



## JUTA'S ADVANCE NOTIFICATION SERVICE

APRIL 2019

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

Herewith the cases in the April 2019 law reports

### JUDGMENTS OF INTEREST IN THE APRIL 2019 EDITIONS OF THE *SALR* AND *SACR* LAW REPORTS.

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

#### **SOUTH AFRICAN LAW REPORTS**

##### **Mall owner granted relief against Eskom**

Shopping mall owner Resilient Properties (Pty) Ltd, who had the misfortune of having a mall located in a municipality that wasn't paying Eskom for electricity, invoked an impending humanitarian disaster in getting the Gauteng High Court to grant interdictory relief against Eskom. The High Court found that though Eskom was entitled to cut off supply to the municipality, its knowledge of the humanitarian disaster that would follow made its decision to do so irrational. *Resilient Properties (Pty) Ltd v Eskom Holdings (SOC) Ltd and Others* 2019 (2) SA 577 (GJ)

##### **Third-party-negligence defence fails in dog attack case**

The plaintiff (Cloete) was attacked and seriously injured by three dogs belonging to the defendant (Van Meyereren), and claimed damages under the *actio de pauperie*. Van Meyereren raised a defence of third party negligence, arguing that a thief had left his gate open and allowed the dogs to escape. The Port Elizabeth High Court refused to uphold the defence on the ground that Van Meyereren was unable to prove that the alleged thief had control of the dogs. *Cloete v Van Meyereren* 2019 (2) SA 490 (ECP)

##### **Court orders that persons who qualified as advocates under former Act, be admitted under new Act**

The Grahamstown High Court came to the rescue of advocates who failed to meet the minimum qualifications recently imposed by the Legal Practice Act 28 of 2014. The court found that s 115 of the Act made it clear that the various applicants, who had qualified for admission under the former Act before 1 November 2018, were entitled to be admitted and enrolled as advocates without having to in addition satisfy the requirements of the Legal Practice Act. *Ex part Bakkes and Similar Cases* 2019 (2) SA 486 (ECG)

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

### **Various aspects relating to execution of search-and-seizure operations and validity of search warrants**

The court found, inter alia, that there was no reason why civilian experts should not be used in search-and-seizure operations; Police Investigative Directorate investigators were cast in same position as police officials for the purpose of searches; and the fact that a warrant did not indicate whether the commissioner of oaths acted ex officio did not invalidate said warrant. *Keating and Others v Senior Magistrate and Others* 2019 (1) SACR 396 (GP)

### **Police treating accused as non-suspect to extract admissions might not otherwise have obtained**

The police treated the accused as a non-suspect in order to extract admissions they might not otherwise have obtained if he had been informed of his constitutional rights. Courts were cautioned to be vigilant in examining such circumstances to protect the constitutional right against self-incrimination. *S v Bomvana* 2019 (1) SACR 418 (ECM)

### **Criminalisation of failure to give prior notice of public gathering unconstitutional**

The court found that the criminalisation of the failure to give prior notice of a gathering in terms of 12(1)(a) of the Regulation of Gatherings Act 205 of 1993 constituted an unjustifiable limitation of the right in s 17 of the Constitution to assemble, demonstrate, picket and petition. *S v Mlungwana and Others* 2019 (1) SACR 429 (CC)

## **WE WELCOME YOUR FEEDBACK**

Please send any comments or queries to [lawreports@juta.co.za](mailto:lawreports@juta.co.za).

Kind Regards

**The Juta Law Reports Team**

# **SOUTH AFRICAN LAW REPORTS**

**APRIL 2019**

## **TABLE OF CASES**

- *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC)
- *Commissioner, South African Revenue Service v Volkswagen South Africa (Pty) Ltd* 2019 (2) SA 362 (SCA)
- *GCC Engineering (Pty) Ltd and Others v Maroos and Others* 2019 (2) SA 379 (SCA)
- *Milnerton Estates Ltd v Commissioner, South African Revenue Service* 2019 (2) SA 388 (SCA)
- *Minister of Home Affairs and Another v Ali and Others* 2019 (2) SA 398 (SCA)
- *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 (2) SA 403 (WCC)
- *African Development Bank v TN* 2019 (2) SA 437 (GP)
- *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP)
- *Ex parte Bakkes and Similar Cases* 2019 (2) SA 486 (ECG)
- *Cloete v Van Meyeren* 2019 (2) SA 490 (ECP)
- *Ex parte KF and Others* 2019 (2) SA 510 (GJ)
- *Mayekiso and Another v Patel NO and Others* 2019 (2) SA 522 (WCC)
- *NM v John Wesley School and Another* 2019 (2) SA 557 (KZD)

