



JUTA'S ADVANCE NOTIFICATION SERVICE

NOVEMBER 2018

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

Herewith the cases in the November 2018 law reports

JUDGMENTS OF INTEREST IN THE NOVEMBER 2018 EDITIONS OF THE SALR, SACR AS WELL AS THE NAMIBIAN LAW REPORTS 2018 (3).

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

SOUTH AFRICAN LAW REPORTS

Decision of South African Football Association's Arbitration Tribunal: whether administrative action

Ndoro v Safa concerns a direction of the National Soccer League (NSL) to the football club Ajax Cape Town, that one of its players, Mr Tendai Ndoro, not be fielded. Ajax and Ndoro take the matter to the Dispute Resolution Chamber of the NSL and it finds Ndoro eligible to play. However, the NSL appeals to the Arbitration Tribunal of the South African Football Association, and it finds the Chamber has no jurisdiction in the matter. Ajax and Ndoro then apply to the High Court to review the Tribunal's award; and it considers the question whether the Tribunal's decision is administrative action. *Ndoro and Another v South African Football Association and Others* 2018 (5) SA 630 (GJ)

Waiver of right to claim maintenance on dissolution of marriage

In *ST v CT* the court considers the enforceability of a spouse's waiving of her right to claim maintenance on the dissolution of the marriage, recorded in the couple's antenuptial contract. Is the clause contrary to public policy? *ST v CT* 2018 (5) SA 479 (SCA)

Is a 'Club fee' a cost of credit?

This case concerns a retailer's offering of a 'Club' membership to its credit customers. The membership gives access to various services and benefits. Is the Club membership fee a cost of credit in s 101 of the National Credit Act 34 of 2005? *Edcon Holdings Ltd v National Consumer Tribunal and Another* 2018 (5) SA 609 (GP)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Charge of contravening statute; defence of customary law right to perform act

When the State charge Mr Gongqose with contravening the Marine Living Resources Act 18 of 1998 by attempting to fish in a marine protected area, Mr Gongqose raises as his defence, a customary law right of access to marine resources in the area concerned. The appeal court is posed the questions, inter alia: has the Act extinguished the right; and is Mr Gongqose's act,

performed under the right, lawful? *Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others* 2018 (2) SACR 367 (SCA)

Factors supporting mitigation of sentence: belief in witchcraft

In this case the accused's belief in witchcraft has a causative role in his attack on the victim. At sentencing, is the belief a valid mitigating factor? *S v Xaba and Others* 2018 (2) SACR 387 (KZP)

18 months' direct imprisonment for theft of biltong

The accused, a 29 year old father of three, steals biltong to the value of R1100, and receives an 18 month prison sentence. Is the sentence appropriate? *S v Heuwel* 2018 (2) SACR 436 (WCC)

THE NAMIBIAN LAW REPORTS

Vicarious liability—standard of care expected of a medical practitioner

The respondent accidentally shot himself through the leg, which eventually, after treatment in a state hospital, resulted in the amputation of his leg. The respondent sued the appellant, the Minister of Health and Social Services, for the recovery of damages caused by the negligence of the doctor and/or other medical officers employed by the appellant. The court considers the standard of care expected from general practitioners and whether it is the same for specialist practitioners. *Minister of Health and Social Services NO v Kasingo* 2018 (3) NR 714 (SC)

The constitutionality of the imposition of land tax in terms of the Agricultural (Commercial) Land Reform Act 6 of 1995

The appellant launched numerous constitutional applications in the court a quo in which its main attack was directed against ss 76–80 of the Agricultural (Commercial) Land Reform Act 6 of 1995 (the Act) which provide for the imposition of land tax. The High Court found that the land tax imposed under these sections passed constitutional muster and dismissed the challenges to the regulations and other decisions taken pursuant to them. The Supreme Court held that the approach of the appellant that land tax was unconstitutional for any authority other than the legislature to prescribe or determine any element of a tax was fundamentally misconceived and was in conflict with an ordinary meaning of the term 'provide for taxation' which was contained in art 63(2)(b) of the Constitution of Namibia. *Kambazembi Guest Farm CC t/a Waterberg Wilderness v Minister of Lands and Resettlement and Others* 2018 (3) NR 800 (SC)

Right to privacy guaranteed under art 13 of the Constitution of Namibia demanding strict interpretation of search and seizure provisions

The state sought to have six search warrants issued by a magistrate in terms of s 22(4) of the Anti-Corruption Act 8 of 2003 admitted into evidence. The search warrants were issued on the mentioned dates directing 'all authorised officers' to search the premises identified. The court held that by its ordinary meaning an authorised officer must be identified and mentioned in the warrant to conduct the entry and search, not any or all officers. *S v Lameck and Others* 2018 (3) NR 902 (HC)

