



JUTA'S ADVANCE NOTIFICATION SERVICE

AUGUST 2018

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

Herewith the cases in the August 2018 law reports

JUDGMENTS OF INTEREST IN THE AUGUST 2018 EDITIONS OF THE SALR, SACR AS WELL AS THE NAMIBIAN LAW REPORTS 2018 (2).

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

SOUTH AFRICAN LAW REPORTS

Mining Charter: once empowered, always empowered?

This case considers whether the Mining Charter's empowerment targets for ownership by historically disadvantaged persons, impose an obligation on mining right holders to restore and continuously maintain targets where beneficiaries dispose of ownership, or whether 'once empowered', they were 'always empowered'. *Chamber of Mines v Minister of Mineral Resources and Another* 2018 (4) SA 581 (GP)

Duty of courts towards lay-litigants when ordering bonded immovable property executable

Courts, in their order declaring bonded immovable property executable, must inform lay-litigant debtors that, should they pay arrears before sale in execution, the original agreement would be reinstated. *Duma v Absa Bank Ltd* 2018 (4) SA 463 (GP)

Articles: preconditions for attendance at practical training course

Strict compliance with s 15(1)(b)(ivA) of Attorneys Act 53 of 1979, which insists on prior registration or service of articles, is not required; attendance at practical training course may therefore take place before registration of articles. *Ex parte Mdyesha* 2018 (4) SA 468 (GP)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Duties of police towards persons in their custody after arrest

Senior police officers recommended bail for the plaintiff after his arrest for drunken driving, but this recommendation was not given effect to when he was transferred to a different police station. There, the plaintiff was instead detained for the weekend in cells together with violent-crime detainees, and was sodomised. In his claim for damages, the court considers whether the failure of the police to have separated him from violent-crime detainees, constituted a dereliction of their duties towards persons in their custody after arrest. *EF v Minister of Safety and Security* 2018 (2) SACR 123 (SCA)

Crimes against minors: adequacy of proof of complainant's age in guilty plea

The court considers whether, in written statement in terms of s 112(2) of Criminal Procedure Act 51 of 1977, an admission of the complainant's age—where it is an essential element of charge—constitutes sufficient proof of the complainant's age, absolving the state of the duty of proving child's age. *Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi* 2018 (2) SACR 230 (SCA)

Bail pending appeal: reasonable prospects on appeal alone not enough

While the regional magistrate who heard the appellant's bail application pending his appeal (against a conviction for murder and a sentence of 12 years' imprisonment) was of the opinion that there was a reasonable prospect of success on appeal, the magistrate nevertheless refused bail. In an appeal against this the decision, the High Court held that the cumulative effect of other considerations rendered it not in the interest of justice to extend bail: the mere fact that court a quo considered that appellant had reasonable prospects on appeal did not per se mean that interests of justice dictated release on bail. *S v Pataka* 2018 (2) SACR 135 (GJ)

THE NAMIBIAN LAW REPORTS

When desertion is 'malicious and constructive'

The plaintiff in divorce proceedings sought an order that the defendant forfeit the benefits derived from their marriage in community of property in respect of a specific immovable property which was registered in plaintiff's name. The court, inter alia, considers the meaning of 'malicious and constructive desertion', the main basis of the plaintiff's claim. *WWB v Aipanda NO* 2018 (2) NR 446 (HC)

Practice directive when relying on foreign, in lieu of local, case law

Rule 130 of High Court Rules requires that counsel relying on foreign authority must certify that no Namibian authority was found. The court held that, as a matter of convenience and fairness to the court and opponents, legal practitioners must refer to the particular pages, paragraphs or excerpts relied upon. *Conrad v Dohrmann and Another* 2018 (2) NR 535 (HC)

Substantial compliance with required formalities when executing a Will sufficient.

Only the first three pages of a will was signed by the testatrix and witnesses. This strictly constituted non-compliance with s 2(1)(a)(iii) and (iv) of Wills Act 7 of 1953, invalidating the will. The court however considered that requiring strict compliance violated the fundamental right of person to dispose of their property as they pleased, a right enshrined in art 16(1) of the Constitution; and where, as in this case, there was substantial compliance with statutory provisions, the Will was accordingly valid. *Mwoombola and Another v Master of the High Court* 2018 (2) NR 482 (HC)

WE WELCOME YOUR FEEDBACK

Please send any comments or queries to lawreports@juta.co.za.

Kind Regards

The Juta Law Reports Team

SOUTH AFRICAN LAW REPORTS

AUGUST 2018

TABLE OF CASES

- Saidi and Others v Minister of Home Affairs and Others 2018 (4) SA 333 (CC)
- Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd 2018 (4) SA 358 (SCA)
- Bee v Road Accident Fund 2018 (4) SA 366 (SCA)
- BS v PS 2018 (4) SA 400 (SCA)
- Bragge v Douglasdale Dairy (Pty) Ltd 2018 (4) SA 409 (GJ)
- Douglasdale Dairy (Pty) Ltd and Others v Bragge and Another 2018 (4) SA 425 (SCA)
- John Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in Liquidation) and Another 2018 (4) SA 433 (SCA)
- Mantis Investment Holdings (Pty) Ltd v Eastern Cape Development Corporation and Others 2018 (4) SA 439 (SCA)
- Mostert and Others v FirstRand Bank Ltd t/a RMB Private Bank and Another 2018 (4) SA 443 (SCA)
- NK v MEC for Health, Gauteng 2018 (4) SA 454 (SCA)
- Duma v Absa Bank Ltd 2018 (4) SA 463 (GP)
- Ex parte Mdyesha 2018 (4) SA 468 (GP)
- Levay and Another v Van den Heever and Others NNO 2018 (4) SA 473 (GJ)
- Ntombela v Road Accident Fund 2018 (4) SA 486 (GJ)
- Octagon Chartered Accountants v Additional Magistrate, Johannesburg, and Others 2018 (4) SA 498 (GJ)
- Transcend Residential Property Fund Ltd v Mati and Others 2018 (4) SA 515 (WCC)
- TC v SC 2018 (4) SA 530 (WCC)
- Trustees, Avenues Body Corporate v Shmaryahu and Another 2018 (4) SA 566 (WCC)
- Chamber of Mines v Minister of Mineral Resources and Another 2018 (4) SA 581 (GP)

