

January 2013

We wish all our readers a peaceful and safe holiday, and a prosperous new year!

The Juta Law Reports Team

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

Herewith the cases of interest in the January reports. Also included below are the table of cases and flynotes.

The 2012(2) edition of the Namibian Law Reports will be available at the end of January. For the table of cases and flynotes, see further below.

JUDGMENTS OF INTEREST IN THE JANUARY EDITIONS OF THE SALR AND THE SACR

SOUTH AFRICAN LAW REPORTS

Trust accounts and internet scams

An internet banking swindle involved the transfer of a substantial amount of money into a law firm's trust account, which was then transferred to a third party, without the firm knowing the true source of the funds. The court looked at what legal duty lay on attorneys to properly establish the source of the funds, before paying them out. *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP)

Voluntary and friendly sequestration: the hazards

The risks of abuse and that the interests of creditors will be undermined are examined in *Ex Parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP). And in *Plumb on Plumbers v Lauderdale And Another* 2013 (1) SA 60 (KZD) the court found that several of the provisional sequestration applications from the same attorney's office contained allegations of fact that were identical or similar in form and content, and that the affidavits could not have correctly represented, in each case, facts which the deponent believed to be true.

Buyer beware: of the contract

A customer bought a car from a second-hand car dealer, the deal financed by the bank. Four days later he returned the seriously defective vehicle and demanded a refund of his deposit. The dealer did not refund him, and the bank's attorneys ended up issuing summons against him. The court takes a stern look at the contract, and whether its terms comply with the National Credit Act and the Constitution. *Standard Bank of South Africa Ltd v Dlamini* 2013 (1) SA 219 (KZD)

SOUTH AFRICAN CRIMINAL LAW REPORTS

Admission of guilt fine leading to criminal record

On a charge of disturbing the peace, the notice to appear form did not warn that payment of the fine would lead to a criminal record. The constitutionality of the procedure of the issuing police officer and the wording of the form is examined in the judgment of *S v Parsons* 2013 (1) SACR 38 (WCC).

Domestic violence protection orders: who can apply?

Two brothers were involved in a business, but their relationship broke down, resulting in one applying for a protection order against the other. The meaning of 'domestic relationship' is examined, and whether the dispute between them was really of a commercial nature and not a matter of domestic violence. *Daffy v Daffy* 2013 (1) SACR 42 (SCA)

Police use of force in effecting an arrest

A policeman intervened in a shootout in a crowded place, and shot one of the participants who had turned to face the policeman with gun in hand. The court considered whether the policeman's shooting was justified, considering that the man was posing a threat to the policeman and to members of the public in the vicinity. *Ngubane v Chief Executive Director of Emergency Services, Ethekwini Metropolitan Service and Another* 2013 (1) SACR 49 (KZD)

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Constitutional law—Human rights—Right to personal liberty and dignity—Appellant detained in terms of s 77(6) of Criminal Procedure Act read with ch 3 of Mental Health Act—Article 7 of Constitution which protected individual liberty had to be broadly interpreted—Detention as President's patient depriving person of liberty and dignity—

Constitution, arts 7 and 8, Criminal Procedure Act 51 of 1977, s 77(6) and Mental Health Act 18 of 1973, ch 3.

Delict—Elements—Unlawfulness or wrongfulness—Breach of legal duty—Breach by officials in ministry of justice of their statutory duties, resulting in unlawful detention—Respondent's defence that appellant's detention was in terms of court order, could not be correct because it meant that person could be detained for as long as order subsisted—Mental Health Act provided in detail steps to be taken to obtain release of person detained in terms of order by magistrate, and once person so detained was fit for release, decision left to health authorities and court, steps prescribed by Mental Health Act had to be complied with reasonably—Mental Health Act 18 of 1973, ch 3.

Delict—Elements—Negligence—Delay in releasing appellant from mental facility—Wrongful detention—Statutory duty upon hospital board and its personnel and Minister of Justice and his personnel to act reasonably—Reasonable person, in these circumstances, would have foreseen possibility of his conduct causing loss to another person and would have taken reasonable steps to avoid such possibility—There was no reasonable explanation for delay to act in order to discharge appellant as a President's patient, which was a necessary step in the process before a judge could order release of appellant—Court holding that delay unreasonable—Respondent liable to compensate appellant for damages under Lex Aquilia.

