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FEBRUARY 2019

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JUDGMENTS OF INTEREST IN THE FEBRUARY 2019 EDITIONS OF THE SALR, SACR AS WELL AS THE NAMIBIAN LAW REPORTS 2018 (4).

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

SOUTH AFRICAN LAW REPORTS

Private schools: cancellation of schooling agreements

In this case, a private school cancelled its agreement with parents to educate their children, on account of the behaviour of the father. Among the issues in the Supreme Court of Appeal, was whether the parents or the children were owed a hearing before the cancellation. *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA)

Refugee Appeal Board: proceedings before

Applicant's application for asylum was refused, and his appeal to the Refugee Appeal Board dismissed. On review, the High Court considers the burden and standard of proof before the Board; the approach the Board ought to adopt to information it gathers; the investigative duty of the Board in regard to s 3(a) of the Refugees Act 130 of 1998; and the approach to be adopted to s 3(b). *FNM v Refugee Appeal Board and Others* 2019 (1) SA 468 (GP)

Motor vehicle accidents: identity of vehicles and their owners

A rock fell from a truck, penetrated plaintiff's windscreen, and struck him on the head. Plaintiff tried to bring his claim within s 17(1)(a) of the Road Accident Fund Act 56 of 1996. However, he could not identify the specific vehicle from which the rock fell, though he could identify 23, from one of which, it probably came. He could also identify those vehicles owners. The issue was whether the owner and vehicle were sufficiently identified, to bring the claim within the section. *Jones v Road Accident Fund* 2019 (1) SA 514 (GP)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Conviction for murder changed to culpable homicide

The appellant grabbed a steak knife and directed a stabbing movement towards the deceased who was hitting and dragging her by the hair from behind. The court held that she must have foreseen possibility she might injure or kill the deceased but that there was no proof that she had reconciled herself with the occurrence of death or disregarded consequences of it occurring. The conviction for murder was changed to one of culpable homicide. *S v Botha* 2019 (1) SACR 127 (SCA)

Audibly uttering obscenities in court not amounting to contempt of court *in facie curiae*

An accused, appearing for the third time, audibly uttered obscenities when his case was postponed yet again. The court on appeal found that magistrate and prosecutor overreacted to frustrations expressed by accused and recommended that both the National Prosecuting Authority and the Magistrates Commission educate officers of the court in the scope of their powers when unseemly behaviour occurred. *S v Meiring* 2019 (1) SACR 227 (GJ)

Meaning of 'exceptional circumstances' in s 17(2)(f) of Superior Courts Act 10 of 2013

The mere recanting by a state witness did not, without more, amount to 'exceptional circumstances' in terms of s 17(2)(f) of Superior Courts Act 10 of 2013. *S v Liesching and Others* 2019 (1) SACR 178 (CC)

THE NAMIBIAN LAW REPORTS

Whether a South African clinical psychologist giving expert evidence in a Namibian court could be considered as practising as provided for in the Social Work and Psychology Act 6 of 2004

The plaintiff gave notice that he intended calling an expert clinical psychologist (D) to give expert evidence in the main action. The defendant objected to the calling of D as an expert witness on the ground that D was a South African national and as a result had to be registered in Namibia as contemplated in s 17 of the Social Work and Psychology Act 6 of 2004. The practice of a clinical psychologist included reporting and testifying in a court as an expert. D had drafted the report in question and would base his evidence and opinion on the said report. D would be compensated for the services that he rendered within the course and scope of his practice, which included presenting the said report to court. D would accordingly be practising when he testified and produced his report in court and therefore D had to be registered with the council in Namibia. *CS v CS* 2018 (4) NR 973 (HC)

Maternal filicide—sentence of 25 years' imprisonment imposed

The accused had admitted she had unlawfully and with intent to cause the death of her biological three-year-old child suffocated her. She further admitted that on the same date the murder took place she attempted to set alight the motor vehicle in which she and the deceased were, with the intention to defeat or obstruct the course of justice. In mitigation she testified that at the time of the incident she was enraged at her family and her ex-partner and felt anger towards them. The accused's actions on that day were irrational, and she was driven by anger and completely lost perspective and that this was a factor that the court in sentencing should take into consideration. Persons who fail to take control of their emotions when facing life's challenges will not be rewarded and weight would not be attached thereto in determining sentencing. *S v Seas* 2018 (4) NR 1050 (HC)

The constitutionality of s 66 of the Magistrates Courts Act, 1944, rules 12(1), 36 and 43 of the Magistrates' Courts Rules