FLYNOTES

SAIDI AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS (CC)

ZONDO ACJ, CAMERON J, FRONEMAN J, JAFTA J, KATHREE-SETILOANE AJ, KOLLAPEN AJ, MADLANGA J, MHLANTLA J, THERON J and ZONDI AJ
2018 APRIL 24
[2018] ZACC 9

Immigration—Refugee—Asylum seeker permit—Whether, after rejection of asylum application, and exhaustion of internal review and appeal, and pending judicial review, refugee reception officer having power to extend permit—Whether, on being asked, officer having discretion to extend or not extend—Refugees Act 130 of 1998, ss 22(1) and 22(3).

AUCTION ALLIANCE (PTY) LTD v WADE PARK (PTY) LTD (SCA)

PONNAN JA, MAJIEDT JA, SWAIN JA, DAMBUZA JA and MOTHLE AJA
2018 MARCH 23
[2018] ZASCA 28

Contract—Interpretation—Proper approach—Principles of interpretation restated—Failure of court a quo to follow correct approach to interpretation—When interpreting document, not sufficient for court to merely outline well-established principles—Must be evident from interpretive process itself that principles applied—Court a quo erring in finding letter to have not constituted consent.

BEE v ROAD ACCIDENT FUND (SCA)

SERITI JA, MATHOPO JA, ROGERS AJA, HUGHES AJA and SCHIPPERS AJA
2018 MARCH 29
[2018] ZASCA 52

Damages—Bodily injuries—Loss of income or earning capacity—Plaintiff and brother each owned 50% of close corporation—Plaintiff’s claim permissibly quantified with reference to corporation’s reduced profits.

Damages—Quantification—Collateral source rule—Benevolent payments increasing plaintiff’s post-injury earnings beyond market-related salary for reduced role—Correctly disregarded in calculation of plaintiff’s patrimonial loss resulting from diminished earning capacity.

Evidence—Expert evidence—Joint minutes—Court generally bound by—Rules for repudiation by parties.

BS v PS (SCA)

LEWIS JA, WILLIS JA, SWAIN JA, MATHOPO JA and MOCUMIE JA
2018 MARCH 28
[2018] ZASCA 37

Marriage—Divorce—Proprietary rights—Accrual system—Power to defer satisfaction of accrual claim (s 10)—Ousted by requirement that pension interest assigned non-member in divorce order be paid without delay (s 24A)—Matrimonial Property Act 88 of 1984, s 10; Government Employees Pension Law, 1996, s 24A.

BRAGGE v DOUGLASDALE DAIRY (PTY) LTD (GJ)

MAKHANYA J
2016 MAY 20

Will—Fideicommissum—Fiduciary—Ownership of property—Jus possidendi and doctrine of *salva rei substantia*—Fiduciary’s right to evict profitable tenant from land—Fideicommissary’s standing to oppose eviction application.

Will—Fideicommissum—Fideicommissary—Protectable interest in property—None existing during pendency of fideicommissary condition—Before this fideicommissary having no claim based on fiduciary’s obligation to transfer property *salva rei substantia*.

DOUGLASDALE DAIRY (PTY) LTD AND OTHERS v BRAGGE AND ANOTHER (SCA)

SHONGWE ADP, WILLIS JA, SWAIN JA, DAVIS AJA and HUGHES AJA
2018 MAY 25
[2018] ZASCA 68

Will—Fideicommissum—Fiduciary—Death—Rights of fideicommissary where property registered in fiduciary’s name—Right of executor of fiduciary’s estate to enforce eviction order granted to fiduciary.

Estoppel—Res judicata—Issue estoppel—Scope of where appeal did not deal with court a quo’s factual findings.

JOHN WALKER POOLS v CONSOLIDATED AONE TRADE & INVEST 6 (PTY) LTD (IN LIQUIDATION) AND ANOTHER (SCA)

SHONGWE ADP, WILLIS JA, MOCUMIE JA, MOTHLE AJA and ROGERS AJA
2018 MARCH 8
[2018] ZASCA 12

Appeal—Power of court on appeal—Power to dismiss appeal where judgment or order sought would have no practical effect or result—To be determined without reference to costs, save under exceptional circumstances—Costs meaning costs in court a quo, not appellate court—Superior Courts Act 10 of 2013, s 16(2)(a).

Appeal—Leave to appeal—Application—Costs—Proposed appeal becoming moot during pendency of application in Supreme Court of Appeal—Liability for costs in application—Time when matter became moot relevant—Duty of litigants to make reasonable proposals inter se on costs—Prospects on merits and conduct of parties.