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Kind Regards

The Juta Law Reports Team

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2018 JUNE 19; JULY 10, 13
[2018] NAHCMD 212

Banker—Relationship between banker and client—Contractual relationship of debtor and creditor—Same relationship between client and Nampost after lifting of regulations published in terms of Posts and Telecommunications Act 19 of 1992—Sui generis relationship, one of deposit, debtor and creditor and agency—Prescription did not run from date of deposit—Creditor had right to determine when performance must be made—Contractual relationship between bank and customer reiterated.

MINISTER OF HEALTH AND SOCIAL SERVICES NO v KASINGO (SC)

DAMASEB DCJ, HOFF JA and MOKGORO AJA
2016 JULY 8; 2018 JULY 6

Delict—Liability for—Vicarious liability—Negligence of medical practitioner—Standard of care expected from general practitioner not same as specialist practitioner—Prevailing circumstances—Lack of expert staff and facilities in state facility—Causation—Omission by doctor or staff too remote to attract legal liability—Absence of sufficiently close connection between alleged omission and consequence, namely amputation of leg.

BEUKES AND ANOTHER v FIRST NATIONAL BANK LTD AND OTHERS (HC)

ANGULA DJP

2018 APRIL 3, 13

[2018] NAHCMD 94

Execution—Sale in execution—Immovable property—Immovable property primary home of applicants—Valuation of immovable property—Valuation certificate only admissible as proof of value of property if regional or municipal authority council or land valuation not available—High Court Rules, rule 110(9).

NAMDEB DIAMOND CORPORATION (PTY) LTD v COETZEE (SC)

MAINGA JA, HOFF JA and FRANK AJA

2018 JULY 9; AUGUST 1

Appeal—To Supreme Court—From decision in High Court—When leave to appeal required—Application for leave to appeal in High Court struck from roll—Order striking appeal made by High Court sitting as court of appeal—Section 14(1) of Supreme Court Act 15 of 1990 qualified by s 18(2)(b) of High Court Act 16 of 1990—Leave to appeal to Supreme Court required and if refused, petition procedure in s 14(6) of Supreme Court Act to be followed.

MBELLE PANEL BEATERS & TRANSPORT CC v WILLEMSE (NLD)

CHEDA J

2018 FEBRUARY 20, 21; MARCH 12

[2018] NAHCNLD 21

Prescription—Extinctive prescription—Interruption—Service of process—Letter of demand not constituting service of 'process' affecting running of prescription—Prescription running from agreed date of payment—No demand for payment necessary—Debt due and payable within three years of agreed date—Summons issued after claim became prescribed—Special plea upheld.

UUTONI v FREEDOM SQUARE INVESTMENTS TWENTY FOUR CC t/a OSHAKATI FISH SHOP (NLD)

CHEDA J

2018 MAY 7; JUNE 11

[2018] NAHCNLD 51

Practice—Judgments and orders—Summary judgment—Drastic civil procedure—Opposition to—Requirements—Court to be appraised of material facts with sufficient particularity and completeness to make proper determination—Defendant's defence meritorious and arguable—Application dismissed.

DIRECTOR, GENERAL NAMIBIA CENTRAL INTELLIGENCE SERVICE AND ANOTHER v HAUFIKU AND OTHERS (HC)

GEIER J

2018 APRIL 20; JUNE 18

[2018] NAHCMD 174

Constitutional law—Fundamental rights—Freedom of speech and expression and media guaranteed by art 21 of Constitution—Function of press to ferret out corruption, dishonesty and graft wherever it might occur and to expose perpetrators.

Interdict—Final interdict—When refused—Applicant seeking interdict preventing media from publishing article—Pleadings vague—Did not plead factual matter informing secrecy, sensitivity and classification of information.

Interdict—Final interdict—Requirements for—Preventing media from publishing article aimed at exposing certain alleged corrupt activity and unauthorised expenditure—Injury actually committed or reasonably apprehended—Could be no reasonable apprehension of injury or harm where information sought to be interdicted was already in public domain—It would make no sense to interdict information which was to form substance of newspaper article.

