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AUGUST 2017

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JUDGMENTS OF INTEREST IN THE AUGUST EDITIONS OF THE SALR, SACR AND AS WELL AS THE NAMIBIAN LAW REPORTS

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SOUTH AFRICAN LAW REPORTS

The right of an occupier in terms of ESTA to make improvements

An occupier as defined in terms of the Extension of Security of Tenure Act 62 of 1997 made essential improvements to her living quarters. Were they lawful where the owner of the property had withheld their consent? The Constitutional Court held that an occupier had the right in terms of the Act to make improvements required to bring their dwelling up to a standard consonant with human dignity. An owner's consent was not a prerequisite, but the occupier had to raise the issue of the proposed improvements with the owner. The court in reaching its conclusions confirmed that the applicable constitutional right—an occupier's right to secure tenure (s 25(6))—imposed positive obligations on private individuals such as the present owner. *Daniels v Scribante and Another* 2017 (4) SA 341 (CC).

The appointment of a Special Master of Labour Tenants

In the light of serious administrative failures in the processing of applications by labour tenants for awards of land, the Land Claims Courts found it necessary to resort to a novel remedy. It appointed a 'Special Master of Labour Tenants', to supervise the processing of labour tenant claims under the Land Reform (Labour Tenants) Act 3 of 1996. *Mwelase and Others v Director-General, Department of Rural Development and Land Reform and Others* 2017 (4) SA 422 (LCC).

A widow's claim for loss of support—physical appearance not to be considered

In respect of a widow's claim for loss of support, a court could not take her physical appearance into account in determining a contingency deduction for the possibility of her remarriage. To do so would violate the constitutional values of equality and dignity. *Esterhuizen and Others v Road Accident Fund* 2017 (4) SA 461 (GP)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Court impermissibly imputing consent by conduct to child under 12 years in respect of sexual acts

The accused had been convicted of sexual offences against a 10-year-old child. The High Court, in considering sentence, imputed consent by conduct to the complainant, despite the Sexual Offences Act providing that a child under the age of 12 years was unable to consent to sexual acts. In doing so, the High Court had committed an error of law as contemplated in terms of s 311 of the CPA. The SCA set aside sentence and remitted the matter to the High Court. *Director of Public Prosecutions, Gauteng v MG* 2017 (2) SACR 132 (SCA).

Damages for unlawful arrest on a charge of prostitution

The plaintiff had been unlawfully arrested and detained for 37 hours, before being released and the charge against her of prostitution dismissed. In determining damages, the court considered the inhumane conditions of the cell, the stigmatisation the complainant had suffered given the nature of the charge, and the fact that she had lost her job. An award of damages of R120 000 was found to be appropriate. *Mathe v Minister of Police* 2017 (2) SACR 211 (GJ).

An interpreter is permitted to administer oath in criminal proceedings

In criminal proceedings, where a witness testified through an interpreter, the latter was empowered to administer the prescribed oath if the judicial officer so preferred and if the interpreter did so in the presence of or under the eyes of the judicial officer. *S v Pilane* 2017 (2) SACR 154 (SCA).

NAMIBIAN LAW REPORTS

Liability of the government for damages for delictual claims against magistrate

Based on conduct of a magistrate who heard his case, the plaintiff sued, in addition to that magistrate, the government for delictual damages. Could the state be liable for the judicial acts of a magistrate because, while exercising over the case of the plaintiff, the magistrate was exercising the judicial power of the state of the Republic of Namibia. The court concluded that it could not, based on the principle of separation of powers as enshrined in the Constitution, which recognised the independence of the judiciary. *Visagie v Government of the Republic of Namibia and Others* 2017 (2) NR 488 (HC)

Constitutionality of medical licensing scheme requiring doctors to be licensed to sell medication

In issue was the constitutionality of provisions of the Medicines and Related Substances Control Act 13 of 2003, which imposed a requirement on doctors to be licensed to sell medications. The court held that the licensing scheme created was unconstitutional, for lack of guidelines and standards, resulting in arbitrariness and discrimination between equally situated doctors. *Medical Association of Namibia and Another v Minister of Health and Social Services and Others* 2017 (2) NR 544 (SC).