Costs—Application for leave to appeal—Proposed appeal becoming moot during pendency of application in Supreme Court of Appeal—Liability for costs in application—Time when matter became moot relevant—Duty of litigants to make reasonable proposals inter se on costs—Prospects on merits and conduct of parties.

MANTIS INVESTMENT HOLDINGS (PTY) LTD v EASTERN CAPE DEVELOPMENT CORPORATION AND OTHERS (SCA)

PONNAN JA, SWAIN JA, DAMBUZA JA, DAVIS AJA and MOTHLE AJA
2018 JUNE 1
[2018] ZASCA 95

Company—Winding-up—Interrogation—Subpoena to appear—Creditor asking for subpoena of persons—Master, without proper consideration of request, issuing same—Companies Act 61 of 1973, ss 415 and 417.

MOSTERT AND OTHERS v FIRSTRAND BANK LTD t/a RMB PRIVATE BANK AND ANOTHER (SCA)

SHONGWE ADP, VAN DER MERWE JA, ROGERS AJA, HUGHES AJA and SCHIPPERS AJA
2018 APRIL 11
[2018] ZASCA 54

Credit agreement—Consumer credit agreement—Remedying of default in agreement—Payment can only be made by or on behalf of consumer—National Credit Act 34 of 2005, s 129(3).

NK v MEC FOR HEALTH, GAUTENG (SCA)

LEWIS JA, MAJIEDT JA, WILLIS JA, DAMBUZA JA and PILLAY AJA
2018 MARCH 15
[2018] ZASCA 13

Damages—Bodily injuries—General damages—Assessment—Courts to adopt flexible approach, determined by broadest general considerations, depending on what was fair in all circumstances of case.

Damages—Bodily injuries—General damages—Assessment—Compensation for pain and suffering neither a duplication of amount awarded for past and future medical and hospital expenses, nor for loss of amenities of life.

Damages—Bodily injuries—General damages—Assessment—Past awards serving as guide—Importance of awards, where sequelae similar, being consonant with one another, across country.

Damages—Bodily injuries—Loss of income or earning capacity—Calculation—Contingencies—Assessment—Approach to.

DUMA v ABSA BANK LTD (GP)

RAUTENBACH AJ
2017 OCTOBER 2

Execution—Attachment of immovable property—Declaration of executability—Judicial oversight—Duty of court, in its order declaring bonded property specially executable, to inform lay-litigant debtors that, should they pay arrears before sale in execution, original agreement would be reinstated—National Credit Act 34 of 2005, s 129(3).

EX PARTE MDYESHA (GP)

MAKGOKA J and MOLEFE J
2016 AUGUST 4

Attorney—Admission and enrolment—Admission—Requirements—Attendance at practical training course—May take place before registration of articles—Strict compliance with s 15(1)(b)(ivA) of Attorneys Act 53 of 1979, which insists on prior registration or service of articles, not required.

Attorney—Articles of clerkship—Probation—Attorneys' firms' practice of making potential candidate attorneys sign pre-articles contracts containing probationary periods—Court remarking that practice still rife despite Supreme Court of Appeal's disapproval.

LEVAY AND ANOTHER v VAN DEN HEEVER AND OTHERS NNO (GJ)

VAN DER BERG AJ
2017 DECEMBER 13

Company—Winding-up—Application—Intervention—Whether creditor or minority shareholder can intervene to oppose.

NTOMBELA v ROAD ACCIDENT FUND (GJ)

SUTHERLAND J
2018 MARCH 19

Evidence—Expert evidence—Joint minutes—Failure to comply with requirements in court's Practice Manual—Appropriate order and costs order.

OCTAGON CHARTERED ACCOUNTANTS v ADDITIONAL MAGISTRATE, JOHANNESBURG, AND OTHERS (GJ)

GAUTSCHI AJ, MAKUME J and SIWENDU J
2017 APRIL 26

Magistrates' court—Civil proceedings—Jurisdiction—Removal of actions to High Court—Section 50(1) of Magistrates' Courts Act allowing for removal of both claim in convention and claim in reconvention to High Court—Magistrates' Courts Act 32 of 1944, s 50(1).

TRANSCEND RESIDENTIAL PROPERTY FUND LTD v MATI AND OTHERS (WCC)

HOLDERNESS AJ
2018 MARCH 20

Consumer protection—Consumer agreement—Cancellation—By supplier—20-day notice period to remedy defects—Unnecessary for supplier to expressly state in such notice that consumer had 20 business days to remedy defect—Consumer Protection Act 68 of 2008, s 14(2)(b)(ii).

Consumer protection—Consumer—Lease agreement—Occupant paying rent, but not described as tenant in lease—Such occupant a beneficiary of particular services in terms of lease, and therefore qualifying as 'consumer' in terms of Consumer Protection Act, given broad definition of consumer, and given that whole tenor of Act was to protect consumer—Consumer Protection Act 68 of 2008, s 1 sv 'consumer'.

TC v SC (WCC)

DIANE DAVIS AJ
2018 APRIL 18

Marriage—Divorce—Dispute resolution—Parenting disputes—Facilitator—Whether, absent agreement of parents, court may appoint—Whether appointment of is impermissible delegation of court's power.

TRUSTEES, AVENUES BODY CORPORATE v SHMARYAHU AND ANOTHER (WCC)

BINNS-WARD J and LANGA AJ
2018 MAY 10

Housing—Consumer protection—Community Schemes Ombud—Appeal against adjudicator’s order—Correct procedure—Community Schemes Ombud Service Act 9 of 2011, s 57.