KAMBAZEMBI GUEST FARM CC t/a WATERBERG WILDERNESS v MINISTER OF LANDS AND RESETTLEMENT AND OTHERS (SC)

MAINGA JA, SMUTS JA and MOKGORO AJA
2018 JULY 2, 27

Constitutional law—Legislation—Constitutionality of—Agricultural (Commercial) Land Reform Act 6 of 1995, ss 76–80—Argument that land tax regime in Act amounted to impermissible delegation of legislative power to minister—Such delegation alleged to be in conflict with doctrine of separation of powers and in direct conflict with art 63(2)(b) of Constitution—Appellant’s approach fundamentally misconceived.

Constitutional law—Legislation—Constitutionality of—Agricultural (Commercial) Land Reform Act 6 of 1995 and various regulations—Appellant failed to show how each of impugned regulations offended against constitutional provisions and principles relied upon or common law—Attack upon constitutionality of land tax regime as provided for in Act and regulations was without merit.

Costs—Constitutional litigation—Proper approach—Manner in which multiple applications were pursued at minimum fell within category of manifestly inappropriate—Conduct and unnecessary proliferation of this litigation was to be discouraged, resulting in considerable costs and judicial time being spent upon it—Ordered to pay costs.

ROAD FUND ADMINISTRATION v SKORPION MINING COMPANY (PTY) LTD (SC)

DAMASEB DCJ, SMUTS JA and HOFF JA
2018 JUNE 7; JULY 13

Appeal—Condonation—Late prosecution and reinstatement—Unacceptable conduct of appellant’s counsel—High Court allowed art 18 of Namibian Constitution to be used as cause of action and to grant constitutional damages in respect of what was otherwise private law action for damages—Not proper case to refuse condonation out of hand without considering prospects of success.

Constitutional practice—Courts—Decisions of—Constitution must be last and not first resort in resolution of disputes that come before courts—Court was faced with two mutually destructive versions in action proceedings, dispute was capable of and was one which had to be resolved by common law.

STANDARD BANK NAMIBIA LTD v SHIPILA AND OTHERS (SC)

HOFF JA, CHOMBA AJA and MOKGORO AJA
2016 OCTOBER 11; 2018 JULY 6

Practice—Judgments and orders—Default judgment—Order declaring bonded property executable—Whether new application required—Court not precluded from considering order for foreclosure of bond together with order for default judgment in respect of capital amount—High Court Rules, rule 108(1)(a) and (b).

Practice—Judgments and orders—Default judgment—Order declaring bonded property executable—Where immovable property was primary home of judgment debtor, substantial compliance with Form 24 would suffice—Court must consider all relevant circumstances including ‘less drastic measures than a sale in execution’.

ARANGIES AND ANOTHER v UNITRANS NAMIBIA (PTY) LTD AND ANOTHER (SC)

SHIVUTE CJ, HOFF JA and FRANK AJA

2018 JUNE 22; JULY 27

Review—By Supreme Court—In what cases—Supreme Court Act 15 of 1990, s 16—Irregularity in case management proceedings—Audi alteram partem—Managing judge committed irregularity but had he granted applicants' legal practitioners full hearing same conclusion not to admit witness statements and video clip should have been reached.

Practice—Judicial case management—Orders made in case management—Unacceptable for applicants to, contrary to order and with total disregard for case management process, shortly before resumption of trial file witness statements in respect of matter which, had there been proper preparation, should have been filed at outset of case.

S v KAPIA AND OTHERS (HC)

LIEBENBERG J

2018 JUNE 11–12, 28; JULY 5

[2018] NAHCMD 202

Criminal procedure—Sentence—Fine—Crimes ranging from fraud, theft by conversion and contravention of s 424(3) of Companies Act 61 of 1973—Factors considered when imposing sentence—Court taking judicial notice that 'white-collar' crimes on increase—Punishment in form of fines imposed in so called 'white-collar' crime should not be such that it made game seem worth candle.

Criminal procedure—Sentence—Generally—Remorse as mitigating factor—Important factor when considering deterrence as objective of punishment.

Criminal procedure—Sentence—Fraud—Competent sentence for conviction of fraud and contravening s 424(3) of Companies Act 61 of 1973—Same sentencing objectives could be achieved by imposition of punishment other than direct imprisonment.

Criminal procedure—Sentence—Theft—Competent sentence for conviction of theft (by conversion) and contravening s 424(3) of Companies Act 61 of 1973—Nature of and circumstances under which accused misused his company being more reprehensible, sentence of imprisonment seemed warranted.

S v LAMECK AND OTHERS (HC)

LIEBENBERG J

2018 JUNE 19–20; JULY 16

[2018] NAHCMD 214

Criminal procedure—Evidence—Admissibility—Search warrant—Addressed to all authorised officers and not specified officer—Right to privacy guaranteed under art 13 of Constitution and demanding strict interpretation of search and seizure provisions.