



JUTA'S ADVANCE NOTIFICATION SERVICE

MAY 2018

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

Herewith the cases in the May 2018 law reports

JUDGMENTS OF INTEREST IN THE MAY 2018 EDITIONS OF THE SALR, SACR AS WELL AS THE NAMIBIAN LAW REPORTS 2018 (1).

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

SOUTH AFRICAN LAW REPORTS

Removal of consumer's record of debt rearrangement

The removal of consumer's record of debt rearrangement by a credit bureau or by the credit register, is not a judicial process. It may only be affected through the prescribed administrative process in s 71 of the National Credit Act 34 of 2005. *Phaladi v Lamara* 2018 (3) SA 265 (WCC).

Validity of lease where building plans not approved and/or occupancy certificate not issued

The Supreme Court of Appeal considers the correctness of the High Court's decision, that a lease of property without approved building plans and/or valid occupancy certificate (as required by ss 4(1) and 14(1) of the National Building Regulations and Building Standards Act 103 of 1977) was valid but unenforceable. *Wierda Road West Properties (Pty) Ltd v Sizwe Ntsaluba Gobodo Inc* 2018 (3) SA 95 (SCA).

Duty of to inquire as to marital status of party contracting with

Section 15(9)(a) of the Matrimonial Property Act 88 of 1984 provides that when a spouse in a marriage in community of property enters into a transaction without the consent of the other spouse required under ss 15(2) or (3), and the other transacting party 'does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions . . . it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3)'. The court considers whether the phrase 'cannot reasonably know', imposes a positive duty to enquire as to the marital status of the other contracting party which must be discharged before the deeming clause is triggered. *Broodie NO v Maposa and Others* 2108 (3) SA 129 (WCC).

SOUTH AFRICAN CRIMINAL LAW REPORTS

Notice of regulated gatherings

The section of the Regulation of Gatherings Act 205 of 1993 that requires notice of a regulated gathering (s 12 (1)(a)), held to infringe the rights of freedom assembly and declared unconstitutional. *S v Mlungwana and Others* 2018 (1) SACR 538 (WCC).

Substantial and compelling circumstances

The Supreme Court of Appeal considers whether a two-year period of incarceration prior to sentencing constitutes substantial and compelling circumstances to reduce a minimum sentence of life imprisonment. *S v Ngocobo* 2018 (1) SACR 479 (SCA).

Prisoner's right to education infringed

Failure by prison authorities to forward an examination entry form to the education authorities, held to amount to an unlawful interference with a prisoner's right to education. *Sigudo v Minister of Higher Education and Others* 2018 (1) SACR 485 (GJ).

THE NAMIBIAN LAW REPORTS

Costs award against police officers behaving badly

Two police officers are held personally liable for costs of suit on attorney and client scale. Their conduct—engaging in repeated unlawful arrests and detention, and searched and seizures without warrants—was held to have been objectionable, unreasonable, unjustifiable, and oppressive of the plaintiff's rights. *Lazarus v Government of the Republic of Namibia (Ministry of Safety and Security) (2)* 2018 (1) NR 56 (HC).

When to raise an alibi

The accused relied, inter alia, on an alibi which he first raised when he testified. The court confirmed that disclosing an alibi at such a late stage might adversely affect the value to be accorded to it. *S v Britz* 2018 (1) NR 97 (HC).

Variation of custody orders

Disputes regarding the custody of children are never res judicata, and as upper guardian of children a court is never functus officio. Portions of agreements dealing with custody of children are always subject to variation upon good cause shown, and subject to best interest of child. *SK v SK* 2018 (1) NR 268 (HC).

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Kind Regards

The Juta Law Reports Team

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BANK OF NAMIBIA v SMALL & MEDIUM ENTERPRISES BANK LTD AND OTHERS (1) (HC)

PRINSLOO J

2017 JULY 6, 7

Company—Winding up—Application—Lodging of—Provisions of s 351(4) of Companies Act 28 of 2004 peremptory—Application to be lodged with master before presenting it to court—Lodging of application on same day with registrar and master—Evidence not clearly establishing non-compliance with s 351(4)—Court would not speculate—Substantial compliance with s 351(4)—Application not fatally defective.

BANK OF NAMIBIA v SMALL & MEDIUM ENTERPRISES BANK LTD AND OTHERS (2) (HC)

PRINSLOO J

2017 JULY 10, 11

Company—Winding up—Application—Winding up of registered bank—Applicant, after assuming control of first respondent under s 56 of Banking Institutions Act 2 of 1998, applying for provisional winding up order—Bank factually and commercially insolvent—No resources available for recapitalisation of bank—Bank’s substratum fell away—Unable to conduct business as banking institution as provided in s 1 of Banking Institutions Act.

Company—Winding up—Grounds—Winding up just and equitable—Section 349(h) of Companies Act 28 of 2004—Wide discretionary power exercised judicially, taking into account all relevant circumstances, including competing interests of all concerned—Just and equitable to grant provisional winding up order.

BANK OF NAMIBIA v SMALL & MEDIUM ENTERPRISES BANK LTD AND OTHERS (3) (HC)

PRINSLOO J

2017 OCTOBER 18, 19; NOVEMBER 29; DECEMBER 4

Company—Winding up—Application—Final order—Winding up of bank—Appointment of liquidators—Liquidators appointed by Master of High Court—Master has sole administrative discretion in appointing liquidators—Discretion could only be attacked in review proceedings on specific grounds—Aggrieved respondents failing to review master’s decision.