An appropriate sentence in respect of repeat offender of minor offences

The accused was convicted for the theft of a pack of biscuits. The accused had two previous convictions for similar petty offences. In considering an appropriate sentence, the court stressed that the punishment had to relate to the actual offence

committed, and that the fact of previous convictions did not alter the petty nature of the offence under consideration. The court reduced the two-year sentence of imprisonment handed down by the court a quo, and suspended part of it. *S v Muchaka* 2017 (2) NR 574 (HC)

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2017 MARCH 7, 14

[2017] NAHCMD 78

Practice—Judgments and orders—Summary judgment—Interlocutory application—Compliance with High Court Rules, rule 32(9) and (10) peremptory for all interlocutory applications—Compliance required genuine deliberate engagement in process of attempting to resolve matters amicably—Full participation by both parties required—Non-compliance with rule 32(9) and (10) rendering application fatally defective—Application struck from roll.

LTS v GPS AND OTHERS (HC)

ANGULA DJP

2017 FEBRUARY 16; MARCH 3

[2017] NAHCMD 56

Appeal—Notice of appeal—Validity of—Failure to furnish security for costs—Validity of notice of appeal to be determined by court of appeal—Court of appeal has discretion to condone non-compliance with rules.

AUAS DIAMOND COMPANY (PTY) LTD v MINISTER OF MINES AND ENERGY (SC)

SHIVUTE CJ, MARITZ JA and STRYDOM AJA

2007 JULY 12; 2017 APRIL 19

Mines and minerals—Exclusive prospecting licence—Renewal in terms of s 48 of Minerals (Prospecting and Mining) Act 33 of 1992—Renewal subject to acceptance of terms and conditions within one month of being granted—Acceptance of renewal by person not authorised to do so—Renewal of licence lapsing—Time periods in Act peremptory—Respondent refusing further renewal—Appellant retained no residual rights to apply for second renewal.

NELUMBU AND OTHERS v HIKUMWAH AND OTHERS (SC)

DAMASEB DCJ, SMUTS JA and HOFF JA

2017 APRIL 3, 13

Practice—Applications and motions—Founding affidavit—Must contain all necessary averments to sustain cause of action and lay basis for case—Affidavits constituting pleadings and evidence—Party could not rely on different cause of action in replying affidavit—Portions in annexures relied upon must be identified in affidavit and indication must be given of case sought to be made out based on such portions.

Constitutional law—Fundamental rights—Breach of audi alteram partem rule under art 18 of Constitution—Audi flexible rule—Specific bases for reliance on breach must be clearly pleaded—Appellants could put up facts and contentions as to why on facts respondents' removal did not offend Constitution—Affidavits lacking in specificity—Appeal succeeding.

S v DIERGAARDT (HC)

NDAUENDAPO J and LIEBENBERG J

2016 DECEMBER 14; 2017 MARCH 31

[2016] NAHCMD 102

Criminal law—General principles of liability—Mens rea—Mistake of fact—Mistake must be bona fide and reasonable—Theft of calf mistakenly believed to be res nullius—Based on evidence belief neither bona fide nor reasonable—Conviction upheld.

Criminal law—Stock theft—Sentence—Appeal against—Court a quo misdirected itself by being guided by prescribed minimum sentence of two years applicable to stock valued at less than N\$500 and by giving equal weight to all factors—Court enjoined to give more weight to certain factors and less to others in finding suitable sentence—Court substituting sentence with a wholly suspended sentence.

LIKUWA AND OTHERS v COUNCIL OF THE MUNICIPALITY OF WINDHOEK AND ANOTHER (HC)

UEITELE J

2017 MARCH 29, 30; APRIL 12

[2017] NAHCMD 113

Spoliation—Mandament van spolie—When available—Applicants must prove peaceful and undisturbed possession and deprivation thereof—Applicants failing to prove peaceful possession and deprivation thereof—Applicants attempting to build structures on municipal land—Respondents preventing unlawful building of shacks—Applicants' type of possession amounting to land grabbing not enjoying protection of mandament van spolie.