Housing—Consumer protection—Community Schemes Ombud—Application for dispute resolution—Standing to make application—Requirements—Applicant must be materially affected by community-scheme related matter, and must have material interest in scheme—Both requirements must be met for standing to be established—Community Schemes Ombud Service Act 9 of 2011, ss 38(1) and 39(1).

CHAMBER OF MINES v MINISTER OF MINERAL RESOURCES AND ANOTHER (GP)

MABUSE J, SIWENDU J and BARRIE AJ
2018 APRIL 4

Minerals and petroleum—Mining and prospecting rights—Charter contemplated in s 100 of MPRDA—Legal status of—Effect of mining rights under MPRDA—Whether charter’s empowerment target imposing obligation to restore and continuously maintain target where beneficiaries disposing of ownership, or whether ‘once empowered, always empowered’—Mineral and Petroleum Resources Development Act 28 of 2002, ss 23(1)(h), 23(6), 100(1)(b) and item 7 of sch II.

SOUTH AFRICAN CRIMINAL LAW REPORTS

AUGUST 2018

TABLE OF CASES

- EF v Minister of Safety and Security 2018 (2) SACR 123 (SCA)
- S v Pataka 2018 (2) SACR 135 (GJ)
- National Police Commissioner and Another v Ngobeni 2018 (2) SACR 142 (SCA)
- S v Zotwa 2018 (2) SACR 151 (ECG)
- Sulani v Mashiyi and Another 2018 (2) SACR 157 (ECP)
- Minister of Safety and Security v South African Hunters and Game Conservation Association 2018 (2) SACR 164 (CC)
- Ex parte National Director of Public Prosecutions 2018 (2) SACR 176 (SCA)
- Gounden and Another v Noncebu NO and Others 2018 (2) SACR 186 (KZP)
- S v Pillay 2018 (2) SACR 192 (KZD)
- S v Permall and Another 2018 (2) SACR 206 (WCC)
- Director of Public Prosecutions, Northern Cape v Swart and Another 2018 (2) SACR 211 (NCK)
- S v Van Eeden 2018 (2) SACR 218 (NCK)
- Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi 2018 (2) SACR 230 (SCA)

FLYNOTES

EF v MINISTER OF SAFETY AND SECURITY (SCA)

LEWIS JA, SERITI JA, SALDULKER JA, MAKGOKA AJA and SCHIPPERS AJA
2018 MAY 9; JUNE 1
[2018] ZASCA 96

Police—Duties and powers of—Towards persons in their custody after arrest—Senior police officers recommending bail for plaintiff after arrest for drunken driving, but not given effect to when transferred to different police station—Plaintiff detained in cells for weekend where sodomised—Police failing to separate him from violent-crime detainees—Damages awarded.

S v PATAKA (GJ)

DOSIO AJ
2018 APRIL 4, 23

Bail—Pending appeal—When to be granted—Prospects of success on appeal—Mere fact that court considers that appellant has reasonable prospects on appeal does not per se mean that interests of justice dictate release on bail.

NATIONAL POLICE COMMISSIONER AND ANOTHER v NGOBENI (SCA)

SHONGWE ADP, WALLIS JA, SALDULKER JA, MATHOPO JA and PLASKET AJA
2018 MARCH 15
[2018] ZASCA 14

Police—National Commissioner—Powers—To establish board to inquire into allegations of misconduct by provincial commissioner—South African Police Service Act 68 of 1995, ss 8(2)(c), 8(8) and 9(1).

S v ZOTWA (ECG)

STRETCH J and JOLWANA AJ
2017 JUNE 14; SEPTEMBER 7

Traffic offences—Sentence—Suspension of driver's licence in terms of s 35(1) of National Road Traffic Act 93 of 1996—Magistrate failing to bring provisions of s 35(3) and (4) to attention of accused—Irregularity committed, and suspension set aside.

SULANI v MASHIYI AND ANOTHER (ECP)

DAWOOD J
2018 FEBRUARY 2

Trial—Accused—Failure to appear in court—Issue of warrant of arrest—Provisions of s 67(1)(b) of Criminal Procedure Act 51 of 1977 not precluding court from staying execution of warrant of arrest in appropriate cases

MINISTER OF SAFETY AND SECURITY v SOUTH AFRICAN HUNTERS AND GAME CONSERVATION ASSOCIATION (CC)

ZONDO DCJ, CACHALIA AJ, DLODLO AJ, FRONEMAN J, GOLIATH AJ, JAFTA J, PETSE AJ and THERON J
2018 FEBRUARY 7; JUNE 7

Arms and ammunition—Licensing—Renewal of licence—Sections 24 and 28 of Firearms Control Act 60 of 2000 constitutionally valid.

EX PARTE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS (SCA)

SHONGWE ADP, SERITI JA, SWAIN JA, PLASKET AJA and D PILLAY AJA
2018 MAY 23, 31
[2018] ZASCA 86

Prevention of crime—Preservation of property order—Application for—Application may be brought ex parte and without notice to other party—Provisions of statute take precedence over rules of court and practice directives—Prevention of Organised Crime Act 121 of 1998, s 38(1).

GOUNDEN AND ANOTHER v NONCEBU NO AND OTHERS (KZP)

SEEGOBIN J and MAHABEER AJ
2017 DECEMBER 8, 15

Review—Criminal proceedings not finalised—Whether decision on admission of certain evidence reviewable—Accused’s financial distress not sufficient ground for piecemeal adjudication of case.