- Resilient Properties (Pty) Ltd v Eskom Holdings (Soc) Ltd and Others 2019 (2) SA 577 (GJ)
- Samons v Turnaround Management Association Southern Africa NPC and Another 2019 (2) SA 596 (GJ)
- Wings Park Port Elizabeth (Pty) Ltd v MEC, Environmental Affairs, Eastern Cape and Others 2019 (2) SA 606 (ECG)
- Standard Bank of South Africa Ltd v Hendricks and Another and Related Cases 2019 (2) SA 620 (WCC)
- Starways Trading 21 CC (in Liquidation) and Others v Pearl Island Trading 714 (Pty) Ltd and Another 2019 (2) SA 650 (SCA)

## FLYNOTES

### **RUTA v MINISTER OF HOME AFFAIRS (CC)**

BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J  
 2018 DECEMBER 20  
 [2018] ZACC 52

**Immigration**—Refugee—Asylum seeker—Delay in applying for asylum—Effect—Operation of Refugees and Immigration Acts—Crimes excluding individuals from refugee status—Place of commission—Refugees Act 130 of 1998; Immigration Act 13 of 2002.

### **COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v VOLKSWAGEN SOUTH AFRICA (PTY) LTD (SCA)**

NAVSA JA, SERITI JA, WALLIS JA, WILLIS JA and MATHOPO JA  
 2018 SEPTEMBER 19  
 [2018] ZASCA 116

**Revenue**—Income tax—Deductions—Expenditure incurred in production of income—Trading stock—Valuation of stock at year-end—Whether to be valued at net realisable value in accordance with International Accounting Standard 2 (IAS 2 or AC 108)—Income Tax Act 58 of 1962, s 22(1)(a).

### **GCC ENGINEERING (PTY) LTD AND OTHERS v MAROOS AND OTHERS (SCA)**

CACHALIA JA, SERITI JA, MOLEMELA JA, SCHIPPERS JA and MOTHLE AJA  
 2018 DECEMBER 3  
 [2018] ZASCA 178

**Company**—Business rescue—Liquidation proceedings already initiated—Effect of application for business rescue—Not suspending appointment, office or powers of provisional liquidators—No legal provision providing for re-vesting of control of company's property in its directors—Companies Act 71 of 2008, s 131(6).

**Company**—Business rescue—Master—Role with respect to business rescue proceedings.

### **MILNERTON ESTATES LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE (SCA)**

NAVSA ADP, WALLIS JA, MATHOPO JA, MATOJANE AJA and NICHOLLS AJA  
 2018 NOVEMBER 20  
 [2018] ZASCA 155

**Revenue**—Income tax—Deemed accrual of proceeds of sale of property on date of agreement—Whether applicable to sale of immovable property where sales occurring in one tax year, all suspensive conditions fulfilled in that year but transfer registered and purchase price received in following year—Court bound by earlier decision on issue—Income Tax Act 58 of 1962, s 24(1).

**MINISTER OF HOME AFFAIRS AND ANOTHER v ALI AND OTHERS (SCA)**

LEWIS JA, SERITI JA, WALLIS JA, MATHOPO JA and MOLEMELA JA  
2018 NOVEMBER 30  
[2018] ZASCA 169

**Immigration**—Citizenship—By naturalisation—Whether section applying to persons born before its effective date—Order that regulations be made in respect of applications under section, and that pending promulgation of regulations, applications be accepted on affidavit—South African Citizenship Act 88 of 1995, s 4(3).

**WWF SOUTH AFRICA v MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND OTHERS (WCC)**

ROGERS J  
2018 SEPTEMBER 26

**Fisheries and fishing**—Fishing quotas—Determination of total allowable catch (TAC) for West Coast Rock Lobster—Review—Failure by decisionmaker in department to have regard to binding principles of environment protection, conservation and sustainability, as well as obligations to follow best scientific evidence, and abide by 'precautionary principle'—Decision arbitrary, irrational and unreasonable—Determination set aside—Constitution, s 24(b); Marine Living Resources Act 18 of 1998, s 2; National Environmental Management Act 107 of 1998, s 2.

**Environmental law**—Environmental conservation—Environmental damage—Prevention and remediation—Where lack of scientific certainty—Applicability of precautionary principle—Discussion of—Marine Living Resources Act 18 of 1998, s 2; National Environmental Management Act 107 of 1998, s 2.

