



JUTA'S ADVANCE NOTIFICATION SERVICE

MAY 2019

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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

Decision to put suspended sentence into operation appealable

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 police officer used a police-issue firearm and was dressed in uniform when he assaulted and raped the complainant. The court found that the fact that the policeman was off duty at the time of the incident was not an irrelevant consideration in assessing the liability of the Minister. In the particular circumstances of the case, the court found that the Minister was 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)

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Kind Regards

The Juta Law Reports Team

SOUTH AFRICAN LAW REPORTS

MAY 2019

TABLE OF CASES

- Competition Commission v Hosken Consolidated Investments Ltd and Another 2019 (3) SA 1 (CC)
- Law Society of South Africa and Others v President of the Republic of South Africa and Others 2019 (3) SA 30 (CC)
- SA Veterinary Association v Speaker of the National Assembly and Others 2019 (3) SA 62 (CC)
- Trustees, Simcha Trust v Da Cruz and Others 2019 (3) SA 78 (CC)
- Commissioner, South African Revenue Service v Big G Restaurants (Pty) Ltd 2019 (3) SA 90 (SCA)
- Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others 2019 (3) SA 97 (SCA)
- Oranje and Others v Rouxlandia Investments (Pty) Ltd 2019 (3) SA 108 (SCA)
- Pexmart CC and Others vHMocke Construction (Pty) Ltd and Another 2019 (3) SA 117 (SCA)
- Refugee Appeal Board and Others v Mukungubila 2019 (3) SA 141 (SCA)
- Tavakoli and Another v Bantry Hills (Pty) Ltd 2019 (3) SA 163 (SCA)
- Viziya Corporation v Collaborit Holdings (Pty) Ltd and Others 2019 (3) SA 173 (SCA)
- Astral Operations Ltd and Others v Minister for Local Government, Western Cape and Another 2019 (3) SA 189 (WCC)
- Greeff v Cooper and Others 2019 (3) SA 203 (WCC)
- Luanga v Perthpark Properties Ltd 2019 (3) SA 214 (WCC)
- Motloung and Another v Sheriff, Pretoria East 2019 (3) SA 228 (GP)
- Western Cape Department of Social Development v Barley and Others 2019 (3) SA 235 (SCA)
- Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs 2019 (3) SA 251 (SCA)

FLYNOTES

COMPETITION COMMISSION v HOSKEN CONSOLIDATED INVESTMENTS LTD AND ANOTHER (CC)

BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J
2019 FEBRUARY 1
[2019] ZACC 2

Competition—Competition Tribunal—Jurisdiction—To make declaratory orders—Competition Tribunal possessing such power—Competition Act 89 of 1998, ss 27(1) and 58.

Competition—Competition Tribunal—Jurisdiction—Declaratory order sought that proposed transaction not constituting notifiable merger—Whether Tribunal could be approached directly in absence of notification of transaction to Competition Commission—Tribunal could hear matter in absence of notification—Competition Act 89 of 1998, s 13A.

Competition—Promotion of competition—Merger control—Merger—Notifiable merger—Change in nature of control—De facto to de jure—Acquiring firm, having obtained merger approval for transaction that resulted in de facto control of another company, proposing second new transaction that would result in increased shareholding and de jure control—In accordance with once-off principle, latter transaction not notifiable—Competition Act, s 12(2)(a), s 12(2)(g), s 15, s 16(3).

LAW SOCIETY OF SOUTH AFRICA AND OTHERS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS (CC)

MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J
2018 DECEMBER 11
[2018] ZACC 51

President—Conduct—Constitutionality—Participation decision to suspend operations of SADC Tribunal and subsequent signing of 2014 Protocol stripping it of its jurisdiction to hear complaints by individuals against member states—President's conduct unconstitutional, unlawful and irrational—Constitution, s 231(1).

International law—International agreements, treaties and conventions—Vienna Convention on Law of Treaties (1969)—Constituting binding customary international law—Constitution, s 232; Vienna Convention, art 18.