S v KONDO (NLD)

LIEBENBERG J and TOMMASI J

2012 MARCH 23, 30

Criminal procedure—Plea—Plea of guilty—Statement must contain all elements of offence and facts which accused admits—Statement should not be mere regurgitation of charge-sheet—Court must satisfy itself that accused admits all elements of offence—Legal practitioners must acquaint themselves fully with all admitted facts and elements of offence—Criminal Procedure Act 51 of 1977, s 112(2).

MOBILE TELECOMMUNICATIONS LTD v NAMIBIA TELECOMMUNICATIONS COMMISSION AND OTHERS (HC)

SMUTS J

2012 MARCH 20; APRIL 3

Administrative law—Administrative bodies—Decisions of functionary—Statutory body has duty to keep proper records—Such record keeping especially important for bodies which have perpetual succession.

Administrative law—Review—Right to fair administrative justice—Review of administrative decisions—Function of court to determine whether decision made by specialist body was fair and whether proper procedures had been followed—Reasons provided by commission within context of its decisionmaking demonstrated that reasonable choice was made by commission, exercising one of reasonable options open to it—Application

dismissed—Commission held liable for 25% of costs, due to slovenly manner in which it had gone about litigation process—Constitution, art 18.

KAVEKOTORA v TRANSNAMIB HOLDINGS LTD AND ANOTHER (LC)

SMUTS J

2012 JANUARY 20; FEBRUARY 3

Labour law—Unfair dismissal—What constitutes—Appellant applying for unpaid leave to run for political office—First respondent alerting him to policy which deems employees to have resigned when running for political office—Appellant unsuccessful in election—First respondent refusing reinstatement—Arbitrator dismissing complaint of unfair dismissal—Appellant contending that policy not applicable to him—Court on appeal holding that appellant had elected to resign when fully aware of company policy—Appeal against arbitrator’s award dismissed.

EH v D (HC)

DAMASEB JP

2012 JANUARY 20, 25, 27

Practice—Applications and motions—Urgent applications—Urgent application for interim custody of minor—Court in such applications would not take pedantic approach requiring applicant seeking urgent relief to meticulously explain reason for every delayed action in coming to court—Considerations in such applications different from urgent applications of commercial nature.

Husband and wife—Custody of minor child—Interim custody pending application for variation of custody order—Respondent, custodian parent, moving minor to boarding school—Applicant seeking interim custody—Minor obviously resentful of move—Court satisfied that respondent acting in best interests of minor and not with ulterior motive—Application dismissed.

STRAUSS AND ANOTHER v LABUSCHAGNE (SC)

SHIVUTE CJ, MARITZ JA and O’REGAN AJA

2011 JULY 13; 2012 JUNE 21

Land—Sale—Agricultural land—Land Reform Act providing that agricultural land first to be offered to state—Land only to be sold if state issues waiver—Act further providing that foreigners only to purchase land with minister’s consent—First appellant, foreigner, and respondent, owner of farms, entering into agreements of loan and lease of respondent’s farms—Respondent agreeing to bequeath land to first appellant—Agreements not constituting alienation in terms of Act—Act defining ‘alienation’ to include sale, exchange, donation or disposal—Agreements between parties not ineluctably leading to first appellant

becoming owner of farms—Agreements between parties thus not constituting ‘alienation’ in terms of Act—Land Reform Act 6 of 1995.

Land—Sale—Agricultural land—First appellant and respondent entering into several agreements regarding respondent’s farms—First agreement providing that first appellant to lend money to respondent—Payment of loan in tranches over several years—Second agreement providing for lease by first appellant of respondent’s farms at nominal rental—Third agreement, that respondent would bequeath farms to first appellant—Court on appeal holding that agreements ‘anomalous’—Purpose of agreements clearly to circumvent peremptory provisions of Act—Agreements held to be in fraudem legis and void ab initio—Land Reform Act 6 of 1995.