EK v BK (NLD)

CHEDA J

2017 JANUARY 17; FEBRUARY 27; MARCH 20; APRIL 10

[2017] NAHCNLD 30

Court—Hierarchy of courts—High Court took precedence over magistrates' courts—Supreme Court took precedence over all courts—Magistrate's court could not refuse legal practitioner permission to appear in High Court—Failure of appearance impaired dignity of court—Magistrate's court has duty of obeying hierarchal command of appearance—Legal practitioner not required to provide proof of commitment to appear in High Court or Supreme Court.

Legal practitioner—Rights and duties—Duty of obeying hierarchal command of appearance in court—Legal practitioner not required to produce proof of commitment to appear in superior court—Legal practitioner's duty to court first priority above that of his/her client—Legal practitioner must renounce agency to save his/her own integrity thereby promoting proper administration of justice.

ZHAO v ERF ONE EIGHT FIVE THREE (CC/2007/0071) KLEIN WINDHOEK PROPERTY CC AND ANOTHER AND ONE OTHER CASE (HC)

UEITELE J

2016 FEBRUARY 16; 2017 MARCH 27

[2017] NAHCMD 100

Close corporation—Winding up—In what cases—Deadlock between members—Breakdown of trust and confidence—Pending litigation between members—Winding up required to be just and equitable—Mere existence of deadlock not per se rendering winding up just and equitable—Not just and equitable to liquidate close corporations while litigation pending—Application stayed pending finalisation of litigation—Close Corporations Act 26 of 1988, s 68(d).

VISAGIE v GOVERNMENT OF THE REPUBLIC OF NAMIBIA AND OTHERS (HC)

GEIER J, UEITELE J and MILLER AJ

2014 APRIL 10; 2017 APRIL 24

[2015] NAHCMD 120

Constitutional law—Constitution—Interpretation of—Constitution composite document giving effect to principles expressed in preamble read with art 1(1)–(3) and art 78(2) and (3) and differentiation between other organs of state and judiciary in art 25(1) and (2)—Constitution to be interpreted as a whole—Judiciary independent.

State—Liability—For damages—Delict committed by member of judiciary—Judiciary independent—State/government not liable for damages for delictual claims against magistrate—Judicial officers personally liable if plaintiff established requisite elements.

MEDICAL ASSOCIATION OF NAMIBIA AND ANOTHER v MINISTER OF HEALTH AND SOCIAL SERVICES AND OTHERS (SC)

DAMASEB DCJ, MAINGA JA and O'REGAN AJA

2015 JUNE 15; 2017 FEBRUARY 9

Constitutional law—Legislation—Constitutionality of—Limitation imposed by s 31(3) of Medicines and Related Substances Control Act 13 of 2003 requiring licensing by regulatory council to sell medicine—Limitation subject to art 21(1) and 21(2) of Constitution—Absence of guidelines and standards resulting in arbitrariness and discrimination between equally situated doctors—Licensing scheme resulted in institutional failure—Limitation inconsistent with Constitution and invalid.

Constitutional law—Legislation—Constitutionality of—Severability of unconstitutional licensing scheme—Severance based on principle of separation of powers—After carving out unconstitutional provisions, remainder must be workable and consistent with Constitution and constitutionally legitimate objectives of legislation—Severance of invalid provisions ordered.

Statute—Validity—Medicines and Related Substances Control Act 13 of 2003, ss 29(7)(b), 29(9)(b), 29(13)(b), 29(19)(b) and 31(3)—Licensing scheme requiring doctors to be licenced to sell medicine—Scheme imposing discriminatory limitation on doctors—Words 'who holds a licence contemplated in section 31(3) subject to the conditions of that license' where they appear in s 29(7)(b), 29(9)(b), 29(13)(b), 29(19)(b) invalid and s 31(3) declared of no force and effect.

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

UEITELE J

2017 APRIL 14, 27

[2017] NAHCMD 127

Constitutional law—Separation of powers—Separation between judiciary and other organs of state—Judicial intervention limited to preventing violation of Constitution—Applicant seeking transfer to another prison—Applicant failing to request transfer in terms of s 74 of Correctional Service Act 9 of 2012—Applicant not showing unlawful conduct by Commissioner-General—Court not to encroach upon or usurp powers of executive branch of government—Application dismissed.

