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FEBRUARY 2018

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Herewith the cases in the February 2018 law reports

JUDGMENTS OF INTEREST IN THE FEBRUARY 2018 EDITIONS OF THE SALR, SACR AS WELL AS THE NAMIBIAN LAW REPORTS 2017 (4).

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

SOUTH AFRICAN LAW REPORTS

Whether a reference in a trust deed to "descendants" and "issue" included adopted children

In a trust deed executed in 1953, the trust founder made provision for the payment, from the time of his death, of income to his children; and on their death to the children's 'descendants' or 'issue'. The High Court held that these terms as used in the deed *did not* include adopted children. This was so given the meaning of the words and the intent of the founder at the time the deed was entered into. *Harper and Others v Crawford NO and Others* **2018 (1) SA 589 (WCC)**

The discretion to refuse permission to disclose evidence given at a s 28 investigation under National Prosecuting Authority Act.

A national newspaper sought permission from the National Director of Public Prosecutions to disclose the record of evidence given by a high-ranking government official at an investigation under s 28 of the National Prosecuting Authority Act. The NDPP in its discretion refused such permission. The SCA held that such refusal was irrational, given inter alia the clear public interest in the issues raised and the fact that such information had already been made public by the interviewee. *Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others* **2018 (1) SA 471 (SCA)**

Circumstances in which a bank could terminate a client's bank account

The applicants sought an urgent application to interdict the respondent bank from closing their accounts. The court refused the relief, holding that the bank's decision to terminate the relationship was governed by the ordinary rules of contract, which allowed banks to terminate their contracts with clients on proper notice. Further, banks were fully entitled to terminate on the ground, as here, that the client had a bad reputation or because of business or reputational risks. *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* **2018 (1) SA 562 (GP)**

SOUTH AFRICAN CRIMINAL LAW REPORTS

An appropriate sentence for murder on basis of dolus eventualis

The accused had been convicted of murder on the basis of dolus eventualis, having shot his girlfriend, allegedly thinking that she was an intruder. The court a quo found there to be substantial and compelling circumstances justifying a sentence less than the statutory minimum of 15 years. The SCA overturned the sentence on appeal, instead imposing the minimum sentence, finding that anything less was shockingly lenient, that the accused had failed to take the court into its confidence and had not displayed true remorse. *Director of Public Prosecutions, Gauteng v Pistorius* **2018 (1) SACR 115 (SCA)**

An appropriate sentence for fraud and corruption by an official in Department of Justice

The accused, an official of the Department of Justice, had been convicted of corruption and fraud arising from his attempts to improperly secure bail for accused persons for reward. Stressing the damage caused to society by offences of the type in question, the court held that sentence of eight years' imprisonment was appropriate. *S v Mofomme* **2018 (1) SACR 213 (GP)**

What constituted provocation

The accused was convicted for murder having stabbed the deceased to death shortly after the latter had stabbed his father in the face with a broken bottle. Reversing the finding of the regional magistrates' court, the High Court held that the deceased's conduct amounted to provocation, justifying a sentence lesser than the prescribed minimum of 15 years' imprisonment. *S v Kordom* **2018 (1) SACR 173 (NCK)**

THE NAMIBIAN LAW REPORTS

A more lenient sentence for an HIV positive accused?

The accused, in his sentence proceedings in the High Court, Windhoek, following on from his conviction for theft of a large sum of money, argued that his HIV positive status meant it would be unjustified or unreasonable to send him to prison. The court disagreed, holding that to grant a more lenient sentence based on HIV status would amount to discrimination against those not infected with the virus and be detrimental to the administration of justice and the interests of society. *S v ES* **2017 (4) NR 983 (HC)**.

Duties of a tender board when uncovering corruption

The Tender Board, subsequent to deciding to award tenders to the applicants for the provision of catering services to government school hostels, but before notifying the applicants of such decision, cancelled the tender for the catering services, based on evidence of corruption by the evaluation committee. Did the board act unfairly in failing to give the applicants an opportunity to be heard before cancellation? No, the court held. It was duty-bound to cancel the tender given the evidence corruption. Further, the decisions would have only become final on notification to the successful tenderers. *Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others* **2017 (4) NR 998 (HC)**

The discretion of a prosecutor general to bring application for preservation order ex parte

The prosecutor general has a discretion of bringing an application for a preservation order under the Prevention of Organised Crime Act, ex parte. However, this discretion must be exercised for a legitimate purpose in good faith, fairly, reasonably, in the interests of justice without caprice, malice or ulterior motive. In this case the prosecutor general had failed to make full disclosure of all material facts when making application to the court. On these grounds, the order was set aside. *Atlantic Ocean Management Group (Pty) Ltd and Another v Prosecutor-General* **2017 (4) NR 939 (HC)**