DISCIPLINARY COMMITTEE FOR LEGAL PRACTITIONERS v MURORUA AND ANOTHER (HC)

VAN NIEKERK J, PARKER J and SIBOLEKA J

2010 NOVEMBER 25, 26; 2012 JUNE 25

Legal practitioner—Misconduct—Unprofessional conduct—What constitutes—First respondent, a legal practitioner, failing to mention to court undertaking he had given to colleague—Applicant finding first respondent guilty of unprofessional conduct and seeking order striking him off the roll—Court holding that misleading court and lying to colleagues, constituting unprofessional conduct—However, majority of court not satisfied that first respondent wilfully misleading court—First respondent’s conduct close to warranting striking off roll, but that in present case it would be unfair to do so—Court ordering first respondent’s suspension for one year.

DI SAVINO v NEDBANK NAMIBIA LTD (SC)

SHIVUTE CJ, MAINGA JA and NGCOBO AJA

2012 MARCH 29; JUNE 21

Practice—Judgments and orders—Summary judgment—Bona fide defence—Defendant must satisfy court that had bona fide defence—Defendant must depose to facts which, if true, would establish defence—Defendant must disclose facts upon which defence was based—Court must be satisfied that defendant had good defence in law—Defendant must make full disclosure so that court apprised of all relevant facts.

Practice—Judgments and orders—Summary judgment—Defence—Appellant in present case raising new points on appeal—Court disinclined to allowing raising of new points on appeal—Court having discretion to allow raising of new points—Court must be satisfied that new points covered by pleadings, that it would not result in unfairness, that other party would have conducted case differently if points raised from the start—However, since summary judgment drastic remedy, courts more inclined to allow raising of new points on appeal.

COUNCIL OF THE MUNICIPALITY OF KEETMANSHOOP v ROOI AND OTHERS (HC)

MILLER AJ

2012 JUNE 11; JULY 18

Estoppel—Application of—Doctrine of estoppel finds no application in circumstances where effect would be that there is contravention of statutory provision.

LM AND OTHERS v GOVERNMENT OF THE REPUBLIC OF NAMIBIA (HC)

HOFF J

2010 JUNE 1–3; SEPTEMBER 1–3, 6–8, 10; 2011 JANUARY 18–20, 27

2012 JULY 30

Medicine—Medical treatment—Consent to treatment—Plaintiffs, all HIV positive, all sterilised during caesarean section—Plaintiffs claiming unlawful sterilisation—Plaintiffs signing consent forms—Defendant pleading *volenti non fit iniuria*—Question whether consent constituting informed consent—Evidence establishing that plaintiffs not fully informed of consequences of sterilisation—Court not satisfied that plaintiffs fully informed of consequences and alternative contraceptive methods—Court holding defendant liable for unlawful sterilisations.

S v NENGONGO (HC)

SMUTS J and GEIER J

2012 JUNE 22, 27

Firearms—Safekeeping—Offences under Arms and Ammunition Act 7 of 1996—Failure to ensure safekeeping of firearm in contravention of s 38(1)(j)—Appellant leaving firearm on car seat in bag with small safe—Act and regulations containing specific prescriptions for safekeeping of firearms, including fitting of a safe in vehicle—Appellant failing to ensure safety of firearm—Legislature clearly intending to safeguard firearms and prevent them from landing in the wrong hands—Court *a quo* correctly convicting appellant for failure to ensure safekeeping of firearm.

Criminal procedure—Sentence—Imposition of—Factors to be taken into account—Sentence for offences under Arms and Ammunition Act 7 of 1996—Appellant failing to ensure safekeeping of firearm—Magistrate cautioning and discharging accused—On appeal, court holding that magistrate failed to appreciate seriousness of offence—Court substituting sentence with fine of N\$3000 or three months' imprisonment.

FRANS v PASCHKE AND OTHERS (HC)

DAMASEB JP

2012 JUNE 14, 25

Enrichment—Unjust enrichment—Date for determining quantum of enrichment—Value to be determined as at date when court reserved judgment and not from date of summons.