**AFRICAN DEVELOPMENT BANK v TN (GP)**

KOLLAPEN J and DE VOS J  
2018 JUNE 15

**Marriage**—Divorce—Maintenance—Maintenance order—Civil enforcement—Emoluments attachment order—Application for—Whether employer entitled to notice—Ex parte nature of applications for emoluments attachment orders confirmed—Maintenance Act 99 of 1998, s 28(1),

**Marriage**—Divorce—Maintenance—Maintenance order—Civil enforcement—Emoluments attachment order—Application for rescission of—Good cause shown—What constitutes—Whether competent to challenge it on basis that founding affidavit of applicant for emoluments attachment order not setting out computation or amount of arrear maintenance—Maintenance Act 99 of 1998, s 28(2)(a).

**BALENI AND OTHERS v MINISTER OF MINERAL RESOURCES AND OTHERS (GP)**

BASSON J  
2018 NOVEMBER 22

**Land**—Informal land rights—Deprivation—Consent of informal land rightsholders—Applicant for mining rights required to obtain consent from informal land rights-holders deprived of their informal land rights by proposed mining activities—Interim Protection of Informal Land Rights Act 31 of 1996, s 2(1).

**Minerals and petroleum**—Mining and prospecting rights—Application for mining rights—Applicant required to obtain consent from informal land rights holders deprived thereof by proposed mining activities—Interim Protection of Informal Land Rights Act 31 of 1996, s 2(1).

### **EX PARTE BAKKES AND SIMILAR CASES (ECG)**

ROBERSON J  
2019 JANUARY 18

**Advocate**—Admission—Qualifications—Legal Practice Act—Applicant seeking admission after coming into operation of LPA—Obtained qualification prior to such date under former Admission of Advocates Act—Entitled to be admitted as advocate without having to meet new minimum qualifications under LPA—Legal Practice Act 28 of 2014, s 115.

### **CLOETE v VAN MEYEREN (ECP)**

LOWE J  
2018 NOVEMBER 27

**Animal**—Damage caused by—*Actio de pauperie*—Defences—Third-party negligence—Established defence requiring negligent failure by third party to control animal—No basis in law or logic to extend defence to situations in which element of control absent—Intruder negligently left gate open, allowing defendant's dogs to escape and attack plaintiff—No control—Defence of third-party negligence not availing defendant.

**Delict**—Specific forms—Strict liability—*Actio de pauperie*—Dog attack—Defence of third-party negligence—Intruder left gate open—To establish third-party negligence, plaintiff to prove negligent failure by third party to control animal—Defence not availing defendant.

### **EX PARTE KF AND OTHERS (GJ)**

SIWENDU J  
2018 JUNE 28

**Children**—Surrogacy—Surrogate motherhood agreement—Confirmation—Requirement that surrogate mother be 'in all respects suitable person' to act as such—Criteria for assessing suitability—Children's Act 38 of 2005, s 295(c)(ii).

### **MAYEKISO AND ANOTHER v PATEL NO AND OTHERS (WCC)**

GAMBLE J, MANTAME J and SHER J  
2018 OCTOBER 24

**Insolvency**—Trustee—Lack of authority—Removal by Master—Not automatically invalidating decisions taken before removal—Insolvency Act 24 of 1936, s 76.

**Land**—Unlawful occupation—Eviction—Statutory eviction—Whether appropriate—Obligation on illegal occupant to provide relevant information, particularly where legally represented—Claim of imminent homelessness contradicted by occupant's wealthy lifestyle and ability to afford protracted litigation—Appeal against eviction dismissed—Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(7).

### **NM v JOHN WESLEY SCHOOL AND ANOTHER (KZD)**

MASIPA J  
2018 DECEMBER 19

**Education**—School—Independent school—Exclusion policy—Policy excluding learners where parents failing to pay school fees in breach of contract—Not in itself unlawful, but any decision taken had to be reasonable; not infringe child's right to education; in best interests of child; and procedurally fair—Court finding that exclusion policy under which learner excluded from exams and seated apart from fellow learners in classroom not in best interests of child and in breach of s 29(3) of Constitution (obligation of independent school to maintain standards not inferior to public schools)—Constitution, ss 28(2) and 29(3).

**RESILIENT PROPERTIES (PTY) LTD v ESKOM HOLDINGS SOC LTD AND OTHERS (GJ)**

VAN DER LINDE J

2018 SEPTEMBER 14

**Electricity**—Supply—Termination—Court granting application by shopping mall owner for interim order prohibiting Eskom from cutting electricity to local authority pending review—Electricity Regulation Act 4 of 2006, s 21(5)(c).

