



## JUTA'S ADVANCE NOTIFICATION SERVICE

MAY 2019

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

Herewith the cases in the May 2019 law reports

**JUDGMENTS OF INTEREST IN THE MAY 2019 EDITIONS OF THE SALR, SACR AS WELL AS THE NAMIBIAN LAW REPORTS 2019 (1).**

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

### **SOUTH AFRICAN LAW REPORTS**

#### **President Zuma unlawfully stripped the SADC tribunal of its powers**

When President Zuma conspired in the dismantling of the Southern African Development Community Tribunal, stripping it of its jurisdiction to hear complaints by individuals against member states, he acted unlawfully, found the Constitutional Court in *Law Society of South Africa and Others v President of the Republic of South Africa* 2019 (3) SA 30 (CC). The President's conduct had its origins in the Zimbabwe land reform programme. Zimbabwe had removed its own courts' jurisdiction over the matter, thus leaving the Tribunal as the only forum available to affected landowners. When the Tribunal subsequently ruled in favour of the landowners, President Zuma, abetted by other SADC heads of state, first suspended the Tribunal's operations and then removed its human rights mandate. This, said the Constitutional Court, constituted a violation of the Constitution and the rule of law.

#### **Government department not responsible for death of child at daycare facility**

A five-year-old entrusted to daycare fell out of bed and was asphyxiated. The parents, claiming psychiatric injury, sued the Department of Social Development for its failure to duly process the registration of the facility. The Supreme Court of Appeal found that the department's conduct—legally an omission—was not wrongful and in any event caused neither the child's death nor any proved psychiatric injury. See *Western Cape Department of Social Development v Barley and Others* 2019 (3) SA 235 (SCA)

#### **Anton Piller redux**

For recent law on *Anton Piller* orders—which grant plaintiffs the right to enter into a prospective defendant's premises and seize documents and computer files to prevent them from being lost or destroyed—see *Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others* 2019 (3) SA 173 (SCA), in which the court set one aside because the applicant had failed to show a well-founded and reasonable apprehension that evidence would be concealed. The court reiterated that *Anton Piller* orders were neither a form of early discovery nor a mechanism for an plaintiff to determine whether it had a cause of action.

## **SOUTH AFRICAN CRIMINAL LAW REPORTS**

### **Criminal Procedure Act not prohibiting appeal of decision to put suspended sentence into operation**

The Supreme Court of Appeal found that, properly interpreted, s 309(1)(a) of Criminal Procedure Act 51 of 1977 did not prohibit the appeal of a decision to put into operation a suspended sentence. *Stow v Regional Magistrate, Port Elizabeth No and Others* 2019 (1) SACR 487 (SCA)

### **Liability of Minister for criminal acts committed by police officer**

An off-duty officer used a police-issue firearm and was dressed in uniform when he committed the rape. The court found that the fact that policeman off duty was not irrelevant consideration to liability of Minister. In the particular circumstances of the case, the court found the Minister not liable. *RM v Mokgethi and Another* 2019 (1) SACR 511 (NWM)

### **Reduction in sentences for murder committed in course of vigilante action**

The accused were convicted of a murder committed in the course of a violent vigilante action. The court found that in circumstances where they were relatively young, not inherently wicked and largely influenced by community, less severe sentences were appropriate. An effective sentence of 30 years' imprisonment was reduced to 18 years' imprisonment in respect of three accused, and 20 years' imprisonment to 15 years in respect of another accused. *S v Radebe and Others* 2019 (1) SACR 429 (FB)

## **THE NAMIBIAN LAW REPORTS**

### **Whether the general rule that costs should follow the result worked in matrimonial proceedings?**

At the conclusion of proceedings in an action for divorce, and a counterclaim, the parties agreed that the plaintiff would withdraw her claim and the defendant would amend his counterclaim to incorporate the points they came to agree on. The court was required to determine the only remaining point of contention, namely the question of costs. The High Court held that the general rule that costs should follow the result did not always work satisfactorily in matrimonial proceedings. The court also held that it would be appropriate in what were primarily matrimonial and family law proceedings, to take into account the apparent inequality of the financial means of the parties. *GR v ER* 2019 (1) NR 46 (HC)