Company—Winding up—Application—Final order—Costs of opposition to granting of final order—Test to be applied—Whether or not it could fairly be said that there were no reasonable prospects of successfully opposing order—Respondents mainly raising technical points and contributing unnecessarily to prolixity of papers and associated costs—Court questioning bona fides of respondents’ opposition to order—Respondents ordered to pay costs of opposing final order.

S v GAINGOB AND OTHERS (SC)

SHIVUTE CJ, SMUTS JA, HOFF JA, MOKGORO AJA and FRANK AJA

2017 NOVEMBER 7; 2018 FEBRUARY 6

Constitutional law—Fundamental rights—Dignity—Whether fixed prison sentences of 67 and 64 years infringed upon appellants’ art 8 constitutional right to human dignity or right not to be subjected to cruel, inhuman or degrading treatment or punishment—Sentences infringed upon art 8 rights—Lengthy sentences removed all realistic hope of release in future—Statutory purpose of rehabilitation undermined—Sentences substituted with life imprisonment.

Criminal procedure—Sentence—Imprisonment—Excessively long sentences—Court substituting sentences to life imprisonment—Such sentence not violating appellants’ art 8 constitutional right—Life sentence subject to parole provisions of ss 115 and 117 of Correctional Service Act 9 of 2012—Trial courts should not impose excessively long sentences to circumvent right of hope of release through parole eligibility.

EGERER AND OTHERS NO v EXECUTRUST (PTY) LTD AND OTHERS (SC)

DAMASEB DCJ, MAINGA JA and HOFF JA

2017 OCTOBER 12; 2018 FEBRUARY 6

Trust and trustees—Trustee—Deed of trust—Powers of founder trustee—Power to prescribe mode of appointment of trustees, power of exclusively appointing additional trustees or conferring power of assumption on other trustees and power of establishing vesting date of trust.

Trust and trustees—Trustee—Deed of trust—Trust founder placing assets under control of trustees for benefit of beneficiaries—Interpretation of deed of trust—Deed expressly providing only capital beneficiaries to benefit from trust on vesting date—Trust deed reserved power of founder trustee to determine vesting date and appointing trustees in his will—Appointment of three trustees not ultra vires the deed of trust—Monetary bequests in will unenforceable—Founder trustee could not in his will dispose of trust assets held in trust for trust beneficiaries.

MCLAREN NO AND OTHERS NNO v MUNICIPAL COUNCIL OF WINDHOEK AND OTHERS (SC)

MAINGA JA, HOFF JA and FRANK AJA
2017 NOVEMBER 13; 2018 JANUARY 17

Administrative law—Administrative action—What constitutes—Lease agreement—Commercial contractual relationship—Source and nature of power contractual—Organ of state contracted in equal power relation with powerful commercial entity—Local authority terminating long-term lease agreement—Decision to cancel agreement not administrative action—Decision not reviewable.

Contract—Breach—What constitutes—Lessee’s conduct, judged objectively, amounting to repudiation—Cessation by lessee of its operations clearly indicating intention not to continue with agreement constituting material breach and repudiation—Applicant entitled to accept repudiation and to cancel agreement.

SK v SK (HC)

PRINSLOO J
2017 NOVEMBER 9, 17

Marriage—Custody of minor children—Settlement agreement made order of court—Custody of children never res judicata—Court not functus officio—Court upper guardian of children—Portions of agreement dealing with custody of children subject to variation upon good cause shown and subject to best interest of child.

BABYFACE CIVILS CC JV HENNIMMA INVESTMENTS AND OTHERS v //KARAS REGIONAL COUNCIL AND OTHERS (HC)

ANGULA DJP
2017 OCTOBER 5; 2018 FEBRUARY 7

Estoppel—Application of—Cancellation of tender award—Doctrine of estoppel found no application where neither official nor his/her agent had power to extend time for provision of guarantee—Tender award also made without compliance with peremptory provisions of s 17 of State Finance Act 31 of 1991 and s 37(2) of Regional Councils Act 22 of 1992—Doctrine of estoppel could not give effect to what was not permitted by law—Reliance on estoppel failing.

Administrative law—Tender award—Regional council awarded tender for building a school—Council was delegated powers defined in Decentralisation Enabling Act 33 of 2000 to perform functions as agent of line minister—Council failing to obtain treasury approval for expenditure under s 17 of State Finance Act 31 of 1991 and s 37(2) of Regional Councils Act 22 of 1992—Tender award unlawful, null and void and liable to be set aside.

SHIIMI v CITY OF WINDHOEK MUNICIPALITY COUNCIL (HC)

PRINSLOO J
2017 SEPTEMBER 26, 27

Local authority—Legal proceedings—Limitation of—Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970, ss 2(1)(a) and (c)—Purpose to protect local authority against lawsuits—Aimed at providing local authority opportunity of investigating matter—Debt due when creditor has knowledge of identity of debtor and facts giving rise to debt or first day creditor could acquire knowledge of facts by exercising reasonable care—Creditor required to take steps reasonable person would have taken to acquire knowledge of cause of action.