**SAMONS v TURNAROUND MANAGEMENT ASSOCIATION SOUTHERN AFRICA NPC AND ANOTHER (GJ)**

WINDELL J

2018 OCTOBER 15

**Voluntary association**—Disciplinary proceedings—Finding and sanction—Whether administrative action—Promotion of Administrative Justice Act 3 of 2000.

**WINGS PARK PORT ELIZABETH (PTY) LTD v MEC, ENVIRONMENTAL AFFAIRS, EASTERN CAPE AND OTHERS (ECG)**

PLASKET J

2018 AUGUST 28

**Administrative law**—Administrative action—Review—After failure of internal appeal—In most cases, both decisions to be challenged.

**Environmental law**—Protection of the environment—Environmental authorisation—Internal appeal against refusal—Wide appeal created—National Environmental Management Act 107 of 1998, s 43.

**STANDARD BANK OF SOUTH AFRICA LTD v HENDRICKS AND ANOTHER AND RELATED CASES (WCC)**

ERASMUS J, DOLAMO J and SAVAGE J

2018 DECEMBER 18

**Mortgage**—Foreclosure—Judicial execution—Primary residence—Application for (i) judgment for accelerated full outstanding balance and (ii) order declaring property executable—Money judgment and execution claims inextricably linked, and must be sought simultaneously in same proceedings—Court, where it considers it to be in interests of justice, may postpone money judgment together with order for special execution.

**Mortgage**—Foreclosure—Judicial execution—Primary residence—Application for (i) judgment for accelerated full outstanding balance and (ii) order declaring property executable—Practice of banks proceeding to court to seek both money judgment and order for special execution for 'trifling amounts' after debtor had been in arrears for only limited time, and without any appropriate steps having been taken to resolve matter, deprecated.

**Mortgage**—Foreclosure—Judicial execution—Primary residence—Service of process—Application for order declaring primary residence specially executable must be personally served on debtor by sheriff, alternatively in manner as authorised by court—This was so even where domicilium citandi clause provided—Uniform Rules of Court, rule 46A.

**Mortgage**—Foreclosure—Judicial execution—Primary residence—Reserve price—Where court grants order for execution against primary residence of debtor, saving exceptional circumstances it is obliged to set reserve price—Uniform Rules of Court, rule 46A.

**Execution**—Sale in execution—Immovable property—Primary residence—Reserve price—Where court grants order for execution against primary residence of debtor, saving exceptional circumstances it is obliged to set reserve price—Uniform Rules of Court, rule 46A.

**STARWAYS TRADING 21 CC (IN LIQUIDATION) AND OTHERS v PEARL ISLAND TRADING 714 (PTY) LTD AND ANOTHER (SCA)**

LEWIS JA, WALLIS JA, ZONDI JA, VAN DER MERWE JA and MATOJANE AJA  
2018 DECEMBER 3  
[2018] ZASCA 177

**Sale**—Contract—Terms and conditions—Implied and tacit terms—Terms implied by statute—Statutory variation in price to reflect increase or decrease in customs duty payable by importer (seller)—Constituting implied term—Inclusion of words ‘ex warehouse’ not constituting agreement to contrary—Seller’s insistence on contrary interpretation constituting repudiation of contract—Customs and Excise Act 91 of 1964, s 59.

**Revenue**—Customs and excise—Import duty—Statutory variation of contract price to reflect alteration in duty payable—Constituting implied term in contract of sale—Inclusion of words ‘ex warehouse’ not constituting agreement to contrary—Seller’s insistence to contrary interpretation constituting repudiation of contract—Customs and Excise Act 91 of 1964, s 59.

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

**APRIL 2019**

### **TABLE OF CASES**

- Haarhoff and Another v Director of Public Prosecutions, Eastern Cape 2019 (1) SACR 371 (SCA)
- Keating and Others v Senior Magistrate and Others 2019 (1) SACR 396 (GP)
- S v Motladile 2019 (1) SACR 415 (FB)
- S v Bomvana 2019 (1) SACR 418 (ECM)
- S v Mlungwana and Others 2019 (1) SACR 429 (CC)
- S v Dlamini 2019 (1) SACR 467 (KZP)
- S v Wildridge 2019 (1) SACR 474 (ECG)
- S v Khathutshelo and Another 2019 (1) SACR 480 (LT)