SA VETERINARY ASSOCIATION v SPEAKER OF THE NATIONAL ASSEMBLY AND OTHERS (CC)

MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J
2018 DECEMBER 5
[2018] ZACC 49

Constitutional law—Constitution—Foundational principles—Participatory democracy—Parliament's obligation to involve public when drafting and enacting legislation—Test—Nullity resulting from failure to comply.

Constitutional law—Parliament—Obligations—National Assembly's obligation to facilitate public participation in legislative process—Ambit—Amendment to Bill—Materiality and standard of reasonableness—Sufficiency of notice period—Constitution, s 59(1)(a); s 72(1)(a); s 118(1)(a).

Constitutional law—Legislation—Validity—Medicines and Related Substances Act 101 of 1965, s 22C(1)(a)—Word 'veterinarian' excised.

Veterinarian—Dispensing and compounding of medicines—Statutory amendment requiring license declared unconstitutional and invalid—Word 'veterinarian' excised from relevant statutory provision—Medicines and Related Substances Act 101 of 1965, s 22C(1)(a).

TRUSTEES, SIMCHA TRUST v DA CRUZ AND OTHERS (CC)

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

2019 FEBRUARY 19

[2018] ZACC 8

Local authority—Buildings—Building plans—Approval—Disqualifying factors—Legitimate expectations test—Whether applying to all three disqualifying factors under National Building Regulations and Building Standards Act 103 of 1977, s 7(1)(b)(ii)(aa).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v BIG G RESTAURANTS (PTY) LTD (SCA)

PONNAN JA, MBHA JA, MATHOPO JA, SCHIPPERS JA and ROGERS AJA

2018 DECEMBER 3

[2018] ZASCA 179

Revenue—Income tax—Deductions—Allowance in respect of future expenditure on contracts—Whether income accrued in terms of contract—Narrow meaning of ‘in terms of’—In present case, taxpayer’s income not accruing in terms of franchise agreement—Income Tax Act 58 of 1962, s 24C(2).

LOUIS PASTEUR HOLDINGS (PTY) LTD AND OTHERS v ABSA BANK LTD AND OTHERS (SCA)

NAVSA ADP, SWAIN JA, MATHOPO JA, MOCUMIE JA and MATOJANE AJA

2018 NOVEMBER 29

[2018] ZASCA 163

Company—Business rescue—Disposal of property—Secured property—Requirements—Whether met—Practitioner proposing periodic payment from property (rental income) in eventual discharge of secured debt—Companies Act 71 of 2008, s 134(3).

Practice—Applications and motions—Separation of issues for preliminary determination—Caution to be exercised.

ORANJE AND OTHERS v ROUXLANDIA INVESTMENTS (PTY) LTD (SCA)

MAYA P, SWAIN JA, MATHOPO JA, CARELSE AJA and NICHOLLS AJA

2018 DECEMBER 7

[2018] ZASCA 183

Land—Land reform—Statutory protection of tenure—Relocation—Occupier may resist relocation where proposed accommodation will impair dignity—Extension of Security of Tenure Act 62 of 1997, ss 5(a) and 6(2)(a).

PEXMART CC AND OTHERS v H MOCKE CONSTRUCTION (PTY) LTD AND ANOTHER (SCA)

NAVSA ADP, LEWIS JA, MOCUMIE JA, MOLEMELA JA and MAKGOKA JA

2018 DECEMBER 3

[2018] ZASCA 175

Competition—Unlawful competition—Unlawful use of confidential information and trade secrets—Principles restated.

Competition—Unlawful competition—Unlawful use of confidential information—What constitutes protectable confidential information—Requirements

Evidence—Witnesses—Calling, examination and refutation—Failure to call material witness—Circumstances in which adverse inference to be drawn.