The first applicant, through the second applicant, a close corporation, was the registered owner of a sectional title unit consisting of section No 32 and in a building known as Urban Space in Windhoek. The first respondent, the body corporate which managed the Urban Space building, obtained judgment by default in a magistrates' court against the close corporation in respect of arrear levies and penalties for unit 32. The judgment remained unsatisfied and unit 32 was attached pursuant to a warrant of execution and sold in execution to the second respondent. The applicants sought an order declaring s 66 of the Magistrates Courts Act 32 of 1944 invalid insofar as it authorised the sale in execution of immovable property if insufficient movable property to satisfy a judgment or order of a magistrates' court was not found, declaring rule 12 of the Magistrates' Courts Rules invalid insofar as it authorised the clerk of the magistrates' court to grant judgment by default, declaring rule 43 of the rules invalid

insofar as it authorised the issue of a warrant of execution against immovable property without the supervision of a magistrate and not in the same manner as prescribed by rule 108 of the Rules of the High Court of Namibia which required the matter to be brought before a judge in order to obtain an order declaring the property specially executable. The differentiation in procedures in the magistrates' courts and the High Court was not reasonable and not rationally connected to the purpose for which the magistrates' courts were created. Section 66(1)(a) of the Magistrates Courts Act and rules 36 and 43 of the Magistrates' Courts Rules insofar as they permitted the sale in execution of immovable property without judicial oversight offended against art 10(1) of the Constitution. There was thus the need to align s 66(1)(a) of the Magistrates Courts Act and rules 36 and 43 of the Magistrates' Courts Rules with the procedures set out in rule 108 of the High Court Rules. *Hiskia and Another v Body Corporate of Urban Space and Others* 2018 (4) NR 1067 (HC)

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SOUTH AFRICAN LAW REPORTS

FEBRUARY 2019

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- Compass Insurance Company Ltd v Cobus Smit Projekbestuur CC and Another 2019 (1) SA 413 (WCC)
- Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB)
- FNM v Refugee Appeal Board and Others 2019 (1) SA 468 (GP)
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- Van der Bijl and Another v Featherbrooke Estate Home Owners' Association (NPC) 2019 (1) SA 642 (GJ)

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[2018] ZASCA 150

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SOS SUPPORT PUBLIC BROADCASTING COALITION AND OTHERS v SOUTH AFRICAN BROADCASTING CORPORATION (SOC) LTD AND OTHERS (CC)

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Media—Broadcasting—Television—SABC—Channel-distribution agreement with private broadcaster—Power of Competition Commission to investigate—Not restricted—Commission may use full search and summons powers—May interview those who signed agreement—Competition Act 89 of 1998, ch 5 part B; s 49A.

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[2018] ZASCA 143

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[2018] NAHCMD 219

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[2018] NAHCMD 102

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[2018] NAHCMD 315

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2018 SEPTEMBER 6, 7, 18

[2018] NAHCMD 289

Criminal procedure—Sentence—Plea of guilty—Such plea a factor to be taken into account in sentencing—Guilty plea should be followed by sincere expression of remorse given in evidence under oath for it to be mitigating factor—Failing to testify about his feelings towards his victims' harm, pain and suffering accused not taking court into his confidence—Guilty plea accorded less weight.

Criminal procedure—Sentence—Minimum sentences—Rape—Combating of Rape Act 8 of 2000—Substantial and compelling circumstances justifying lesser sentence—Exceptional circumstances not required for finding of substantial and compelling circumstances—All factors to be considered—Court to determine whether substantial and compelling circumstances exist in circumstances of case—Victims subjected to brutal assaults with infliction of grievous bodily harm and death—No substantial and compelling circumstances found to exist justifying lesser sentence.

Criminal procedure—Sentence—Multiple counts—Serious offences—Imposition of lengthy terms of imprisonment inevitable—Life imprisonment—Correctional Services Act 9 of 2012, s 99—Governs commencement, computation and expiry of sentences—Any further term of imprisonment imposed in addition to life sentence to be served concurrently with earlier sentence of life imprisonment in terms of s 99(2)—Irrespective whether further term exceeds 371–2 years' imprisonment.

S v SEAS (HC)

LIEBENBERG J

2018 AUGUST 13, 17

[2018] NAHCMD 245

Criminal law—Murder—Sentence—Maternal filicide—Accused's motive for murdering child was to get back at ex-partner—Accused's action irrational and driven by anger—Persons who fail to take control of their emotions when facing life's challenges will not be rewarded and weight would not be attached thereto in determining sentencing—Sentence of 25 years' imprisonment imposed.

Criminal law—Murder—Sentence—Generally—Courts not only under duty to uphold rule of law but also have duty to reflect society's indignation and antipathy towards those making themselves guilty of heinous crimes—Aggravating factors—Murder was a serious offence—Offence committed against innocent child by mother—Accused sole provider and protector of minor child—Commission of offence premeditated—These factors weigh heavily against accused—Mitigating factors—Accused pleaded guilty—Accused showed remorse during trial—Accused would have to live with pain and feelings of guilt for as long as she lived—Not likely that accused would repeat this offence—Accused regretting what she had done to her own child—This weighed heavily in accused's favour—Accused's personal circumstances simply did not measure up to gravity of offence and interests of society—Imposition of lengthy term of imprisonment on charge of murder was therefore inescapable.