S v PILLAY (KZD)

HENRIQUES J
2018 APRIL 24; MAY 7

Murder—Sentence—Mitigating factors—Crime not premeditated or planned—Accused acting with diminished responsibility after break-up of relationship—Genuine remorse shown and accused pleading guilty from outset—Sentence of 20 years’ imprisonment imposed.

Sentence—Imprisonment—Cumulative effect of—Order that sentences should run concurrently—When appropriate—Accused convicted of murder and unlawful possession of firearm used to commit murder— Unlawful possession of firearm antedated murder by long period—No reason for sentences to run concurrently.

S v PERMALL AND ANOTHER (WCC)

BOQWANA J and THULARE AJ
2017 DECEMBER 8

Traffic offences—Sentence—Fine with alternative of imprisonment—Ratio between monetary amount of fine and months of imprisonment—Golden mean ratio 3333,33.

DIRECTOR OF PUBLIC PROSECUTIONS, NORTHERN CAPE v SWART AND ANOTHER (NCK)

MATLAPENG AJ
2017 DECEMBER 8; 2018 FEBRUARY 26

Appeal—Reservation of question of law—Question of law—What constitutes—Whether trial court failed to apply applicable legal principles to proven facts—In casu, court examining record and finding trial court accounted for all evidence and accorded it due weight in acquitting accused—No question of law raised, but one of fact.

S v VAN EEDEN (NCK)

TLALETSI JP and OLIVIER J
2018 APRIL 23; MAY 18

Trial—Irregularity in—What constitutes—Accused represented at trial by attorney barred from practising by High Court interdict, at instance of Law Society—Fatal irregularity—Proceedings set aside.

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG DIVISION, PRETORIA v HAMISI (SCA)

LEWIS JA, DAMBUZA JA and ROGERS AJA
2018 MAY 3, 21
[2018] ZASCA 61

Plea—Guilty—Written statement in terms of s 112(2) of Criminal Procedure Act 51 of 1977— Sufficiency of—Admission of age of complainant when essential element of charge—Where accused admits complainant’s age in statement, state absolved of duty of proving child’s age.

THE NAMIBIAN LAW REPORTS

2018 (2)

TABLE OF CASES

- Free Press of Namibia (Pty) Ltd and Others v Nyandoro 2018 (2) NR 305 (SC)
- New Africa Dimensions CC and Others v Prosecutor-General 2018 (2) NR 340 (SC)
- Tjirovi v Minister for Lands and Resettlement and Others 2018 (2) NR 358 (HC)
- New Force Logistics CC v Anti-Corruption Commission 2018 (2) NR 375 (HC)
- Dama v Old Mutual Life Assurance Ltd 2018 (2) NR 392 (NLD)
- S v Aukongo 2018 (2) NR 398 (NLD)
- Namibia National Teachers' Union v Government of the Republic of Namibia and Others NO 2018 (2) NR 403 (LC)
- S v Ndamwoongela 2018 (2) NR 422 (HC)
- Kapika v Minister of Urban and Rural Development and Others 2018 (2) NR 432 (HC)
- WWB v Aipanda NO 2018 (2) NR 446 (HC)
- SV v HV 2018 (2) NR 460 (HC)
- Somaeb v Chief Justice and Another 2018 (2) NR 468 (HC)
- Ndemuweda v Government of the Republic of Namibia (Minister of Health and Social Services) 2018 (2) NR 475 (HC)
- Mwoombola and Another v Master of the High Court 2018 (2) NR 482 (HC)
- Spangenberg v Kloppers 2018 (2) NR 494 (HC)
- Bank Windhoek Ltd v Mofuka and Another 2018 (2) NR 503 (SC)
- McLaren and Others NNO v Minister of Finance and Others 2018 (2) NR 509 (HC)
- S v Munuma and Others 2018 (2) NR 521 (HC)
- Conrad v Dohrmann and Another 2018 (2) NR 535 (HC)
- Arandis Power (Pty) Ltd v President of the Republic of Namibia and Others 2018 (2) NR 567 (SC)
- Government of the Republic of Namibia v Phillipus 2018 (2) NR 581 (SC)
- GR v ER 2018 (2) NR 589 (HC)
- Wyss and Another NO v Hungamo and Others 2018 (2) NR 596 (SC)

FLYNOTES

FREE PRESS OF NAMIBIA (PTY) LTD AND OTHERS v NYANDORO (SC)

MAINGA JA, HOFF JA and CHOMBA AJA
2017 OCTOBER 26; 2018 MARCH 1

Constitutional law—Fundamental rights—Freedom of speech and expression guaranteed by art 21(1)(a) of Namibian Constitution—Freedom of speech subject to law of Namibia imposing reasonable restrictions on exercise of right—Media in disseminating information and ideas obliged to wield power of freedom of speech responsibly and with integrity.

Defamation—Defences—Media—Article true or substantially true—Appellant failing to show article true or substantially true—Defences of public benefit and qualified privilege failing.

Defamation—Defences—Media—Publication reasonable and in public interest—Irregularities in issuing pilots' licences in public interest—Third applicant however acting unreasonably and negligently—Conduct falling short of accepted good journalistic practices and Code of Ethics of Society of Professional Journalists—Appeal dismissed.