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Kind Regards

The Juta Law Reports Team

SOUTH AFRICAN LAW REPORTS

FEBRUARY 2018

TABLE OF CASES

- MEC for Health and Social Development, Gauteng v DZ obo WZ 2018 (1) SA 335 (CC)
- Hotz and Others v University of Cape Town 2018 (1) SA 369 (CC)
- Ethekewini Municipality v Mounthaven (Pty) Ltd 2018 (1) SA 384 (SCA)
- Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality 2018 (1) SA 391 (SCA)
- Maharaj and Others v Mandag Centre of Investigative Journalism NPC and Others 2018 (1) SA 471 (SCA)
- Smyth and Others v Investec Bank Ltd and Another 2018 (1) SA 494 (SCA)
- Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme 2018 (1) SA 513 (SCA)
- AJP Properties CC v Sello 2018 (1) SA 535 (GJ)
- Beadica 231 CC and Others v Trustees, Oregon Unit Trust and Others 2018 (1) SA 549 (WCC)
- Annex Distribution (Pty) Ltd and Others v Bank of Baroda 2018 (1) SA 562 (GP)
- Harper and Others v Crawford NO and Others 2018 (1) SA 589 (WCC)
- Singh and Another v Mount Edgcombe Country Club Estate Management Association Two (RF) (NPC) and Others 2018 (1) SA 615 (KZD)
- Ali and Others v Minister of Home Affairs and Another 2018 (1) SA 633 (WCC)
- Rahube v Rahube and Others 2018 (1) SA 638 (GP)

FLYNOTES

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG v DZ obo WZ (CC)

ZONDO DCJ, CAMERON J, FRONEMAN J, JAFTA J, KATHREE-SETILOANE AJ, KOLLAPEN AJ, MADLANGA J, MHLANTLA J, THERON J and ZONDI AJ

2017 OCTOBER 31

[2017] ZACC 37

Damages—Bodily injuries—Medical expenses—Future medical expenses—Once and for all rule and rule that damages must sound in money—Development of common law to provide for periodic payments and payment in kind—Insufficiency of evidence tendered—Question of development left open—Possibilities discussed.

HOTZ AND OTHERS v UNIVERSITY OF CAPE TOWN (CC)

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

2017 APRIL 12

[2017] ZACC 10

Costs—Constitutional litigation—Proper approach—Unsuccessful party in constitutional litigation against state—Litigants involved in student protests at university campus, which turned violent, in support of free and decolonised education—Unsuccessfully opposing interdict brought against them by university—Court ordering unsuccessful litigants to pay costs—Students protesting in vindication of rights to education, freedom of association, freedom to demonstrate and freedom of expression—Given constitutional context, inappropriate to award costs against students.

ETHEKWINI MUNICIPALITY v MOUNTHAVEN (PTY) LTD (SCA)

TSHIQI JA, SERITI JA, SALDULKER JA, GORVEN AJA and PLOOS VAN AMSTEL AJA

2017 SEPTEMBER 29

[2017] ZASCA 129

Land—Rights in—Registered title condition entitling transferor to claim retransfer of land if transferee not erecting building of prescribed value within prescribed period—Nature of rights created—Right to claim retransfer personal right, not limited real right.

Prescription—Extinctive prescription—Debt—What constitutes—Claim for retransfer of property under contractual reversionary clause registered as title condition—Such claim constituting 'debt' as contemplated in Prescription Act 68 of 1969, ch III.

Prescription—Extinctive prescription—Debt—Meaning—Including obligation to deliver immovable property—Prescription Act 68 of 1969, ch III.

HOME TALK DEVELOPMENTS (PTY) LTD AND OTHERS v EKURHULENI METROPOLITAN MUNICIPALITY (SCA)

PONNAN JA, CACHALIA JA, MAJIEDT JA, WILLIS JA and SCHIPPERS AJA

2017 JUNE 2

[2017] ZASCA 77

Delict—Elements—Unlawfulness or wrongfulness—City manager's non-issue of s 82 certificates to developers—Not wrongful (majority judgment)—Absence of 'something more' justifying liability—Wrongful (dissenting judgment)—Abuse of power justifying such liability—Town Planning and Townships Ordinance 15 of 1986.

MAHARAJ AND OTHERS v MANDAG CENTRE OF INVESTIGATIVE JOURNALISM NPC AND OTHERS (SCA)

PONNAN JA, PETSE JA, TSOKA AJA, MBATHA AJA and SCHIPPERS AJA

2017 SEPTEMBER 29

[2017] ZASCA 138

Media—Freedom of expression—Limitations—Prohibition on disclosure, without permission of National Director of Public Prosecutions, of record of evidence given at investigation under s 28 of NPA Act—Proper exercise of NDPP's discretion—Discretion to be exercised on case-by-case basis, weighing up public interest against likelihood of harm—Failure to consider s 28 record rendering decision to refuse permission irrational—National Prosecuting Authority Act 32 of 1998, s 41(6)(c).

Prosecuting authority—National Director of Public Prosecutions—Discretion to permit or refuse disclosure of record of evidence given at investigation under s 28 of NPA Act—Proper exercise of—National Prosecuting Authority Act 32 of 1998, s 41(6)(c).

