—Failure by Road Traffic Infringement Agency to follow precepts leading to notices and penalties being set aside.

**S v MATHE (GJ)**

KEIGHTLEY J and KUNY AJ  
2016 OCTOBER 18, 28

**Trial**—Assessors—Absence of—Magistrate dispensing with assessors for lack of resources—Irregularity as envisaged by s 324 of Criminal Procedure Act 51 of 1977.

**S v HEWU AND OTHERS (ECG)**

REVELAS J  
2017 APRIL 6

**Trial**—Striking of case from roll—Magistrate taking view that accused unlawfully rearrested immediately after matter had previously been struck off roll—Magistrate ought to have undertaken enquiry in terms of s 342A of Criminal Procedure Act 51 of 1977—Striking-off incorrect in circumstances.

**MOHAN v DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL AND OTHERS (KZD)**

CHETTY J  
2017 FEBRUARY 7

**Legal practitioner**—Duties of—Duty to court—Necessity to disclose all relevant facts—Applicant for temporary stay of prosecution in three separate cases not revealing at hearing of application that one case already part-heard—Such omission material—Duty of legal representative to be fully candid with the court as to the correct state of affairs.

**STOW v REGIONAL MAGISTRATE, PORT ELIZABETH AND OTHERS (ECG)**

MAKAULA J and ROBERSON J  
2016 NOVEMBER 10; 2017 FEBRUARY 9

**Sentence**—Suspended sentence—Putting into operation of—Breach of conditions of suspension—Failure to pay amounts imposed as condition of suspension—Constitutionality of s 297(1)(b) read with s 297(1)(a)(i)(aa) of the Criminal Procedure Act 51 of 1977—Provisions not discriminating against persons without means and not unconstitutional.