S v MUCHAKA (HC)

2017 MARCH 10

[2017] NAHCMD 69

Criminal procedure—Sentence—Previous convictions—Minor offences—Theft of biscuits—Petty offences remaining such irrespective of number of previous convictions—Accused repeatedly reoffended—Custodial sentence justified—Punishment must relate to offence committed, be aimed at deterring accused in least harmful way and be reasonable in relation to seriousness of offence—Custodial sentence reduced and partially suspended.

S v MICHAEL (NLD)

TOMMASI J and JANUARY J

2017 MARCH 3

[2017] NAHCNLD 17

Criminal procedure—Plea—Guilty—Section 112(1)(a) of Criminal Procedure Act 51 of 1977—Provision utilised to speedily dispose of minor offences—Magistrate should apply discretion judiciously in determining if case was serious or minor offence—Assault with the intention to cause grievous bodily harm serious offence—Section 112(1)(a) procedure not suitable.

MOBILE TELECOMMUNICATIONS LTD v ECKLEBEN (SC)

DAMASEB DCJ, MAINGA JA and HOFF JA

2017 MARCH 27; JUNE 1

Lease—Validity—Property should be clearly identified or identifiable—Agreement drawn by appellant—Parties ad idem as to premises and essentialia of agreement—Agreement valid.

Contract—Breach—Repudiation—Inferred where party exhibited deliberate and unequivocal intention not to be bound by contract or by unlawful intentional termination of contract—Respondent not evincing intention not to be bound—Respondent desired agreement to run full term.

Contract—Performance—Impossibility of—Nature of contract—Relationship between parties—Nature of impossibility invoked—Self-created impossibility would not avail appellant—Reasonable demands not leading to impossibility of performance—Contemplated or foreseeable and not impossibility—Impossibility was not brought about by vis major or casus fortuitous—Performance not impossible.

JI v HI (NLD)

CHEDA J

2017 MARCH 20, 27; MAY 8

[2017] NAHCNLD 37

Practice—Judicial case management—Proceedings court-driven and subject to sanctions—Both defendant and her legal representative failing to attend pre-trial conference—Defendant's legal practitioner withdrawing without providing address within flexible distance from court, as required by rule 14(3)(b) of High Court Rules—Court granting cost order against defendant's legal practitioner and ordering practitioner to continue representing defendant until finalisation of matter.

TONATENI HEBEI CONSTRUCTION CC v UNIVERSITY OF NAMIBIA AND OTHERS (HC)

MASUKU J

2017 MARCH 14; APRIL 4; MAY 19

[2017] NAHCMD 146

Practice—Pleadings—Exception—Summons—Cause of action—Must exist at time of issue of summons unless special circumstances existing—Plaintiff had no right as cessionary at time of issue of summons—Plaintiff failing to disclose special circumstances—Exception upheld.

Partnership—Claim for repayment of money to partnership account—Averments supporting a claim under actio pro socio—Action available to partners both during subsistence of partnership and after dissolution thereof for specific claims including specific performance for payment of money or other partnership assets which were in his/her possession through misappropriation.

WISE v SHIKUAMBI NO AND ANOTHER (HC)

UEITELE J

2016 AUGUST 4; 2017 MAY 24

[2017] NAHCMD 148

Costs—Taxation—Review of taxation—Purpose of costs—Indemnification of successful party subject to High Court Rule 32(11)—Exception—Intermediate step incidental to main dispute—Exception interlocutory proceeding contemplated by High Court Rule 32(11)—Costs limited to N\$20 000—Taxing Master acting ultra vires his powers for higher amount in allocatur—Allocatur reviewed and set aside.

Practice—Pleadings—Exception—Intermediate step incidental to main dispute—Exception interlocutory proceeding contemplated by High Court Rule 32(11)—Costs limited to N\$20 000—Exception deemed to have been raised under new rules by virtue of provisions of rule 138(a).