### **FLYNOTES**

**HAARHOFF AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS, EASTERN CAPE (SCA)**

NAVSA ADP, MOCUMIE JA, MOLEMELA JA, MOKGOHLOA AJA and NICHOLLS AJA  
2018 NOVEMBER 8; DECEMBER 11  
[2018] ZASCA 184

**Evidence**—Witness—Oath—Admonition to speak truth—Compliance with provisions of ss 162 and 164 of Criminal Procedure Act 51 of 1977—Court receiving expert evidence (in application for evidence to be delivered through intermediary) that complainant competent to testify—Court entitled to accept such evidence and justifying conclusion that complainant competent to testify—Complaint that court’s inquiry preceding admonition cursory not justified when seen against background of detailed expert evidence.

**Evidence**—Witness—Oath—Admonition to speak truth—Compliance with provisions of ss 162 and 164 of Criminal Procedure Act 51 of 1977—Court not making specific finding that complainant did not understand nature and import of oath or affirmation—Such express finding not prerequisite.

**KEATING AND OTHERS v SENIOR MAGISTRATE AND OTHERS (GP)**

KOLLAPEN J  
2018 JUNE 18; AUGUST 3

**Search and seizure**—Search warrant—Validity of—Affidavit on which warrant based—Identification of commissioner of oaths—Fact that not indicating whether commissioner acted ex officio not resulting in invalidation of affidavit.

**Search and seizure**—Search warrant—Validity of—Whether Independent Police Investigative Directorate investigators could perform search—IPID investigators cast in same position as police officials for various purposes of Criminal Procedure Act 51 of 1977—Warrant valid.

**Search and seizure**—Search warrant—Validity of—Use of civilian advisers in search to identify and value certain items—No reason such expertise should not be used.

**S v MOTLADILE (FB)**

MBHELE J and MOLITSOANE J

2018 SEPTEMBER 21

**Plea**—Guilty—Unrepresented accused—Magistrate’s duty in respect of—Accused pleading guilty to possessing undesirable dependence-producing substance and confronted with legal phrases and statutory definitions beyond his purview—Magistrate not questioning accused in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977 to establish whether accused appreciated consequences of plea and admitted all elements of offence—Conviction and sentence set aside

**S v BOMVANA (ECM)**

JOLWANA J

2018 JULY 18, 20

**Evidence**—Admissibility—Statement to police officer—Police alleging that accused not regarded as suspect when brought to police station—Clear that accused was considered suspect at that stage, given evidence in possession of police—Also clear that police wished to obtain admissions from accused—Courts to be vigilant in examining such circumstances to protect constitutional right against self-incrimination.

**S v MLUNGWANA AND OTHERS (CC)**

BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J

2018 AUGUST 21; NOVEMBER 19

[2018] ZACC 45

**Public order offences**—Gatherings and demonstrations—Requirement in s 12(1)(a) of Regulation of Gatherings Act 205 of 1993 of prior notice of gathering—Criminalisation of failure to give notice constituting unjustifiable limitation of right in s 17 of Constitution to assemble, demonstrate, picket and petition.

**S v DLAMINI (KZP)**

OLSEN J and MASIPA J

2018 NOVEMBER 9

**Evidence**—Witness—Oath—Admonition to speak truth—Provisions of ss 162 and 164 of Criminal Procedure Act 51 of 1977—When such procedure competent—Court required first to undertake inquiry in terms of s 162 before applying provisions of s 164—Sufficient compliance where court satisfied that it established capacity to understand nature and import of oath, or ability to distinguish between truth and lies.

**Evidence**—Identification—Dock identification—Value of—Child witness unable to articulate description of rapist, but after seeing photograph of accused went straight to accused in identification parade without looking at other participants—Later identifying accused in dock—Insufficient evidence on which to convict accused.



**S v WILDRIDGE (ECG)**

PLASKET J and MTSHABE AJ

2018 DECEMBER 12, 14

**Trial**—Presiding officer—Duties of—Accused not legally represented—Accused choosing to defend himself—Magistrate becoming hostile towards accused after his decision to terminate services of his legal representative—Magistrate then refusing to assist accused—Conviction and sentence set aside.

**S v KHATHUTSHELO AND ANOTHER (LT)**

KGOMO J and MANGENA AJ

2018 JUNE 26

**Review**—Special review in terms of s 304(4) of Criminal Procedure Act 51 of 1977—Manner in which such application to be brought.

**Legal practitioners**—Conduct of—Behaviour in court—Counsel displaying annoyance in court at decision of magistrate—Duty of practitioners towards court reiterated.