REFUGEE APPEAL BOARD AND OTHERS v MUKUNGUBILA (SCA)

MAYA P, WALLIS JA, MBHA JA, SCHIPPERS JA and MOTHLE AJA

2018 DECEMBER 19

[2018] ZASCA 191

Immigration—Refugee—Refugee Appeal Board—Appeal to following exclusion decisions—Nature of appellate jurisdiction—Refugees Act 130 of 1998, ss 4(1)(b) and 24(3)(c).

Courts—High Court—Jurisdiction—To enquire into and determine rights—Approach to be adopted by court—Superior Courts Act 10 of 2013, s 21(1)(c).

TAVAKOLI AND ANOTHER v BANTRY HILLS (PTY) LTD (SCA)

LEWIS JA, ZONDI JA, DAMBUZA JA, MOKGOHLOA AJA and ROGERS AJA

2018 NOVEMBER 28

[2018] ZASCA 159

Local authority—Buildings—Building plans—Approval—Application to set aside where building plans not complying with municipal bylaw—Locus standi—Requirements—Proximity of applicant's building to non-compliant building not sufficient on its own to establish locus standi—Applicant must establish membership of class for whose benefit bylaw enacted or, if enacted in public interest generally, that violation of bylaw caused applicant damages.

VIZIYA CORPORATION v COLLABORIT HOLDINGS (PTY) LTD AND OTHERS (SCA)

WALLIS JA, SALDULKER JA, MATHOPO JA, VAN DER MERWE JA and ROGERS AJA

2018 DECEMBER 19

[2018] ZASCA 189

Discovery and inspection—*Anton Piller* orders—Requirements—Principles restated.

Discovery and inspection—*Anton Piller* orders—Nature—*Anton Piller* order directed at preserving evidence that would otherwise be lost or destroyed—Not a form of early discovery or mechanism for applicant to determine whether it has cause of action.

ASTRAL OPERATIONS LTD AND OTHERS v MINISTER FOR LOCAL GOVERNMENT, WESTERN CAPE AND ANOTHER (WCC)

BINNS-WARD J

2017 OCTOBER 11

Evidence—Privilege—Legal professional privilege—Scope—Memo drafted by counsel and conveyed to respondents' attorneys.

GREEFF v COOPER AND OTHERS (WCC)

DOLAMO J and DAVIS AJ

2018 SEPTEMBER 18

Magistrates' court—Practice—Interdict—Whether magistrates' court could competently interdict magistrates' court subpoena duces tecum which was purportedly an abuse of process.

LUANGA v PERTHPARK PROPERTIES LTD (WCC)

PAPIER J and DAVIS AJ

2018 SEPTEMBER 20

Lease—Termination—Lease for undetermined period—Notice of termination—Rental Housing Act providing that if landlord allows tenant to remain on property on expiry of lease, parties deemed to have entered into periodic lease, terminable on at least 'one month's written notice'—Meaning of 'one month's written notice'—Referring to one calendar month running from first day of month and expiring on last day of month—Rental Housing Act 50 of 1999, s 5(5).

Land—Unlawful occupation—Eviction—Statutory eviction—Duties of respondent’s legal practitioner—Where eviction proceedings opposed and respondent legally represented, respondent’s legal practitioner under positive duty to furnish court with all relevant information in possession in order for court to properly interrogate justice and equity of ordering eviction—Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(6) and (7).

Words and phrases—‘One month’s written notice’—Meaning of in s 5(5) of Rental Housing Act 50 of 1999—Refers to one calendar month running from first day of month and expiring on last day of month.

MOTLOUNG AND ANOTHER v SHERIFF, PRETORIA EAST (GP)

BAQWA J

2018 SEPTEMBER 5

Sheriff—Service—Whether sheriff having duty to serve summons not signed by Registrar.

Practice—Pleadings—Summons—Not signed by Registrar—Whether null.

WESTERN CAPE DEPARTMENT OF SOCIAL DEVELOPMENT v BARLEY AND OTHERS (SCA)

NAVSA ADP, WALLIS JA, MBHA JA, DAMBUZA JA and NICHOLLS AJA

2018 NOVEMBER 30

[2018] ZASCA 166

Delict—Elements—Unlawfulness or wrongfulness—Liability for omission—Failure by state to perform regulatory function—Processing of application to register early child development facility.