SMYTH AND OTHERS v INVESTEC BANK LTD AND ANOTHER (SCA)

NAVSA JA, LEWIS JA, PETSE JA, MATHOPO JA and SCHIPPERS AJA

2017 OCTOBER 26

[2017] ZASCA 147

Company—Oppressive conduct—Relief—Who may apply—Whether beneficial owner of shares, whose shares registered in name of nominee, may apply—Relief available only to 'member' of company—'Member' confined to persons entered in company's register of members—Beneficial owner of shares not included in register—Accordingly not entitled to apply for relief from oppressive conduct—Further, not eligible to join as co-applicants with relevant nominees—Companies Act 61 of 1973, ss 252 and 103.

YARONA HEALTHCARE NETWORK (PTY) LTD v MEDSHIELD MEDICAL SCHEME (SCA)

NAVSA ADP, PETSE JA, MATHOPO JA, MBATHA AJA and ROGERS AJA

2017 SEPTEMBER 22

[2017] ZASCA 116

Enrichment—Condictio indebiti—Requirements—Excusability—Exceptions—Excusability of mistake not requirement in case of mistaken payments by medical aid schemes.

Enrichment—Condictio indebiti—Requirements—Impoverishment—In case of bilateral performances under void or putative contracts—No requirement that plaintiff claiming under condictio must prove value of, or tender return of, what they received—If plaintiff enriched by performance of defendant, latter should counterclaim with condictio indebiti.

AJP PROPERTIES CC v SELLO (GJ)

SPILG J

2017 SEPTEMBER 8

Eviction—Discretion of court—Common-law discretion of court to stay or suspend execution of eviction order—Commercial property—Cancellation of lease should not, where lessee has complied with its terms, result in demise of tenant’s business—Court suspending eviction to afford shopping mall tenant three months to relocate.

Lease—Eviction—Suspension of eviction order—Discretion of court—Commercial property—Cancellation of lease should not, where lessee has complied with its terms, result in demise of tenant’s business—Court suspending eviction to afford shopping mall tenant three months to relocate.

BEADICA 231 CC AND OTHERS v TRUSTEES, OREGON UNIT TRUST AND OTHERS (WCC)

DAVIS J

2017 NOVEMBER 16

Contract—Enforcement—Public policy—Court refusing to enforce strict terms of lease where tenant, though in technical breach, substantially compliant and sanction claimed by landlord (cancellation and eviction) disproportionate.

Lease—Cancellation—Court’s power to interfere—Failure by tenant to renew as stipulated—Court on public policy grounds refusing to enforce strict terms of lease where tenant, though in technical breach, substantially compliant and sanction claimed by landlord (cancellation and eviction) disproportionate—Court declaring that option to renew validly exercised and barring landlord from evicting tenant.

ANNEX DISTRIBUTION (PTY) LTD AND OTHERS v BANK OF BARODA (GP)

FABRICIUS J

2017 SEPTEMBER 21

Banking—Relationship between banker and client—Based on contract—Bank may terminate on reasonable notice or as contractually provided for—Motives irrelevant, save perhaps where there was abuse of rights—Termination on basis of reputational risk posed by client.

Interdict—Interim interdict—Requirements—No such thing in our law as ‘interim-interim’ interdict based on requirements other than those for common-law interim interdict.

Interdict—Interim interdict—Requirements—Balance of convenience—Weighing heavily in favour of party seeking to uphold integrity of established financial system and rule of law.

HARPER AND OTHERS v CRAWFORD NO AND OTHERS (WCC)

DLODLO J

2017 JUNE 30

Trust—Trust deed—Interpretation—Descendants—Issue—Whether including adopted children—Constitution, ss 9 and 25.

SINGH AND ANOTHER v MOUNT EDGEcombe COUNTRY CLUB ESTATE MANAGEMENT ASSOCIATION TWO (RF) (NPC) AND OTHERS (KZD)

SEGOBIN J, CHETTY J and BEZUIDENHOUT J
2017 NOVEMBER 17

Voluntary association—Homeowners association—Conduct rules—Lawfulness of rules setting and enforcing speed limits on public roads within gated estate, and restricting domestic employees' access to such roads—Unlawful without authorisation and/or consent required under NRTA—No contractual arrangement between homeowners association and its members could remedy such illegality—National Road Traffic Act 93 of 1996, s 57(6).

ALI AND OTHERS v MINISTER OF HOME AFFAIRS AND ANOTHER (WCC)

WILLE AJ
2017 SEPTEMBER 7

Persons—Citizenship—Naturalisation—South African Citizenship Act providing that child born in SA of non-SA parents qualified to apply for citizenship upon becoming major, if had lived in SA from date of birth—Interpretation—Whether provision, introduced with effect from 1 January 2013, applying only to persons born after such date—Provision applying to persons who meet requirements of section, irrespective of whether they were born before or after 1 January 2013—South African Citizenship Act 88 of 1995, s 4(3).