### **Fiduciary duty—whether it is owed by an employee to an employer?**

Shoprite Namibia instituted action against the defendant, the manager of one of its shops, for losses it sustained at that branch through the disappearance of stocks of cigarettes. Shoprite Namibia contended that the losses were solely attributable to the defendant's gross dereliction of his duties as manager which constituted a breach of his fiduciary duties towards his employer. The defendant contended that there was no fiduciary duty that he owed to his employer and his duties were circumscribed by his employment contract. The court held, that it was clear that the defendant owed a fiduciary duty to the plaintiff and that duty was owed regardless of whether there was a contractual agreement between the parties or not. There was in most, if not all contracts of service, an implied fiduciary duty on the part of the employee or agent towards the employer or the principal as the case may be. *Shoprite Namibia (Pty) Ltd v Petrus* 2019 (1) NR 175 (HC)

### **Duty of prosecutor to be aware of circumstances in which offence committed**

The accused had been charged in a magistrates' court with dealing in cannabis (three bales) and the possession of the same drug. When the matter came for trial, only the charge of possession was put to the accused, who pleaded guilty, and the magistrate then disposed of the matter by way of s 112(1)(a) of the Criminal Procedure Act 51 of 1977. This happened despite there being evidence available to the prosecutor that the accused had been selling the cannabis to children at a primary school. Had the prosecutor familiarised herself with the

circumstances in which the offence had been committed she would have charged the accused correctly according to the facts. There was a dire need for change in the courts' stance on drug-related matters and to accord the necessary weight to the seriousness of the offences and its prevalence in society. *S v Swatz* 2019 (1) NR 197 (HC)

## **WE WELCOME YOUR FEEDBACK**

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Kind Regards

**The Juta Law Reports Team**

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**MAY 2019**

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**Criminal procedure**—Bail—Application pending appeal—Jurisdiction—High Court—Applicant convicted in High Court but leave to appeal granted on petition to Chief Justice—High Court having jurisdiction in such applications by virtue of s 321 read with s 60 of Criminal Procedure Act 51 of 1977 provided appeal was pending before Supreme Court—Alternatively High Court, being both court of first instance and appeal court had inherent jurisdiction conferred on it by s 2 of High Court Act 16 of 1990.

**Criminal procedure**—Bail—Application pending appeal—Factors to be taken into account: (a) prospects of success on appeal; (b) seriousness of offence involved and sentence as well as risk of abscondment; (c) possible delay before appeal was heard; and (d) interests of administration of justice and public interest—Court to seek to strike balance between protecting liberty of individual and safeguarding proper administration of justice—Since fundamental consideration was interests of justice, court, in exercising its discretion, would lean in favour of liberty of applicant and grant bail where possible—But art 7 of Constitution not applicable in application pending appeal as applicant had lost his personal liberty in accordance with law by being convicted and sentenced in course of a trial.

**Criminal procedure**—Bail—Application pending appeal—Approach of court—Legislature in s 61 of Criminal Procedure Act 51 of 1977 not intending to elevate threshold in bail applications pending trial higher than applications pending appeal—More liberal approach and less stringent test not intended where applicant had been tried and convicted of very serious offence.

**NAMIBIAN MARINE PHOSPHATE (PTY) LTD v MINISTER OF ENVIRONMENT AND TOURISM AND OTHERS (HC)**

UEITELE J

2017 AUGUST 10; 2018 MAY 11

[2018] NAHCMD 122

**Environmental law**—Environmental clearance certificate—Decision of Environmental Commissioner—Appeal against granting of certificate—Locus standi of second respondent—Second respondent citizen of state and community activist—Citizens in constitutional state entitled to approach courts to determine their rights—Second respondent having grievance against Environmental Commissioner's decision to grant environmental clearance certificate in terms of Environmental Management Act 7 of 2007—Second respondent aggrieved person in context of s 50 of Act and entitled to approach court to determine his rights.

**Environmental law**—Environmental clearance certificate—Decision of Environmental Commissioner—Appeal against granting of certificate—Whether appeal lodged within statutory time limit—Minister of Environment and Tourism, in terms of s 50 of Environmental Management Act 7 of 2007 and regulations extending time limit within which appeal to be lodged—Appeal lodged within extended time limit—Such extension of time limit not taken on review—Decision of minister to extend time limit remaining—Appeal held to have been lodged within time limit.