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC v MINISTER OF ENVIRONMENTAL AFFAIRS (SCA)

CACHALIA JA, SALDULKER JA, VAN DER MERWE JA, MOLEMELA JA and ROGERS AJA

2019 JANUARY 24

[2019] ZASCA 1

Company—Winding-up—Application—Locus standi—Extended standing to apply for remedies under s 157 of Companies Act, 2008—Whether Minister of Environmental Affairs qualifying as ‘person’ who may invoke s 157(1)(d) for standing in public interest—Companies Act 71 of 2008, s 157(1)(d).

Company—Winding-up—Application—Grounds—Just and equitable to do so—Availability of alternative means to address complaint—Court to be satisfied applicant having no alternative means to address complaint before granting winding-up order on basis that it would be just and equitable to do so—Companies Act 71 of 2008, ss 81(1)(c)(ii) and 81(1)(d)(iii).

Practice—Applications and motions—Ex parte application—Impermissible use of—Court to vindicate *audi alteram partem* rule by discharging provisional order so obtained.

Practice—Applications and motions—Ex parte application—Uberrima fides rule as to disclosure of facts—If not observed, court to discharge provisional order so obtained when it would not have been granted had fair disclosure been made.

SOUTH AFRICAN CRIMINAL LAW REPORTS

MAY 2019

TABLE OF CASES

- Stow v Regional Magistrate, Port Elizabeth NO and Others 2019 (1) SACR 487 (SCA)
- S v Smith 2019 (1) SACR 500 (WCC)
- RM v Mokgethi and Another 2019 (1) SACR 511 (NWM)
- AK v Minister of Safety and Security and Others 2019 (1) SACR 529 (ECP)
- S v Radebe and Others 2019 (1) SACR 565 (FB)
- S v Nkosi 2019 (1) SACR 570 (GJ)
- S v Ngobese 2019 (1) SACR 575 (GJ)

FLYNOTES

STOW v REGIONAL MAGISTRATE, PORT ELIZABETH NO AND OTHERS (SCA)

PONNAN JA, SERITI JA, ZONDI JA, NICHOLLS AJA and CARELSE AJA
2018 NOVEMBER 12; DECEMBER 12
[2018] ZASCA 186

Sentence—Suspended sentence—Putting into operation of—Appealability of such decision—Properly interpreted s 309(1)(a) of Criminal Procedure Act 51 of 1977 not prohibiting appeal of decision to put suspended sentence into operation.

S v SMITH (WCC)

DOLAMO J and SALIE-HLOPHE J
2017 MARCH 3, 10

Sentence—Habitual criminal—Declaration as in terms of s 286 of Criminal Procedure Act 51 of 1977—Warning prior to declaration—Duty to inform accused should rest upon state and could be discharged by providing certificate produced contemporaneously with accused's criminal record.

RM v MOKGETHI AND ANOTHER (NWM)

GUTTA J
2018 AUGUST 29; NOVEMBER 15

Police—Liability of—For criminal acts committed by police officer—Officer off duty but dressed in uniform and using police-issue firearm in committing rape—Fact that policeman off duty not irrelevant consideration to liability of Minister—In particular circumstances of case, Minister not liable.

AK v MINISTER OF SAFETY AND SECURITY AND OTHERS (ECP)

SEPHTON AJ
2018 AUGUST 15; NOVEMBER 22

Police—Liability of—For failure to conduct proper search for missing person—No proper command and control of search—Police liable.

Police—Liability of—For negligent investigation of charges of rape—Police to be held to account to prevent self-help—Public trust in police playing role in determination of liability in instant case.

