



JUTA'S ADVANCE NOTIFICATION SERVICE

AUGUST 2018

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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, when 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 the Attorneys Act 53 of 1979, which insists on prior registration or service of articles, is not required; attendance at a 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 a 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 the 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 the appellant had reasonable prospects on appeal did not per se mean that the 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 valid. *Mwoombola and Another v Master of the High Court* 2018 (2) NR 482 (HC)

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[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