RAHUBE v RAHUBE AND OTHERS (GP)

KOLLAPEN J
2017 SEPTEMBER 26

Constitutional law—Legislation—Validity—Upgrading of Land Tenure Rights Act 112 of 1991, s 2(1)—Automatic conversion of certain land tenure rights into ownership—Provision unconstitutional and invalid to extent that it fails to afford opportunity, prior to conversion, to occupants and affected parties lacking tenure rights to make submissions to appropriately established forum—Order made with limited retrospective effect and suspended for 18 months to give legislature opportunity to remedy defect.

SOUTH AFRICAN CRIMINAL LAW REPORTS

FEBRUARY 2018

TABLE OF CASES

- Director of Public Prosecutions, Gauteng v Pistorius 2018 (1) SACR 115 (SCA)
- Zuma v Democratic Alliance and Others 2018 (1) SACR 123 (SCA)
- S v Taunyane 2018 (1) SACR 163 (GJ)
- S v Kordom 2018 (1) SACR 173 (NCK)
- S v Rossouw 2018 (1) SACR 179 (NCK)
- S v Sayed and Others 2018 (1) SACR 185 (SCA)
- S v Carneiro 2018 (1) SACR 197 (SCA)
- S v Lerumo and Others 2018 (1) SACR 202 (NWM)
- S v Matitwane 2018 (1) SACR 209 (NWM)
- S v Mofomme 2018 (1) SACR 213 (GP)
- Phaahla v Minister of Justice and Correctional Services and Another 2018 (1) SACR 218 (GP)

FLYNOTES

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG v PISTORIUS (SCA)

BOSIELO JA, SERITI JA, LAMONT AJA, MEYER AJA and MOKGOHLOA AJA

2017 NOVEMBER 3, 24

[2017] ZASCA 158

Murder—Sentence—Imprisonment—Accused convicted on basis of dolus eventualis, having shot girlfriend through wooden toilet door with heavy-calibre pistol—Accused not taking court into his confidence as to circumstances of offence and not displaying any remorse—Sentence of six years' imprisonment shockingly lenient and no justification existing for not imposing statutory minimum of 15 years' imprisonment.

ZUMA v DEMOCRATIC ALLIANCE AND OTHERS (SCA)

NAVSA ADP, CACHALIA JA, BOSIELO JA, LEACH JA and TSHIQI JA

2017 OCTOBER 13

[2017] ZASCA 146

Prosecution—Discontinuance—Decision to discontinue prosecution—Acting National Director of Public Prosecutions reviewing and setting aside own decision to prosecute on ground that political interference with timing of prosecution constituted abuse of prosecuting process—Acting Director conceding review based on inapposite provision of Constitution and that decision to discontinue flawed as being irrational—Such concessions correctly made—Additional grounds present for setting aside decision, such as lack of evidence of political interference, that manner in which NPA conducted litigation deserving of judicial censure, deliberate exclusion of prosecuting team, and incorrect application of case law relied on.

S v TAUNYANE (GJ)

SATCHWELL J, VAN OOSTEN J and MASIPA J

2016 SEPTEMBER 9, 26

Murder—Sentence—Life imprisonment—When to be imposed—Planned or premeditated murder—What constitutes—Period of time between accused forming intention to murder and carrying out murder not always decisive.

S v KORDOM (NCK)

OLIVIER J and SNYDERS AJ

2017 FEBRUARY 27; MARCH 3

Murder—Sentence—Factors to be taken into account—Provocation—What constitutes—Period between provocative act and commission of offence—Clear that short period between two actions—Provocation present.

S v ROSSOUW (NCK)

MAMOSEBO J and ERASMUS AJ

2017 JUNE 5, 19

Sentence—Prescribed minimum sentence—Criminal Law Amendment Act 105 of 1997—Substantial and compelling circumstances—Consideration of on appeal—Proper enquiry required—Cumulative factors including provocation; consumption of alcohol; prior assaults of appellant by deceased; and that appellant mother of three children and gainfully employed, constituting substantial and compelling circumstances justifying lesser sentence.

S v SAYED AND OTHERS (SCA)

PONNAN JA, PETSE JA, WILLIS JA, LAMONT AJA and SCHIPPERS AJA

2017 NOVEMBER 1, 24

Plea—Autrefois acquit—When available—There must have been judgment on merits of case—Conviction having been set aside on irregular conduct of magistrate—Plea of autrefois acquit not available.

Appeal—Condonation—Failure to comply with court rules governing timeous noting of appeal and filing of record—Hopelessly deficient application for condonation not explaining long periods of delay, attorney’s abdicating responsibility to administrative assistant who lacked legal knowledge—Such flagrant breach of rules not requiring examination of prospects of success—Condonation refused.