S v RADEBE AND OTHERS (FB)

LEKALE ADJP, REINDERS J and ZIETSMAN AJ
2018 MAY 21, 24

Murder—Sentence—Murder in course of mob justice—Accused relatively young, not inherently wicked and largely influenced by community—Effective sentence of 30 years' imprisonment reduced on appeal to 18 years' imprisonment in respect of three accused, and 20 years' imprisonment to 15 years in respect of another accused.

S v NKOSI (GJ)

WINDELL J and BEZUIDENHOUT AJ
2018 OCTOBER 29; NOVEMBER 2

Theft—By false pretences—Accused taking deposits from customers for purchase of trucks which he had no intention of delivering—Accused using deposits for his own purposes—Conviction upheld on appeal.

Fraud—What constitutes—Theft by false pretences—All cases of theft by false pretences also fraud.

S v NGOBESE (GJ)

SPILG J
2018 JULY 23; DECEMBER 7

Conspiracy—To murder—What constitutes—Mens rea—Seriousness of offender's commitment to carry out crime to be determined—Subjective state of mind of alleged co-conspirator irrelevant and overt manifestation of assent sufficient.

THE NAMIBIAN LAW REPORTS

2019 (1)

TABLE OF CASES

- Mans NO and Others v Coetzee and Others 2019 (1) NR 1 (SC)
- Nottingham Inc v Rockview Investment Number Seventy One (Pty) Ltd and a Similar Case 2019 (1) NR 8 (HC)
- Van Zyl and Others v Namibian Affirmative Management and Business (Pty) Ltd and Others 2019 (1) NR 27 (HC)
- GR v ER 2019 (1) NR 46 (HC)
- Visagie v Government of the Republic of Namibia and Others 2019 (1) NR 51 (SC)
- S v Barnard 2019 (1) NR 78 (HC)
- Namibian Marine Phosphate (Pty) Ltd v Minister of Environment and Tourism and Others 2019 (1) NR 90 (HC)
- S v Gowaseb 2019 (1) NR 110 (HC)
- Lawrence v GijimaAst Technology Services (Pty) Ltd and Another 2019 (1) NR 115 (LC)
- Ngavetene and Others v Minister of Agriculture, Water and Forestry and Others 2019 (1) NR 129 (HC)
- Elia v Minister of Safety and Security and Others 2019 (1) NR 151 (HC)
- Prosecutor-General v Standard Bank Namibia Ltd and Others 2019 (1) NR 159 (HC)
- Shoprite Namibia (Pty) Ltd v Petrus 2019 (1) NR 175 (HC)
- S v Manale 2019 (1) NR 191 (HC)
- S v Swatz 2019 (1) NR 197 (HC)
- S v Umub 2019 (1) NR 201 (HC)
- S v Noble and Another 2019 (1) NR 206 (HC)
- S v Teek 2019 (1) NR 215 (SC)
- Dannecker v Leopard Tours Car and Camping Hire CC and Others 2019 (1) NR 246 (SC)
- Minister of Health and Social Services v Amakali 2019 (1) NR 262 (SC)
- United Africa Group (Pty) Ltd v Uramin Inc and Others 2019 (1) NR 276 (SC)
- Muhura NO and Another v Lewcor CC 2019 (1) NR 288 (HC)
- Lee's Investments (Pty) Ltd v Shikongu and Another 2019 (1) NR 298 (HC)

FLYNOTES

MANS NO AND OTHERS v COETZEE AND OTHERS (SC)

SUPREME COURT

SHIVUTE CJ, HOFF JA and FRANK AJA

2018 OCTOBER 10, 30

Practice—Judgments and orders—Default judgment—First respondent abandoned judgment in agreement with second respondent that application for rescission would not proceed—Pleadings thereafter exchanged but second respondent then joined third parties (appellants) on basis of indemnity they had given him in respect of first respondent's claim—Third parties and second respondent then pleading that matter res judicata—No privity of agreement between first respondent and third parties and they were therefore unable to raise special plea—To uphold special plea in favour of second respondent would be to disregard agreement he had made with first respondent—Special plea dismissed.