**Environmental law**—Environmental clearance certificate—Decision of Environmental Commissioner—Appeal against decision of Minister of Environment and Tourism to set aside decision of commissioner to award certificate—Appeal in terms of s 51 of Environmental Management Act 7 of 2007—Such appeal only on points of law—Test for whether appeal on point of law—Test being one whether decision that decision maker has reached was one that no reasonable decision maker could have reached—Appellant contending that decision by minister had violated its rights in terms of arts 12 and 18 of Constitution—Such being appeal on point of law.

**Environmental law**—Environmental clearance certificate—Decision of Environmental Commissioner—Appeal against—Minister of Environment and Tourism on appeal in terms of s 50 of Environmental Management Act 7 of 2007 setting aside decision of Environmental Commissioner granting environmental clearance certificate—Appellant not having been informed of appeal hearing and therefore not present at appeal hearing—Such amounting to failure to give appellant fair hearing and to listen fairly to both parties—That fatal to procedural fairness of hearing—Decision set aside.

**S v GOWASEB (HC)**

NDAUENDAPO J and SIBOLEKA J

2018 SEPTEMBER 24; NOVEMBER 20

[2018] NAHCMD 369

**Criminal procedure**—Appeal—Notice of appeal—Late filing of—Condonation—Requirements—Reasonable explanation for delay—Reasonable prospects of success on appeal—Where reasonable prospects of success non-existent, reasonable explanation for delay matters not and condonation to be refused.

**Criminal procedure**—Bail—Considerations—Interests of public or administration of justice—Where accused charged with serious offence and substantial sentence would be imposed on accused if convicted, that fact alone sufficient to permit court to form opinion that not in interests of public or administration of justice to release accused on bail.

**Criminal procedure**—Bail—Considerations—Interests of public or administration of justice—Charge involving gender-based violence—Such crimes having reached crisis point in Namibia—Duty of courts to ensure justice prevailed—Not in interests of justice to release accused on bail, particularly where long term of imprisonment would be imposed if accused convicted.

**LAWRENCE v GIJIMAAST TECHNOLOGY SERVICES (PTY) LTD AND ANOTHER (LC)**

UEITELE J

2017 JUNE 8; 2018 JULY 17

[2018] NALCMD 18

**Labour law**—Dismissal—Fairness of—Employer must establish that termination of contract was based on substantial reason—Respondent's employment terminated on grounds of incapacity—Dismissal fair.

**Labour law**—Dismissal—Fairness of—Fairness or otherwise of decision to terminate contract of employment could not be divorced from process by which it was arrived at—It was through fair process that fair decisions were generally reached.

**NGAVETENE AND OTHERS v MINISTER OF AGRICULTURE, WATER AND FORESTRY AND OTHERS (HC)**

ANGULA DJP

2018 JULY 3; NOVEMBER 26

[2018] NAHCMD 387

**Administrative law**—Review—Application to review and set aside administrative decision—Decision of Minister of Agriculture, Water and Forestry to appoint certain persons to board of directors of Meat Corporation of Namibia—Such decision ultra vires relevant provisions of Meat Corporation Act 1 of 2001 and in violation of art 18 of Constitution and common law—Minister failed to comply with *audi alteram partem* principle in taking decision to appoint directors—Decision by minister held to be in conflict and ultra vires provisions of enabling Act and set aside.

**Practice**—Parties—Locus standi—Members of Meat Corporation of Namibia applying for review and setting aside of decision of Minister of Agriculture, Water and Forestry to appoint certain persons to board of directors of corporation—On basis of their rights as members of corporation and their right to nominate members for consideration for appointment as directors, applicants having right to ensure that affairs of corporation conducted in accordance with dictates of enabling legislation and that they represented members' interests and had required expertise as stipulated by Meat Corporation Act 1 of 2001—Applicants as members of corporation entitled to approach court if they were of view that minister's decision was ultra vires—Applicants having locus standi to bring review application.