MINISTER OF HEALTH AND SOCIAL SERVICES AND OTHERS v MEDICAL ASSOCIATION OF NAMIBIA LTD AND ANOTHER (SC)

MAINGA JA, STRYDOM AJA and LANGA AJA

2011 MARCH 3; 2012 JUNE 21

Statute—Regulations made in terms of statute—Medicines and Related Substances Control Act 13 of 2003 (Medicines Act)—Reference to ‘Minister’ in art 140 of Constitution—Article containing provisions to ensure smooth transfer of power from former administration to government of Namibia—Reference to ‘Minister’ in art 140 means minister of government of Namibia—Reference in art 140(5) of Constitution to ‘Administrator-General’ meaning President of Namibia—Section 4(3) of Medicines and Related Substances Control Act 101 of 1965 interpreted as reference to present Minister of Health and Social Services—Minister did not act ultra vires his powers when he published names of members of 1965 Council in Official Gazette—Court a quo should therefore not have declared all regulations, enacted in terms of s 44 of Medicines Act, to be null and void, since 1965 Council had been validly appointed by President of Namibia.

Statute—Interpretation of—Medicines and Related Substances Control Act 101 of 1965—Section 12(3) of Interpretation Proclamation—Reference to ‘law’ in section not meaning that it has force of law—Regulations under Medicines Act 13 of 2003 published before Act came into force—Publication necessary so that proper consultation could take place—Final regulations published together with notice of commencement of Act—This was necessary, since implementation of Act was dependent upon regulations—Court a quo’s reliance on s 12(3) when declaring all regulations under Medicines Act invalid, accordingly set aside.

Medicine—Medicines and Related Substances Control Act 13 of 2003 (Medicines Act)—Dispensing of medicine—Regulation 34(3) of regulations in terms of Medicines Act—Validity of—Regulation providing for issuing of licences to medical practitioners to dispense medicine—Purpose of medicine was for healing and treatment of illness—Minister not empowered to restrict freedom of choice when purchasing medicine—Act not empowering minister to drastically change policy regarding dispensing of medicine by medical practitioners—Court setting aside reg 34(3)(a), (c), (d) and (e) of regulations in terms of Medicines Act.

TAAPOPI v NDAFEDIVA (HC)

GEIER J

2012 JUNE 4, 6 and 22

Donation—What constitutes—Law generally regards it improbable that person will gratuitously part with money as a gesture of liberality—Defendant alleging donation bearing onus to prove such donation.

Evidence—Witnesses—Calling, examination and refutation—Two mutually destructive versions—Onus on plaintiff—Probabilities favoured plaintiff.

MINISTER OF BASIC EDUCATION, SPORT AND CULTURE v VIVIER NO AND ANOTHER (SC)

MARITZ JA, STRYDOM AJA and MTAMBANENGWE AJA

2008 APRIL 7; 2012 JUNE 29

Evidence—Witnesses—Single witness—Young children—Cautionary rules—Reason for rules being evidential risk—Children having inchoate social and other skills—Children also prone to suggestibility and imaginativeness—Children may not fully comprehend importance of truthfulness—The younger the child, the greater the care needed—However, cautionary rules not applied in formalistic way—Rules intrinsic part of broader logical and reasoned inquiry into substance of evidence.

Evidence—Witnesses—Expert evidence—Where expert in no better position than court to express opinion, evidence would be supererogatory, irrelevant and inadmissible—At other end of spectrum are matters on which court not in position to form opinion unassisted—Between two extremes was whole spectrum of incremental relevance or irrelevance—Depending on degree of assistance to be derived by court from opinions expressed on issue at hand—In present case court satisfied that court a quo correctly evaluating expert evidence.

Damages—Bodily injuries—Psychiatric injury—Quantum of damages for emotional shock—Court a quo awarding N\$25 000—Court on appeal reducing quantum to N\$10 000—Reason for reduction that though court satisfied that second respondent suffered emotional shock, no psychiatric evidence and evidence of second respondent limited.