S v BOOIS (HC)

NDAUENDAPO J

2018 SEPTEMBER 4, 18

[2018] NAHCMD 291

Criminal procedure—Sentence—Previous convictions—Accused convicted of murder, rape, assault by threat and defeating or obstructing the course of justice—Serious offences—Accused having previous conviction for rape prior to Combating of Rape Act 8 of 2000—Therefore liable to minimum sentence of 20 years' imprisonment for present rape—Combating of Rape Act 8 of 2000, s 3(b)(ii)—Accused sentenced to life imprisonment for murder of rape victim who was visibly pregnant—Retribution and deterrence requiring most severe punishment available for such brutal killing of rape victim.

HISKIA AND ANOTHER v BODY CORPORATE OF URBAN SPACE AND OTHERS (HC)

UEITELE J

2017 OCTOBER 5; 2018 AUGUST 31; SEPTEMBER 11

[2018] NAHCMD 279

Magistrates' court—Practice—Service—Summons—Service on close corporation—Irregular service—Not effected at corporation's local office or principal place of business—Nor was service effected on person having any relationship with close corporation—Service of summons invalid as not effected in terms of rule 9(3)(e) of Rules of Magistrates' Courts.

Magistrates' court—Practice—Service—Summons—Service on close corporation—Service effected by affixing summons to door at registered office of close corporation—Neither of rule 9(3)(e) of Rules of Magistrates' Courts nor s 25 of Close Corporations Act 26 of 1988 permitted service of process or document by affixing it to door at registered office of close corporation—Such form of service defective and invalid—Both rule 9(3)(e) and s 25 of Act requiring process or document to be delivered (handed over) to responsible employee at local office, place of business or registered office of close corporation.

Magistrates' court—Practice—Execution—Differentiation between execution procedures in magistrates' court and High Court—Such procedure subject to judicial oversight in High Court but not in magistrates' court—Such differentiation in procedures not reasonable and not rationally connected to purpose for which magistrates' courts created—Rule 12(1)(a) of Magistrates' Courts Rules offending against arts 10(1), 12(1)(a) and 79(1) of Constitution of

Namibia—Furthermore, s 66(1)(a) of Magistrates Courts Act and rules 36 and 43 of Magistrates' Courts Rules insofar as they permitted sale in execution of immovable property without judicial oversight offending against art 10(1) of Constitution and therefore invalid—Procedure in magistrates' courts for execution against immovable property needing to be aligned with procedures set out in rule 108 of High Court Rules.

AKWENYE v AMADHILA (HC)

PRINSLOO J

2018 JULY 30; AUGUST 21, 23

[2018] NAHCMD 252

Practice—Offer of settlement in terms of rule 64 of High Court Rules—Notice in terms of rule 64 containing unconditional settlement offer—Offer made on two of three alternative claims to plaintiff's claims after defendant barred from pleading—Such claim clearly made conditional upon plaintiff not pursuing main claims further—Plaintiff not obliged to accept offer/tender—When offer not accepted, action proceeding in normal way—But failure to accept unconditional offer might be to plaintiff's peril when costs considered—Offer in casu falling short of requirements of rule 64 as alternative claims relied on by defendant not main relief sought by plaintiff—In circumstances not for defendant to pick and choose which claim suitable to satisfy—Application to compel plaintiff to accept offer/tender refused.

KOUJO v MINISTER OF MINES AND ENERGY AND OTHERS (HC)

PRINSLOO J

2018 MAY 18; AUGUST 17, 24

[2018] NAHCMD 260

Administrative law—Administrative action—Review—Where functionary not acting in terms of administrative law and its enabling legislation—Such constituting ground for review—Error in system of ministry resulting in incorrect decision being made—Decision-making process flawed—Decision set aside on review—Constitution of Namibia, art 18.

Mines and minerals—Mining claims—Cancellation of claims—Minerals (Prospecting and Mining) Act 33 of 1992, s 44 read with s 55—Mining commissioner clearly repository of power to cancel mining claims, not minister—Decision of minister to cancel applicant's mining claims irregular and invalid and to be set aside.

Mines and minerals—Mining claims—Granting of—Claims granted on basis of inaccurate coordinates supplied to ministry by applicant for claims—Such resulting in ministry not detecting that claims in same area previously granted to another applicant and resulting in error in ministry's system—Decision-making process in granting of claims flawed—Decision to grant claims set aside—Minerals (Prospecting and Mining) Act 33 of 1992, s 125.