**Review**—Delay in instituting review proceedings—Whether delay unreasonable—Court to have regard to reasonable time required to take all reasonable steps prior to and in order to initiate proceedings, including ascertaining reasons for decision, taking advice from lawyers and experts, making representations where reasonable to do so and attempting to negotiate acceptable compromise before resorting to litigation—Applicants' explanations as to these matters held to be reasonable—Delay of seven months in bringing review application not unreasonable in circumstances.

**ELIA v MINISTER OF SAFETY AND SECURITY AND OTHERS (HC)**

PRINSLOO J

2018 DECEMBER 5; 2019 FEBRUARY 4, 12

[2019] NAHCMD 21

**State**—Actions by and against—Actions against—Liability of state for acts of members of Department of Correctional Service—Statutory requirements for claims—No provision for condonation for failure to comply with requirements of s 133(3) and (4) of Correctional Services Act 9 of 2012.

**Constitutional law**—Legislation—Constitutionality of—Correctional Service Act 9 of 2012, s 133—Raising of such issue—May not be raised for first time in heads of argument.

**PROSECUTOR-GENERAL v STANDARD BANK NAMIBIA LTD AND OTHERS (HC)**

ANGULA DJP

2018 JULY 26; 2019 FEBRUARY 1

[2019] NAHCMD 13

**Criminal procedure**—Forfeiture—Exclusion from operation of forfeiture order—Money having flown into account subject to preservation order after grant of preservation order—Inflows into account after grant of preservation order excluded from forfeiture—Prevention of Organised Crime Act 29 of 2004, ss 59(1), 61 and 63.

**Criminal procedure**—Forfeiture—Exclusion from operation of forfeiture order—Bank seeking funds in bank account to be excluded on basis that it became 'innocent owner' thereof by operation of law—Ownership of property in question not requirement set by s 63 of Prevention of Organised Crime Act 29 of 2004.

**Criminal procedure**—Forfeiture—Exclusion from operation of forfeiture order—Disputed claims by various parties in respect of property excluded from operation of forfeiture of property order because one of parties complied with provisions of s 63 of Prevention of Organised Crime Act 29 of 2004—Resolution of disputes dependent on contractual arrangements between such parties—Court hearing application for forfeiture order and exclusion from operation of forfeiture order not appropriate forum for resolution of such disputes.

**SHOPRITE NAMIBIA (PTY) LTD v PETRUS (HC)**

PRINSLOO J

2018 SEPTEMBER 25–27; NOVEMBER 16 2019; FEBRUARY 1, 11

[2019] NAHCMD 20

**Labour law**—Employee—Fiduciary duty—Manager of branch of retail chain—Manager, despite employer's interventions and assistance, failing to staunch loss of cigarette stocks—Manager owing fiduciary duty to employer to prevent losses and liable in delict to employer despite his dismissal.

**Labour law**—Employee—Claim by employer against employee—Employee having already been dismissed—Employee manager of branch of retail chain who had failed to staunch loss of cigarette stocks—Fiduciary duty owed by employee to employer and employee had breached duty—Employee liable for damages suffered by employer.

**S v MANALE (HC)**

USIKU J

2018 OCTOBER 23; 2019 FEBRUARY 20

[2019] NAHCMD 29

**Criminal procedure**—Conviction—Duplication—Money laundering—Proof of—Accused pleading guilty to 147 counts of fraud involving diversion of funds into accounts of persons not entitled thereto and thereby acquiring the money unlawfully—By acquiring funds unlawfully and having dealt with them as if they were lawfully acquired, and thereby disguised or concealed their origin by re-transferring funds into his own personal account from which he started to deal with them, a case of money laundering had been proven beyond reasonable doubt, without any duplication of convictions—Prevention of Organised Crime Act 29 of 2004, ss 6(a), (b), (c) and 11.

**S v SWATZ (HC)**

DAMASEB JP and LIEBENBERG J

2018 OCTOBER 30

[2018] NAHCMD 343

**Criminal law**—Drug offences—Sentence—Duty of prosecutor to be aware of circumstances in which offence committed—Prosecutor having charged accused, who had been selling cannabis at primary school, only with possession thereof and magistrate then applying provisions of s 112(1)(a) of Criminal Procedure Act 51 of 1977—Dire need for change in courts' stance on drug-related matters and to accord necessary weight to seriousness of offences.