ZC AND ANOTHER v LM AND ANOTHER: IN RE SM (HC)

GEIER J

2012 APRIL 13, 19, 26; MAY 31; JUNE 4

Curator—Appointment of—Curator personae—Such appointment only in exceptional circumstances, since it could amount to encroachment on person's liberty—Court in present case appointing curator personae—Patient suffering from dementia, unable to move or communicate, with poor prognosis.

DU PREEZ v MINISTER OF FINANCE (SC)

MAINGA JA, STRYDOM AJA and O'REGAN AJA

2011 NOVEMBER 4; 2012 JUNE 21

Statute—Interpretation of—Presumption against legislature not altering common law more than necessary—Such presumption rebuttable—Section 79(4) of Income Tax Act providing

that interest could exceed principal debt—Court satisfied that language of section clear and unambiguous—Appellant relying on in duplum rule to challenge amount of interest charged—Section 79(4) clearly intending to alter common-law in duplum rule—Appellant accordingly not entitled to rely on in duplum rule, given clear language of section—Fact that s 79(4) amended subsequent to litigation, also not assisting appellant—Income Tax Act 24 of 1981, s 79(4).

SIMATAA v MAGISTRATE OF WINDHOEK AND OTHERS (HC)

TOMMASI J

2012 JULY 23

Criminal law—Corruption—Public officer—Search and seizure in terms of Anti-Corruption Act 8 of 2003—Before Anti-Corruption Commission approaches judicial officer for search warrant, investigators must have reasonable grounds for such officer to form opinion before issuing warrant—Mere suspicion or speculation not sufficient to justify issuing of warrant.

AUSSENKEHR FARMS (PTY) LTD v NAMIBIA DEVELOPMENT CORPORATION LTD (SC)

MARITZ JA, MAINGA JA and NGCOBO AJA

2012 MARCH 28; AUGUST 13

Court—Abuse of court process—Court having inherent power to protect itself from abuse—Such protection in public interest and for preservation of rule of law—Court must not interfere with free access to courts by summary dismissal of action without hearing evidence, on basis of vexatious proceedings—Court only to do so where claim unfounded or dismissal of action was foregone conclusion—Lack of merit to be demonstrated with clarity—In present case plaintiff causing delay by late filing of pleadings—Court not satisfied that conduct amounting to abuse of process.

Practice—Withdrawal and dismissal of proceedings—Delay in prosecution of case—Dilatory abuse—Prejudice to other party not only consideration—Court must be satisfied that party causing delay using process for ulterior motives—Considerations of fairness and public confidence in judicial system another factor—Inactivity of defendant also playing role—Court not condoning delay by plaintiff but not satisfied that such delay amounting to dilatory abuse.

Practice—Irregular proceedings—What constitutes—Two stage enquiry—Court must first decide whether step irregular—If step irregular, court to determine whether party prejudiced—Steps taken in breach of rules, irregular—In present case plaintiff's delay constituting irregular step—However, court not satisfied that defendant suffered prejudice as result of irregular step.

FN v SM (HC)

SMUTS J

2012 AUGUST 2, 8

Criminal procedure—Domestic violence—Domestic violence protection order—Court compelled to combat evil of domestic violence if satisfied that respondent had committed domestic violence towards complainant—Domestic Violence Act 4 of 2003.

AFRICA PERSONNEL SERVICES (PTY) LTD v SHIPUNDA AND OTHERS (LC)

SMUTS J

2012 JUNE 29; JULY 31

Labour court—Rules of court—Filing of record in appeals—Duty to file record resting on labour commissioner—Rule 17(25) providing that appeal lapses within 90 days—Rule in present form operating harshly against appellants—Failure to file record timeously cannot be laid at door of appellant—Rule 17 needing to be revised accordingly.

Constitutional law—Human rights—Right to assemble—Such right foundational to exercise of democratic rights especially in case of workers—However, such rights not unfettered—Right subject to limitation in terms of art 21(2) of Constitution—One such limitation being right to property—Section 65 of Labour Act 11 of 2007 regulating right to assembly and meetings of trade union—Section providing that employer cannot unreasonably withhold such right.