METROPOLITAN BANK OF ZIMBABWE LTD AND ANOTHER v BANK OF NAMIBIA (SC)

MAINGA JA, SMUTS JA and HOFF JA

2018 OCTOBER 9, 23

Company—Winding up—Application—Requirements of s 351(4) of Companies Act 28 of 2004—Non-compliance with s 351(4)—Provisions of section peremptory but effect of non-compliance to be determined by reference to scope and object of provision—Court condoning substantial compliance with provision.

MINISTER OF FINANCE AND ANOTHER v HOLLARD INSURANCE CO OF NAMIBIA LTD AND OTHERS (HC)

MASUKU J

2018 AUGUST 27, 28; SEPTEMBER 20

[2018] NAHCMD 294

Administrative law—Administrative action—Validity—Applicants applying for urgent order declaring that Namibia National Reinsurance Corporation Act 22 of 1998 and certain government notices and regulations issued pursuant were valid and of full force and effect and compelling respondents to comply therewith—Such order sought pending final determination of respondents' application for review and setting aside of government notices and regulations—Collateral challenge by respondents to validity of applicants' administrative action—Held that respondents right party in such proceedings and that right remedy being sought—Party (respondents) bringing judicial review entitled to treat administrative action in question as void and await further developments—This approach not be equated with contumacious disregard for law—Application and applicants' enforcement of government notices and regulations stayed pending determination of respondents' application for review and setting aside of government notices and regulations.

Practice—Applications and motions—Striking out—Certain paragraphs of respondents' answering affidavit on bases that same were scandalous, vexatious or irrelevant—Certain language employed in answering affidavit falling within realms of being scandalous, vexatious or irrelevant—Ordered to be struck out.

S v IYAMBULA: IN RE HAIPUMBU (NLD)

TOMMASI J and CHEDA J
2018 APRIL 11; OCTOBER 2
[2018] NAHCNLD 105

Contempt of court—*In facie curiae*—Magistrates Courts Act 32 of 1944, s 108—Clerk of court prior court sitting refusing to attest affidavit relating to missing court record—Alleged contempt not committed during sitting of court—Contempt pursuant to the provisions of s 108 must be committed during court's sitting—Alleged conduct took place prior to court sitting and could not be classified as contempt in facie curiae—Furthermore, number of violations of fundamental principles of legal system relating to fairness of hearing before magistrate committed—Proceedings unfair—Conviction and sentence set aside on review.

KASHELA v KATIMA MULILO TOWN COUNCIL AND OTHERS (SC)

DAMASEB DCJ, CHOMBA AJA and MOKGORO AJA
2018 OCTOBER 2; NOVEMBER 16

Land—Communal land—Customary land rights—Transfer of land to local authority—Effect of on customary land rights—Benevolent interpretation of sch 5(3) of Constitution required—Holder of customary land rights had acquired right of exclusive use and occupation of land and that right survived and attached to land even after its proclamation as town land—Constitution of Namibia, sch 5(1), sch 5(3) and Communal Land Reform Act 5 of 2002, s 15(2).

KHARISEB v MINISTRY OF SAFETY AND SECURITY AND OTHERS (HC)

ANGULA DJP
2018 JULY 11; NOVEMBER 7
[2018] NAHCMD 355

Police—Dismissal of employee from service—Deemed dismissal of in terms of s 9 of Police Act 19 of 1990—Legal challenge to dismissal—Prescription of—Cause of action arising when official absent for continuous period of 30 days without permission—Defence to prescription that official required to exhaust internal remedies—No such clear intention appearing from legislation—Claim having prescribed.

CENTRAL PROCUREMENT BOARD v NANGOLO NO AND OTHERS (HC)

MASUKU J

2018 MARCH 22; NOVEMBER 9

[2018] NAHCMD 357

Administrative law—Tender award—Review panel—Powers of under Procurement Act 15 of 2015—Apparent conflict between ss 59 and 60 of Act—Proper interpretation of—Panel has power to set aside on review, whether in part, or as a whole, actions or decisions taken by applicant or public entity that were not in compliance with Act; decisions or actions taken in relation to processes leading to eventual award—Decision or action that brought procurement contract into force could not be set aside by panel—Decision to award tender to third respondent had been taken, which resulted in bringing of procurement award into effect—Panel did not have power in terms of s 60 to set aside decision.

Administrative law—Tender award—Standstill period—Standstill period in s 55(5) of Procurement Act 15 of 2015 appeared to be rendered nugatory by provisions of s 59(2)—Semble: Matter may require consideration by legislature.

Administrative law—Audi alteram partem—Requirement of notice of hearing—Service of notice—Notice by way of WhatsApp message insufficient—Principle of fairness should never be sacrificed on altar of convenience, particularly concerning issues of notice and right to be heard.