Defamation—Damages—Quantum—Assessment of sentimental damages done by trial court—Appeal court would only interfere if court misdirected itself by awarding high or low damages based on wrong principle or when appellate court found award so unreasonable as to be grossly disproportionate to injury inflicted—Mitigation of harm by appellant material—Appellant refusing to retract or apologise when called upon to do so—Damages award of court a quo confirmed.

NEW AFRICA DIMENSIONS CC AND OTHERS v PROSECUTOR-GENERAL (SC)

SHIVUTE CJ, MAINGA JA and MOKGORO AJA
2017 JULY 10; 2018 MARCH 8

Criminal procedure—Organised crime—Forfeiture of property—Owner of property—Property proceeds of unlawful activities—Not necessary that owner of property involved in commission of offence—Owner of property wishing to avoid forfeiture order must apply for exclusion of property from forfeiture order—Owner had onus of proving that he or she acquired interest concerned legally and neither knew nor had reasonable grounds of suspecting property proceeds of unlawful activity—Prevention of Organised Crime Act 29 of 2004, ss 61 and 63(1) and (2).

Criminal procedure—Organised crime—Forfeiture of property—Meaning of property—Any property or service, advantage, benefit or reward, including property representing property so derived; proceeds retained or received directly or indirectly in connection with or as a result of unlawful activity by any person and retained or received in Namibia or elsewhere at any time before or after commencement of this Act including property which mingled with property that was proceeds of unlawful activity—Forfeiture order directed at proceeds of unlawful activities regardless of values or assets given or intended to be given in exchange—Prevention of Organised Crime Act 29 of 2004, s 1.

TJIROVI v MINISTER FOR LANDS AND RESETTLEMENT AND OTHERS (HC)

UEITELE J
2017 AUGUST 31; 2018 MARCH 16
[2018] NAHCMD 56

Administrative law—Administrative action—Review—Exhaustion of internal remedies before approaching court—Matter of statutory interpretation whether internal remedy first had to be exhausted—Section 41(8A) of Agricultural (Commercial) Land Reform Act 6 of 1995—Language of section not expressly or by necessary implication prohibiting access to court—Party has choice of seeking appeal or judicial review remedy—Appeal not providing effective relief—Review dealing with lawfulness of decision-making process—Point in limine failing.

Administrative law—Decisions of functionary—Legality of—Minister for Lands and Resettlement exercising power in terms of s 41(3) of Agricultural (Commercial) Land Reform Act 6 of 1995 by allotting farming land to third respondent—Jurisdictional facts prescribed by s 41(3), necessary prerequisite for exercising such power, absent—Exercise of power of allotment only upon recommendation of Land Reform Advisory Commission—Third respondent not recommended for allotment—Allotment not in compliance with art 18 of Constitution—Decision set aside.

Administrative law—Review—Powers of court—Substitution of decision—Only in exceptional cases established by (i) foregone conclusion; (ii) bias or incompetence; (iii) when court was in better position to exercise power itself; and (iv) extent to which exercise by court of power would infringe doctrine of separation of powers.

NEW FORCE LOGISTICS CC v ANTI-CORRUPTION COMMISSION (HC)

MASUKU J
2018 FEBRUARY 1, 14
[2018] NAHCMD 28

Practice—Applications and motions—Application for final relief—Violation of constitutional rights—Provisions of High Court Rule 32(9) and (10) not applicable—Provisions applicable to interlocutory proceedings under part 3 of High Court Rules.

Criminal procedure—Search and seizure—Search warrant—Attachment of trucks, containers and their contents without warrant in terms of s 23 of Anti-Corruption Act 8 of 2003—Onus on respondent to show strict compliance with statutory requirements—Evidence of state of mind of person executing search and seizure without warrant crucial for establishing reasonable suspicion of commission of offence and reasons for not obtaining warrant—Truck drivers not informed of peremptory s 25(3)(a) and (b) statutory rights—Respondent failing to discharge onus—Order granted for restoration of goods under attachment.

DAMA v OLD MUTUAL LIFE ASSURANCE LTD (NLD)

CHEDA J

2017 OCTOBER 6; DECEMBER 4

[2017] NAHCNLD 117

Contract—Duress—Requirements—Threat that appellant's 'life will be spoiled' if he did not sign acknowledgement of debt—Appellant had onus of proving duress resulting in signing acknowledgment of debt—Required that duress relate to imminent injury by party or his property and that conduct was contra bonos mores—Threat of unspecified action not specific and live threat—Appellant failing to discharge onus—Appeal dismissed.

S v AUKONGO (NLD)

TOMMASI J and JANUARY J

2017 NOVEMBER 14; 2018 FEBRUARY 6

[2018] NAHCNLD 9

Maintenance—Failure to pay maintenance in contravention of s 39(1) of Maintenance Act 9 of 2003—Accused pleading not guilty—Conversion of procedure into enquiry—Accused convicted and sentenced—Failure to explain defence available in s 39(2) to accused before pleading—Failure amounting to irregularity vitiating whole procedure—Conviction and sentence set aside.

NAMIBIA NATIONAL TEACHERS' UNION v GOVERNMENT OF THE REPUBLIC OF NAMIBIA AND OTHERS NO (LC)

ANGULA DJP

2017 OCTOBER 20; 2018 FEBRUARY 21

[2018] NALCMD 2

Labour law—Unfair labour practice—What constitutes—Incentive payments to qualified teachers teaching in remote areas—Term incorporated in employment agreement containing non-variation clause—Employer unilaterally replacing incentive payments with allowances payable to all staff employed in remote and harsh areas—Employer could not unilaterally alter term or condition of contract—Conduct amounting to unfair labour practice under s 50(1)(e) of Labour Act 11 of 2007—Arbitrator's award set aside.