S v CARNEIRO (SCA)

SHONGWE AP, TSHIQI JA, MAJIEDT JA, MOCUMIE JA and TSOKA AJA
2017 NOVEMBER 1, 24
[2017] ZASCA 154

Appeal—Leave to appeal—Application for—From decision of two judges in appeal from lower court—Application brought before commencement of Superior Courts Act 10 of 2013—Procedure governed by s 20 of Supreme Court Act 59 of 1959—Act 10 of 2013 creating higher threshold for appeals and therefore affected existing rights, rendering it prospective in its application.

S v LERUMO AND OTHERS (NWM)

HENDRICKS ADJP and DJAJE J
2017 AUGUST 10

Trial—Accused—Failure to appear in court—Issue of warrant of arrest—Practice of staying execution of such warrants not in accordance with prescripts of s 67 of Criminal Procedure Act 51 of 1977 and must be done away with.

S v MATITWANE (NWM)

KGOELE J and GURA J
2017 NOVEMBER 10, 23

Bail—Withdrawal of—Bail withdrawn mero motu and without accused having opportunity to oppose withdrawal—Such withdrawal grossly irregular.

S v MOFOMME (GP)

BAQWA J and PHAHLANE AJ
2017 NOVEMBER 9

Corruption—Sentence—Nature of offence called for retributive and deterrent aspects of punishment to be brought to fore—Minor official at magistrates’ court offering to improperly obtain bail for accused persons for reward—Sentence of eight years’ imprisonment for first offender confirmed on appeal.

PHAAHLA v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND ANOTHER (GP)

LEGODI J, MOLEFE J and UNTERHALTER AJ
2017 JUNE 27; OCTOBER 3

Prisoner—Parole—Eligibility of prisoner for placement on—Provisions of s 73(6)(b)(iv) of Correctional Services Act 111 of 1998, in adopting date of sentencing and not commission of offence as determinative when more severe regime came into operation, inconsistent with s 9 of Constitution.

THE NAMIBIAN LAW REPORTS

2017 (4)

TABLE OF CASES

- Sylvie McTeer Properties v Kuhn and Others 2017 (4) NR 929 (SC)

- Atlantic Ocean Management Group (Pty) Ltd and Another v Prosecutor- General 2017 (4) NR 939 (HC)
- Prosecutor-General v Africa Autonet CC t/a Pacific Motors 2017 (4) NR 969 (HC)
- S v Willem and Two Other Cases 2017 (4) NR 977 (HC)
- S v Mapanka 2017 (4) NR 980 (HC)
- S v ES 2017 (4) NR 983 (HC)
- S v Mwalyombu 2017 (4) NR 994 (HC)
- Pamo Trading Enterprises CC and Another v Chairperson of the Tender Board of Namibia and Others 2017 (4) NR 998 (HC)
- Chairman Ohangwena Communal Land Board NO v Wapulile 2017 (4) NR 1017 (SC)
- Bertolini v Ehlers and Another 2017 (4) NR 1035 (HC)
- New Era Investment (Pty) Ltd v Ferusa Capital Financing Partners CC and Others 2017 (4) NR 1048 (HC)
- S v TN 2017 (4) NR 1069 (HC)
- S v Schiefer 2017 (4) NR 1073 (SC)
- S v Faria and Others 2017 (4) NR 1086 (NLD)
- Prosecutor-General v Kamunguma and Another 2017 (4) NR 1089 (HC)
- Nghidimbwa v Swapo Party of Namibia and Others 2017 (4) NR 1107 (HC)
- Council of the Itireleng Village Community and Another v Madi and Others 2017 (4) NR 1127 (SC)
- United Africa Group (Pty) Ltd v Uramin Inc and Others 2017 (4) NR 1145 (HC)
- New Era Investment (Pty) Ltd v Roads Authority and Others 2017 (4) NR 1160 (SC)
- Denker v Ameib Rhino Sanctuary (Pty) Ltd and Others 2017 (4) NR 1173 (SC)
- IBB Military Equipment and Accessory Supplies CC v Namibia Airports Company 2017 (4) NR 1194 (HC)
- S v Guibeb 2017 (4) NR 1210 (HC)
- Fischer v Seelenbinder and Another 2017 (4) NR 1214 (HC)

FLYNOTES

SYLVIE McTEER PROPERTIES v KUHN AND OTHERS (SC)

MARITZ JA, CHOMBA AJA and DAMASEB AJA
2006 OCTOBER 12; 2017 AUGUST 15

Practice—Judgments and orders—Final orders—Rules nisi confirmed—Court functus officio—Finality of litigation in public interest—Jurisdiction over matter finally exercised and court’s authority over subject matter ceased—Appeal dismissed.

ATLANTIC OCEAN MANAGEMENT GROUP (PTY) LTD AND ANOTHER v PROSECUTOR-GENERAL (HC)

ANGULA DJP
2017 JUNE 15; SEPTEMBER
[2017] NAHCMD 255

Criminal procedure—Organised crime—Preservation order—Ex parte application in terms of s 51(1) of Prevention of Organised Crime Act 29 of 2004—Applicants entitled to anticipate order by invoking rule 72(2) of High Court Rules.