NOTTINGHAM INC v ROCKVIEW INVESTMENT NUMBER SEVENTY ONE (PTY) LTD AND A SIMILAR CASE (HC)

ANGULA DJP

2018 APRIL 26; AUGUST 28

[2018] NAHCMD 278

Company—Winding up—Application for—By American company under receivership—Respondent companies domiciled in Namibia—Recognition by Namibian court of foreign receiver—Applicant proposing that Namibian liquidators be appointed to deal with assets—Where American company, not receiver, the applicant, no need for foreign receiver to be recognised by Namibian court.

Company—Winding up—Application for—Act of insolvency—Admission of insolvency in 'without prejudice' offer of settlement in response to letter of demand—Admission of insolvency should not be precluded from disclosure in liquidation proceedings on basis of 'without prejudice' rule—Act of insolvency not to be afforded same protection as afforded to settlement negotiations.

Company—Winding up—Application for—Claim against surety based on arbitral award against principal debtor made order of court—Surety alleging principal debt had prescribed—Order of court constituting new cause of action—Surety liable even if original cause of action on which judgment obtained had become prescribed—Prescription against surety commencing to run independently of original debt from date of judgment—Defence based on prescription dismissed.

VAN ZYL AND OTHERS v NAMIBIAN AFFIRMATIVE MANAGEMENT AND BUSINESS (PTY) LTD AND OTHERS (HC)

MASUKU J

2018 OCTOBER 5, 19; NOVEMBER 5

[2018] NAHCMD 350

Company—Proceedings by and against—Action in terms of s 260(1) of Companies Act 28 of 2004—Locus standi—Shareholders of company entitled to proceed in terms of s 260(1) against directors of company whose conduct they alleged was unreasonably prejudicial, unjust or inequitable.

GR v ER (HC)

PRINSLOO J

2018 SEPTEMBER 24; OCTOBER 19, 22

[2018] NAHCMD 336

Costs—Withdrawal—Application for award of costs in terms of High Court Rules, rule 97(3)—Matrimonial proceedings—General rule that costs follow result not always working satisfactorily in matrimonial proceedings—Appropriate in circumstances to take into account apparent inequality of financial means of parties.

VISAGIE v GOVERNMENT OF THE REPUBLIC OF NAMIBIA AND OTHERS (SC)

SHIVUTE CJ, DAMASEB DCJ and FRANK AJA
2018 NOVEMBER 1; DECEMBER 3

Constitutional law—Fundamental rights—Fair trial—Breach of—Whether state liable for damages suffered as result of breach of right to fair trial by judicial officer—Common law not recognising liability of state—Existence of remedy against actual wrongdoer, ie judicial officer, important consideration in determining whether remedy existing against state—In view of remedy against actual wrongdoer, recognition of new remedy against state not necessary—Recognition of liability of state might undermine independence of judiciary—Constitution of Namibia, arts 5, 7, 25(3), 25(4).

State—Liability—Whether state liable for damages suffered as result of breach of right to fair trial by judicial officer—Common law not recognising liability of state—Existence of remedy against actual wrongdoer, ie judicial officer, important consideration in determining whether remedy existing against state—In view of remedy against actual wrongdoer, recognition of new remedy against state not necessary—Recognition of liability of state might undermine independence of judiciary—Constitution of Namibia, arts 5, 7, 25(3), 25(4).

Delict—Liability—Liability of state—Whether state liable for damages suffered as result of breach of right to fair trial by judicial officer—Common law not recognising liability of state—Existence of remedy against actual wrongdoer, ie judicial officer, important consideration in determining whether remedy existing against state—In view of remedy against actual wrongdoer, recognition of new remedy against state not necessary—Recognition of liability of state might undermine independence of judiciary—Constitution of Namibia, arts 5, 7, 25(3), 25(4).

S v BARNARD (HC)

VELIKOSHI AJ
2018 NOVEMBER 28–30; DECEMBER 6
[2018] NAHCMD 399

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.