S v NDAMWOONGELA (HC)

NDAUENDAPO J and LIEBENBERG J

2017 JULY 24; OCTOBER 6

[2017] NAHCMD 282

Criminal procedure—Arrest—Lethal force—Use of force by police officer—Innocent third party killed—Provisions of s 49 of Criminal Procedure Act 51 of 1977—Section not applicable to justify killing of innocent passenger travelling in same vehicle as suspect who was being pursued—Section 49 only applicable as justification for inflicting harm to persons whose arrest were sought or whose flight was sought to be prevented.

KAPIKA v MINISTER OF URBAN AND RURAL DEVELOPMENT AND OTHERS (HC)

UEITELE J

2017 AUGUST 22; OCTOBER 1; 2018 MARCH 9

[2018] NAHCMD 51

Practice—Parties—Locus standi—Applicant seeking enforcement of his designation as chief of Ombuku Traditional Community according to customary law and traditional practices—Applicant had locus standi to obtain legal clarity about his legal entitlements.

Customary law—Traditional authority—Powers of—Designation of chief—Designation according to customary law—Traditional community or members authorised by customary law required to apply to minister for approval of designate candidate as chief—Traditional authority not applying for designation of fourth respondent as chief—Minister’s appointment of fourth respondent as chief set aside—Traditional Authorities Act 25 of 2000, ss 4 and 5(1).

WWB v AIPANDA NO (HC)

PRINSLOO J

2017 JULY 7; SEPTEMBER 25; OCTOBER 31; NOVEMBER 8; 2018 FEBRUARY 9

[2018] NAHCMD 22

Marriage—Divorce—Grounds for—Incurable insanity—Requirements—Whether defendant was of unsound mind—Whether defendant had been subjected to provisions of Mental Health Act 18 of 1973 for period not less than seven years—Whether defendant was incurable—Divorce Laws Amendment Ordinance 18 of 1935, s 1(1)(a) required proof of incurability through evidence of three medical practitioners, two of whom appointed by court—Plaintiff failing to prove defendant incurably insane.

Marriage—Divorce—Proprietary rights—Forfeiture of benefits of marriage in community of property—Property acquired during marriage registered in defendant’s name—Plaintiff paying bond from her earnings—Husband not contributing towards acquisition and maintenance of property—Exceptional circumstances required and proved by plaintiff—Forfeiture of benefits of specific property granted.

SV v HV (HC)

PRINSLOO J

2018 MARCH 6, 16

[2018] NAHCMD 55

Practice—Judicial case management—Relief from imposing sanctions for non-compliance with court orders contemplated in High Court Rules 53 and 54—Application in terms of rule 56 for relief from sanctions—Plaintiff afforded opportunity of showing good cause and providing evidence why sanctions should not be imposed—Plaintiff’s default intentional—Plaintiff failing to show good cause—Particulars of claim struck out in terms of rule 53(2)(b).

SOMAEB v CHIEF JUSTICE AND ANOTHER (HC)

ANGULA DJP

2017 OCTOBER 24; 2018 MARCH 7

[2018] NAHCMD 57

Judge—Actions against—Proceedings against Chief Justice—Applicant sought order against Chief Justice—Applicant failing to obtain consent from most senior judge of Supreme Court prior to instituting proceedings against Chief Justice as required by s 12 of Supreme Court Act 15 of 1990—Section provided procedural mechanism for protecting judiciary against meritless lawsuits—Application struck from role.

NDEMUWEDA v GOVERNMENT OF THE REPUBLIC OF NAMIBIA (MINISTER OF HEALTH AND SOCIAL SERVICES) (HC)

UEITELE J

2017 NOVEMBER 17; 2018 MARCH 23

[2018] NAHCMD 67

Constitutional law—Constitution—Courts—Judicial power of Namibia vesting in courts—Courts guardians of Constitution—Ministry failing to comply with court order—Courts have power to ensure compliance with orders—Organs of state to assist and protect courts to ensure their independence, impartiality, dignity, accessibility and effectiveness—In order to ensure that the courts' authority was effective, an order of court was binding on all persons and organs of state—Disregarding court orders undermining and eroding foundational basis of Republic and could lead to constitutional crisis—Namibian Constitution, art 78.

Contempt of court—What constitutes—Unlawful intentional mala fide disregard of court order—Ministry showing good cause for failure to obey court order—Ministry not unlawfully and intentionally disobeying order—Ministry undertaking to make payment noted.

MWOOMBOLA AND ANOTHER v MASTER OF THE HIGH COURT (HC)

UEITELE J

2017 DECEMBER 19; 2018 APRIL 20

[2018] NAHCMD 103

Constitutional law—Fundamental rights—Property—Right of person to dispose of their property as they pleased in death and in life—Right enshrined in art 16(1) of Constitution—Rules governing testamentary capacity and construction of wills not to deprive testatrix of freedom of testation—Strict compliance with s 2(1)(a)(iii) and (iv) of Wills Act 7 of 1953 resulting in invalidating will in violation of fundamental right—Substantial compliance with statutory provisions—Will valid.