Criminal procedure—Organised crime—Preservation order—Prosecutor-General has discretion of bringing application for preservation order ex parte—Discretion must be exercised for legitimate purpose in good faith, fairly, reasonably, in interest of justice without caprice, malice or ulterior motive—Prosecutor-General has duty to court of making full and frank disclosure of all relevant and material facts—Order tainted by serious and material non-disclosure set aside.

Criminal procedure—Organised crime—Preservation order—Lapsing 120 days after publication—Intention of legislature—Balancing respondent’s constitutional right to property and legitimate objects of Prevention of Organised Crime Act 29 of 2004—Second preservation order only permissible in limited circumstances and must fall within initial 120 days of first preservation order—Second application made after lapsing of first order—No justification for bringing second ex parte application—Order set aside.

PROSECUTOR-GENERAL v AFRICA AUTONET CC t/a PACIFIC MOTORS (HC)

ANGULA DJP

2017 JULY 21; AUGUST 14; SEPTEMBER 13
[2017] NAHCMD 265

Criminal procedure—Organised crime—Preservation order—Lapsing of—Prosecutor-General liable for costs incurred by affected persons for anticipating, varying or rescinding orders—Prosecutor-General required to withdraw proceedings or formally abandon or discharge order and to tender wasted cost.

S v WILLEM AND TWO OTHER CASES (HC)

DAMASEB JP and LIEBENBERG J
2017 SEPTEMBER 11
[2017] NAHCMD 264

Criminal law—Traffic offences—Sentence—Disqualifying accused from obtaining learner's or driving licence—Road Traffic and Transport Act 22 of 1999, s 51—Court must explain import of provision to accused—Accused to be given opportunity of making representations before court declared him or her to be disqualified from obtaining learner's or driving licence.

S v MAPANKA (HC)

LIEBENBERG J and SIBOLEKA J
2017 SEPTEMBER 8
[2017] NAHCMD 262

Criminal procedure—Sentence—Aggravating circumstances—Circumstances could not be assumed based on prosecutor's assertions in absence of evidence—Reliance on unsupported assertions constituted misdirection.

Court—Jurisdiction—Magistrates' court—Magistrates Courts Act 32 of 1944, s 92(1)(b)—Jurisdiction limited to R20 000—Conviction of contravention of s 25(1)(a) of Animal Health Act 1 of 2011 (Act)—Magistrates' court jurisdiction not increased by Act—Fine of R50 000 improper and null and void.

S v ES (HC)

NDAUENDAPO J and SHIVUTE J
2017 MARCH 24; JUNE 23
[2017] NAHCMD 174

Criminal procedure—Sentence—Serious crime—Appellant HIV positive—More lenient sentence based on HIV status would amount to discrimination against those not infected with virus and detrimental to administration of justice and interest of society—Required medication available in prison—Appeal dismissed.

S v MWALYOMBU (HC)

DAMASEB JP and LIEBENBERG J
2017 SEPTEMBER 25
[2017] NAHCMD 271

Criminal procedure—Presiding officer—Unavailability of to continue with trial—After accused pleaded not guilty—Trial continuing before different presiding officer—Such procedure sanctioned by s 118 of Criminal Procedure Act 51 of 1977 only if original magistrate not available—Failure to record unavailability of presiding officer amounting to irregularity—Irregularity not vitiating proceedings.

PAMO TRADING ENTERPRISES CC AND ANOTHER v CHAIRPERSON OF THE TENDER BOARD OF NAMIBIA AND OTHERS (HC)

UEITELE J
2015 NOVEMBER 23; 2017 SEPTEMBER 18
[2017] NAHCMD 268

Administrative law—Fair administrative justice—Article 18 of Namibian Constitution—Administrative officials obliged to act fairly, reasonably and lawfully when exercising public power—Officials guilty of corrupt, unacceptable and disgraceful conduct—Process unlawful and unfair—Tender Board duty-bound to cancel tender—Cancellation taking place before notifying successful tenderers of awards—Tender award only final after written notification to successful

tenderers—Tender Board not functus officio—Cancellation of tender rational, lawful, fair and reasonable.

CHAIRMAN OHANGWENA COMMUNAL LAND BOARD NO v WAPULILE (SC)

SHIVUTE CJ, MAINGA JA and O'REGAN AJA
2016 APRIL 8; 2017 JUNE 8

Land—Communal land—Customary land rights—Fencing off or retaining existing fences on communal land prohibited in terms of s 18 of Land Reform Act 5 of 2002 (Act) unless authorised under s 28(2)(b)—Operation of s 18 suspended once application made to relevant authority for retention of fences erected prior to Act coming into operation—Minister extending period within which to apply—Obligation to apply in terms of s 28(2) remained and prohibition in s 18 persisted in absence of pending application before relevant board—Respondent failing to make s 28(2)(b) application to appellant for retention of existing fences—Appellant entitled to remove fences—Appeal allowed.

