



## JUTA'S ADVANCE NOTIFICATION SERVICE

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

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2016 NOVEMBER 10; DECEMBER 2

[2016] NAHCMD 380

**Spoliation**—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 peremptory—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.