SPANGENBERG v KLOPPERS (HC)

PRINSLOO J

2018 FEBRUARY 27; MARCH 22; APRIL 5

[2018] NAHCMD 81

Practice—Judgments and orders—Interlocutory proceedings—Order refused with costs including costs of one instructed and one instructing counsel—Judgment final—Court functus officio—Exception created by rule 103(1)(b) of High Court Rules for variations of costs orders not applicable as cost order was granted after having heard argument in respect thereof—Costs limited to N\$20 000—Rule 32(11) of High Court Rules.

BANK WINDHOEK LTD v MOFUKA AND ANOTHER (SC)

MAINGA JA, HOFF JA and FRANK AJA

2018 MARCH 14; APRIL 3

Review—Supreme Court—Irregularities in trial court proceedings—Irregularity denoted conduct of proceedings and not result thereof—Court failing to make ruling whether matter urgent, failed to grant condonation as required by rule 73 of High Court Rules and stayed proceedings without argument on merits—Irregularity committed—Court pronounced itself on matter not before it—Proceedings set aside.

MCLAREN AND OTHERS NNO v MINISTER OF FINANCE AND OTHERS (HC)

MASUKU J

2018 MARCH 28; APRIL 20

[2018] NAHCMD 101

Company—Winding up—Voluntary winding up—Liquidators applying for establishing commission of enquiry in terms of provisions of ss 423 and 424 of Companies Act 28 of 2004—Purpose of ss 423 and 424—Summoning of directors or persons believed to possess company property or were indebted to company or for giving information about trade affairs or misconduct of company in liquidation—Sections 423 and 424 only applicable where company involuntarily wound up—No evidence or suspicion of wrongdoing or impropriety regarding company funds or property—Application amounting to abuse of court’s process, dismissed.

S v MUNUMA AND OTHERS (HC)

UNENGU AJ

2018 FEBRUARY 21, 22; APRIL 10

[2018] NAHCMD 87

Criminal procedure—Evidence—Witness—Expert—Function of—Expert assisting court in matters of specialised skill or knowledge—Professional expertise required—Evidence required of witness’s expertise and qualification to express opinion—Opinion to be based on admissible evidence—Accused witness not qualified to give expert evidence about boundaries of Namibia.

CONRAD v DOHRMANN AND ANOTHER (HC)

MASUKU J

2016 NOVEMBER 7–11; 2017 SEPTEMBER 11–15; 2018 JANUARY 30; MAY 14

[2018] NAHCMD 121

Contract—Breach—Remedies—Sale of members’ interest in close corporation and sale of furniture and inventory—Failure to deliver furniture and inventory—Repudiation—Contract divisible—Two distinct and separable items recorded and sold for separate prices—Modes of delivery different for two distinct items—Intention of parties, practicalities and convenience admitted of divisibility—Contract divisible.

Practice—Authority—Foreign authority—Compliance with rule 130 of High Court Rules—Counsel relying on foreign authority, must certify that no Namibian authority was found—Legal practitioners must comply with rule—Cases cited must refer to particular pages, paragraphs or excerpts relied upon—Convenience and fairness to court and opponent.

ARANDIS POWER (PTY) LTD v PRESIDENT OF THE REPUBLIC OF NAMIBIA AND OTHERS (SC)

MAINGA JA, SMUTS JA and HOFF JA

2018 MARCH 1, 16

Appeal—Leave to appeal—Interlocutory matters—Leave of High Court required—Dismissal of review based on undue delay in launching review application—Order not interlocutory—Order finally disposing of review application—Leave to appeal not required.

Review—Tender—Award—Tender awarded by public authority outside validity period prescribed in procurement policy—Procurement policy ensured fair, reasonable and transparent process—Tender awarded outside validity period invalid and set aside.

GOVERNMENT OF THE REPUBLIC OF NAMIBIA v FILLIPUS (SC)

DAMASEB DCJ, SMUTS JA and FRANK AJA

2018 MARCH 15; APRIL 6

Appeal—Leave to appeal—Interlocutory matters—Leave of High Court required—Rationale for requiring leave to appeal against interlocutory matters restated—Interlocutory matters must be appealable and included all orders incidental to main dispute including orders which had final effect but did not dispose of main action—Special plea raised incidental to main matter—Special plea not finally disposing of respondent’s action—Special plea appealable with leave of court a quo—Leave not granted—Appeal struck from roll—High Court Act 16 of 1990, s 18(3).

GR v ER (HC)

PRINSLOO J

2018 APRIL 13; MAY 14, 18

[2018] NAHCMD 134

Marriage—Custody of minor children—Interim custody order—Applicant applying in terms of rule 103(1)(a) and (2) of High Court Rules for rescission of interim custody order of minors granted to respondent—Custody proceedings initially brought in terms of rule 90—Interim custody awarded to respondent in absence of applicant after hearing oral evidence—Rule 103 not applicable to interim matrimonial matters—Applicant should have applied for a variation of order in terms of rule 90(7)—Rescission refused.

WYSS AND ANOTHER NO v HUNGAMO AND OTHERS (SC)

DAMASEB DCJ, SMUTS JA and FRANK AJA

2018 APRIL 9, 23

Close corporation—Members—Cessation of membership—Death of member—Remaining members have pre-emptive right of acquiring deceased member's interest upon his death in terms of s 35 of Close Corporations Act 26 of 1988—Property rights under art 16 of Constitution enforceable by heir and executor subject to existing restrictions—Member required consent during lifetime to dispose of member's interest—Section 35 of Act ensured that same restriction on disposal of membership interest