MINISTER OF JUSTICE v MAGISTRATES' COMMISSION AND ANOTHER (SC)

STRYDOM AJA, LANGA AJA and O'REGAN AJA

2011 APRIL 6; 2012 JUNE 21

Constitutional law—Separation of powers—Independence of judiciary—Namibia constitutional state upholding rule of law and separation of powers—Separation of powers especially important for independence of judiciary—Establishment of Magistrates' Commission serving to guarantee independence of magistracy as part of judiciary.

Magistrate—Misconduct—Magistrates' Commission—Commission recommending dismissal of magistrate found guilty of misconduct—Minister refusing to dismiss magistrate and conducting fresh investigation—Court a quo granting order compelling minister to dismiss magistrate—Court on appeal holding that minister has no power to refuse dismissal of magistrate—Magistrates Act couched in peremptory terms—Fact that minister has discretion to appoint magistrates, not implying power to refuse to dismiss them—Power to dismiss magistrates residing in commission—Aggrieved magistrate having right to approach high court—Magistrates Act 3 of 2003.

AMUNYELA v AROVIN PROPERTY DEVELOPERS (PTY) LTD (HC)

CORBETT AJ

2011 OCTOBER 19; 2012 APRIL 5

Practice—Judgments and orders—Summary judgment—Furnishing of security by defendant at hearing—Furnishing of security lent weight to contention that defendant had bona fide defence—Where security not complying with rule 32(3)(a), court had discretion to take cognisance that tender had been made.

WILDERNESS AIR NAMIBIA (PTY) LTD v JANSE VAN RENSBURG (LC)

MILLER AJ

2012 FEBRUARY 17; MARCH 2; APRIL 4

Labour law—Unfair labour practice—Factors to be considered—First, whether measures taken were fair and reasonable; second, whether fair procedures were followed; third, whether measures implemented were in themselves fair.

DA CUNHA DO REGO v BEERWINKEL t/a JC BUILDERS (SC)

SHIVUTE CJ, MAINGA JA and O'REGAN AJA

2012 JULY 5; AUGUST 22

Practice—Applications and motions—Application for postponement—Court will not grant postponement merely because legal practitioner not available—Court must protect interests of both parties—This rule also protecting general public—Importance of efficient and speedy litigation.

Arbitration—The award—Application to have award made order of court—Validity of award—Arbitration in absence of one party—Section 15(2) of Arbitration Act 42 of 1965 making provision for hearing in absence of one party under certain circumstances.

**MINISTER OF MINES AND ENERGY AND OTHERS v PETRONEFT
INTERANTIONAL LTD AND OTHERS (SC)**

SHIVUTE CJ, MARITZ JA and O'REGAN AJA

2011 NOVEMBER 3; 2012 JUNE 21

Constitutional law—Executive authority—Role of cabinet—Cabinet revoking mandate of parastatal to import petroleum products—Article 40 of Constitution providing inter alia that cabinet responsible for supervising and co-ordinating activities of parastatal—Power including issuing of policy directives—Parastatal in question facing financial difficulties—Decision to revoke mandate falling within cabinet's function in terms of art 40—Allowing parastatal to become insolvent having serious fiscal, economic and security implications—Decision accordingly not unlawful.

Administrative law—Administrative act—What constitutes—Cabinet revoking mandate of parastatal to import petroleum products—Reference to function rather than functionary determining whether or not act administrative—Court assuming for present purposes, that cabinet decision to revoke mandate of parastatal to import petroleum products, constituting administrative act and falling within purview of art 18 of Constitution.

Administrative law—Administrative act—Fairness of—Cabinet revoking mandate of parastatal to import petroleum products—Duty to act fairly not rigid principle imposing specific obligations upon administrative bodies and officials in inflexible, invariable way—Requiring cabinet to consult every party to contract, especially where such contract provided for termination under certain circumstances, would make task of cabinet burdensome.

Administrative law—Administrative action—Validity—Procedural fairness—Legitimate expectation doctrine—Legitimate expectation of consultation ordinarily only arising where established practice of consultation or where promise or representation made that consultation would occur—Respondents not pointing to such practice—Cabinet accordingly not under obligation to consult—Existence of legitimate expectation accordingly not established.

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