**S v UMUB (HC)**

NDAUENDAPO J and LIEBENBERG J  
2018 OCTOBER 10; 2019 FEBRUARY 8  
[2019] NAHCMD 18

**Criminal law**—Drug offences—Sentence—Fight against dealing in and possession of dependence and dangerous dependence producing substances to be intensified at all levels and courts should impose severe sentences that deter would-be offenders—Sentence of ten years' imprisonment imposed for possession of large quantity of dagga and mandrax confirmed on appeal.

**S v NOBLE AND ANOTHER (HC)**

SHIVUTE J  
2019 JANUARY 24; FEBRUARY 5  
[2019] NAHCMD 12

**Criminal procedure**—Bail—Appeal against magistrate's refusal to grant bail—Nature of bail inquiry—Inquiry not to determine issues of validity of search warrant, correctness of charge and capacity in which accused were charged—Such issues to be decided at trial.

**Criminal procedure**—Bail—Appeal against magistrate's refusal to grant bail—Public interest—Accused charged with dealing in large quantity of cocaine which they had allegedly imported into Namibia—Refusal of bail not an anticipatory punishment or infringement of presumption of innocence—Appeal dismissed.

**S v TEEK (SC)**

DIBOTELO AJA, MOKGORO AJA and NKABINDE AJA  
2018 OCTOBER 1; DECEMBER 3

**Criminal procedure**—Evidence—Witness—Children—Cautionary rules in regard to evidence of young children—Danger where children beaten to tell truth to parents constituting possible further need for caution.

**Police**—Powers and duties—Investigation of crime—Police not to investigate any crime against any person in selective manner for purpose of securing conviction of person.

**DANNECKER v LEOPARD TOURS CAR AND CAMPING HIRE CC AND OTHERS (SC)**

MAINGA JA, SMUTS JA and FRANK AJA  
2018 JUNE 1; JULY 13; AUGUST 31

**Appeal**—Security—For costs in terms of rule 14(2) of Supreme Court Rules—Cross-appeal withdrawn—Failure to lodge—Appellant put on terms to provide and to make application for condonation for late filing—Appellant failing to apply for condonation and seeking reinstatement of appeal—Flagrant disregard for rules of court—Condonation refused.

**Close corporation**—Members—Liability of for debts of close corporation—Requirements of s 63 of Close Corporations Act 26 of 1998 relating to proof.

**MINISTER OF HEALTH AND SOCIAL SERVICES v AMAKALI (SC)**

DAMASEB DCJ, SMUTS JA and CHOMBA AJA  
2018 JULY 6; DECEMBER 6

**Practice**—Pleadings—Striking out—Of special plea and party’s defence—Court then granting default judgment without notice to party—Court has panoply of options after striking out—Court to exercise discretion properly—Unjust in circumstances to grant default judgment.

**UNITED AFRICA GROUP (PTY) LTD v URAMIN INC AND OTHERS (SC)**

MAING JA, SMUTS JA and HOFF JA  
2018 OCTOBER 23; NOVEMBER 23

**Practice**—Trial—Postponement—Application for—Costs—Litigant not necessarily responsible for case not proceeding on date set down merely because it applied for postponement—Conduct of opposing party also to be considered when costs determined.

**MUHURA NO AND ANOTHER v LEWCOR CC (HC)**

PRINSLOO J  
2018 OCTOBER 8; NOVEMBER 23  
[2018] NAHCMD 375

**Labour law**—Employee’s compensation—Claim against employer—Action for damages against employer based on employee’s death arising from work-related accident—Action barred by s 7(a) of Employee’s Compensation Act 30 of 1941.

**LEE’S INVESTMENTS (PTY) LTD v SHIKONGU AND ANOTHER (HC)**

OOSTHUIZEN J  
2018 SEPTEMBER 20; OCTOBER 12  
[2018] NAHCMD 321

**Practice**—Judicial case management—Pre-trial report—Variation of a pre-trial order—Oral application for variation brought on day of trial—In circumstances of this case and taking into account pleadings in matter, instructing counsel’s explanation was reasonable and satisfactory, and accepted.