BERTOLINI v EHLERS AND ANOTHER (HC)

MASUKU J
2017 SEPTEMBER 12; OCTOBER 6
[2017] NAHCMD 284

Practice—Applications and motions—Interlocutory application—For costs in terms of High Court Rules, rule 97(3)—Misjoinder of defendant—Withdrawal of action against defendant without tendering costs—Withdrawal only after irregular procedure adopted to join third party—Punitive costs order justified for costs incurred when plaintiff deliberately belatedly withdrew proceedings against defendant—Plaintiff's conduct objectionable, unreasonable and unjustifiable.

NEW ERA INVESTMENT (PTY) LTD v FERUSA CAPITAL FINANCING PARTNERS CC AND OTHERS (HC)

ANGULA AJ
2016 NOVEMBER 10; DECEMBER 2
[2016] NAHCMD 380

Spoilation—Mandament van spolie—When available—Mandament available when control of property removed against will of lien holder—Right to possession not enough—Lien holder must prove actual physical possession without interference or interruption—No evidence of sufficient physical control and undisturbed peaceful possession exercised over property by applicant.

Lien—Builder's lien—Nature of—Security for construction work done on property—Construction work neither identified nor valued—Applicant failing to identify which part of property it occupied—Applicant having no lien over entire property, including areas where little or no construction work done—Court unable to determine extent of lien—Applicant failing to establish lien.

S v TN (HC)

LIEBENBERG J and SHIVUTE J
2017 OCTOBER 10
[2017] NAHCMD 286

Criminal procedure—Sentence—Contravention of s 18(1) of Children's Act 33 of 1960—£200 prescribed maximum fine in s 18(5)—Conversion in terms of s 2 of Decimal Coinage Act 61 of 1959—Maximum fine amounting to N\$400—N\$2000 fine exceeding maximum fine under s 18(5)—Penalty substituted with N\$400—Semble: Expeditious intervention by legislature necessary to amend penalty provision of s 18(5) of the Children's Act—Prescribed fines shockingly inadequate—Inhibiting court's sentencing jurisdiction.

Criminal procedure—Conviction—Duplication—What constitutes—Accused convicted on four charges of ill treatment or neglect of four children by abandoning them in contravention of s 18(1) of Children's Act 33 of 1960—Accused acted with single intent of abandoning four children—Duplication of convictions set aside.

S v SCHIEFER (SC)

DAMASEB DCJ, SMUTS JA and HOFF JA
2016 JUNE 20; 2017 SEPTEMBER 12

Criminal procedure—Sentence—Appeal against—Affording more weight to specific factor at expense of another justifiable—Court may not ignore or disregard such factor altogether—Court a quo should have taken into account that murders committed on spur of moment without planning and that appellant had no history of violent behaviour—No evidence that appellant inherently wicked—Cumulative impact of all mitigating factors rendered sentence strikingly or startlingly or patently inappropriate justifying interference by appeal court.

S v FARIA AND OTHERS (NLD)

TOMMASI J and JANUARY J
2017 SEPTEMBER 12; OCTOBER 17
[2017] NAHCNLD 100

Revenue—Customs and excise—Customs and Excise Act 20 of 1998, s 91—Forfeiture of goods upon being convicted of having contravened s 14 of Act—Provision preemptory—Trial court had no discretion not to declare goods forfeited to state.

PROSECUTOR-GENERAL v KAMUNGUMA AND ANOTHER (HC)

UEITELE J
2017 JULY 4; OCTOBER 20
[2017] NAHCMD 302

Criminal procedure—Organised crime—Forfeiture order—Property held under preservation order, in terms of s 51 of Prevention of Organised Crime Act 29 of 2004—Forfeiture order application under s 59(1) separate application from preservation order application—Supporting affidavit must contain averments necessary to sustain cause of action—Prosecutor-General (PG) incorporating by reference affidavits tendered in preservation order application—PG failing to produce admissible evidence that property instrumentality of scheduled offence or proceeds of unlawful activities—Application dismissed.

NGHIDIMBWA v SWAPO PARTY OF NAMIBIA AND OTHERS (HC)

ANGULA DJP
2017 JUNE 21; OCTOBER 16
[2017] NAHCMD 298

Administrative law—Audi alteram partem—When applicable—Political party withdrawing party member as councillor of town council in terms of s 13(1)(g) of Local Authorities Act 23 of 1992—Member had contractual right to be heard—In absence of prescribed procedure for withdrawal, courts must imply procedural requirements necessary to ensure principles of natural justice observed—Political party violating contractual right of member to be heard before exercising powers under s 13(1)(g)—Decision set aside.

COUNCIL OF THE ITIRELENG VILLAGE COMMUNITY AND ANOTHER v MADI AND OTHERS (SC)

DAMASEB DCJ, SMUTS JA and FRANK AJA
2017 OCTOBER 5, 25

Practice—Parties—Locus standi—Voluntary association—Universitas had legal standing distinct from members with power to sue and be sued in own name—Neither council of universitas nor chairperson of council or traditional councillor appointed under Traditional Authorities Act 25 of 2000 had locus standi to act on behalf of universitas—Appellants not entitled to relief sought.

UNITED AFRICA GROUP (PTY) LTD v URAMIN INC AND OTHERS (HC)

MASUKU J
2017 SEPTEMBER 25; NOVEMBER 3
[2017] NAHCMD 315

Practice—Parties—Joinder—Application to join peregrini parties to proceedings under rule 40 of High Court Rules—Applicant required to comply with rule 65(2)—Application must be served on parties to be joined—Parties entitled to be heard in respect of relief sought.

Court—Jurisdiction—Attachment to found or confirm jurisdiction—Attachment of property required to render judgment of court effectual and enforceable—Judgment meaningless in absence of peregrini or their property in court’s jurisdiction—Application dismissed.

NEW ERA INVESTMENT (PTY) LTD v ROADS AUTHORITY AND OTHERS (SC)

DAMASEB DCJ, MAINGA JA and STRYDOM AJA
2014 NOVEMBER 5; 2017 SEPTEMBER 8

Interdict—Interim interdict—Pending review—Applicant has election whether to seek interim relief or not—Court has discretion of granting or refusing interim relief and regulating own proceedings—Court suspending implementation of tender pending judgment—Court regulating own proceedings—Objection to failure to seek interdict failing.

Review—Government procurement—Procurement process—Board entitled to apply Ministry of Works and Transport Policy—Sound practice based on rational considerations—Benchmarking tender price reasonable and applied even-handedly to all tenderers—Appeal dismissed.

DENKER v AMEIB RHINO SANCTUARY (PTY) LTD AND OTHERS (SC)

DAMASEB DCJ, SMUTS JA and HOFF JA
2017 NOVEMBER 2, 22

Company—Shares—Register of members—Rectification of—Application for in terms of s 122 of Companies Act 28 of 2004—Rectification not granted as of right—Motion proceedings for rectification discouraged where issues complex—Complaint cast in broad terms of invalidity of instruments of transfer due to non-payment of stamp duty—Appellant failing to identify statutory provisions to allow for summary disposition.

Land—Agricultural land—Controlling interest held by foreigner—Not competent for foreign national to hold controlling interest in agricultural land in terms of s 58(1)(a) of Agricultural (Commercial) Land Reform Act 6 of 1995—Registration in deeds office pro-non-scripto—Not capable of conferring rights and obligations as law presumed it having not occurred—Confirming minister to deal with property in terms of s 60 of Act.

IBB MILITARY EQUIPMENT AND ACCESSORY SUPPLIES CC v NAMIBIA AIRPORTS COMPANY (HC)

MASUKU J
2017 SEPTEMBER 26; NOVEMBER 8
[2017] NAHCMD 318

Review—Procedure—Administrative body adopting action procedure for setting aside tender awarded by its previous board of directors to defendant—Action procedure adopted by plaintiff not irregular step or proceeding—Administrative body not compelled to adopt High Court Rule 76 review proceedings—Defendant’s procedural rights protected by rules of court—Action proceedings not liable to be set aside as irregular step or procedure under rule 61(1)—Rule 61(1) application dismissed.

S v GUIBEB (HC)

NDAUENDAPO J and LIEBENBERG J
2017 AUGUST 7
[2017] NAHCMD 210

Maintenance—Failure to pay maintenance in contravention of s 39(1) of Maintenance Act 9 of 2003—Accused pleading guilty but raising defence of becoming unemployed and only being able to do casual work—No evidence of unwillingness to work contemplated by s 39(2) of Act—Conviction amounting to misdirection—Conviction and sentence set aside and case remitted to trial court.

Maintenance—Failure to pay maintenance in contravention of s 39(1) of Maintenance Act 9 of 2003—Court a quo mero motu suspending existing maintenance order until arrears paid—Court had no power to do so—Proceedings should have been converted from criminal to maintenance enquiry about accused’s means in terms of ss 17 and 34 of Act.

FISCHER v SEELENBINDER AND ANOTHER (HC)

UEITELE J

2016 JULY 5; 2017 NOVEMBER 10

[2017] NAHCMD 323

Practice—Applications and motions—Further affidavits—Court has discretion to permit filing of supplementary affidavits—Leave not granted if prejudicial to respondent—New evidence coming into existence after launching application—Relief sought to be evaluated against existing evidence at launch of application—Applicant must withdraw application and bring fresh application incorporating new evidence—Leave to file supplementary founding affidavit refused.

Close corporation—Members—Cessation of membership—Absence of terms of termination agreement—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 prescribing terms of first respondent's retirement and ordering appointment of referee to establish value of close corporation and members' loan accounts.