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# LAW LETTER

*April 2008*



**vennnemeth&hart**  
ATTORNEYS

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*In this special Anniversary edition of Law Letter we consider what our courts have said recently about the problems faced by parents, animal lovers, taxpayers, jilted lovers, buyers of property and employees. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.*

## Law Letter 1988 - 2008

WITH THIS EDITION we are proud to celebrate with our readers the 20th Anniversary of the very first edition of Law Letter, published in April 1988.

Law Letter has established itself over two decades as the leading complimentary independent law newsletter in South Africa. From the outset, our aim was to inform, enlighten and entertain our readers. The law affects us all, from cradle to grave, and we believe that the more our clients know and understand about how the law works, what it seeks to achieve, and how important it is to the well-being and advancement of our society and its people, the better equipped our clients will be to order their affairs to best advantage.

But the law can also be complex, dry, obscure and frustrating. Law Letter strives to make the law accessible to our readers, to let us see things in perspective, in their context, and to celebrate the fascinating world of wit, wisdom and words that help to make the practice of law a noble and worthy profession.

Law Letter has commented over the past 20 years on our transition to a democratic and constitutional democracy, on the emergence of a human rights culture, on crime, corruption, and many misdemeanours, while providing our readers with the latest developments on the broadest spectrum of relevant legal fields – from tax to trade marks, labour to land issues, damages to defamation, banking to biodiversity.

Central to any successful law practice is the relationship between attorney and client. Law Letter has proved to be an effective link as a direct marketing medium to maintain and cement that relationship. We greatly value the input we receive from our readers and welcome any suggestions, criticism or comments.

We are confident that Law Letter will continue to go from strength to strength and sincerely thank all our contributors and especially our loyal printers and distributors, Handy Printing, who have been with us from day one, for their continued expertise, dedication and commitment.

*"You don't get to be the best by being the oldest – you get to be the oldest by being the best."*

## FROM THE COURTS

### *Property Law*

#### ■ Guarantee – All or Nothing

TRANSFERS OF immovable properties are almost always subject to the provision by the purchaser of a guarantee for the purchase price. Once the guarantee is in place, the seller can proceed with the transfer secure in the knowledge that it will be paid the purchase price once the property is legally owned by the purchaser. In the present case, the agreement of sale provided for the purchaser to furnish a bank guarantee "acceptable to the seller". The purchaser obtained a guarantee from a bank which included a clause entitling the bank unilaterally to withdraw the guarantee -

"Should any new or previous undisclosed fact emerge which may prejudice the bank's security or any circumstance arise to prevent or unduly delay registration ..."

Contending that the guarantee was conditional and therefore unacceptable to it, the seller terminated the agreement on the basis of the purchaser's failure to furnish a guarantee in accordance with the agreement. The purchaser denied being in breach of the agreement and sued for performance. The agreement did not specifically provide that the guarantee should be unconditional and the issue was whether the seller was entitled to reject it because it was not. This meant that in order to succeed, the purchaser had to prove that the seller, when exercising its discretion in regard to the acceptability of the guarantee, did not act reasonably and in good faith.

For the purchaser it was contended that it was a long-standing and general practice of financial institutions

to furnish guarantees in the conditional format which was used in this case. Evidence was given by a senior conveyancer with extensive experience that so-called "bank guarantees" invariably contain a clause allowing the bank to withdraw the guarantee in certain circumstances and these are used unless the agreement expressly stipulates that the guarantee should be irrevocable.

The court weighed the reasons given by the seller in rejecting the guarantee against an objective standard of reasonableness in the light of previous decisions touching upon the point. Finding that the seller required security for the payment of the purchase price and that if the bank revoked the guarantee, as it was entitled to do, this would leave the seller without any substitute for that security, the court said that the seller could not reasonably have been expected to accept, to its detriment, a revocable guarantee. It had therefore acted reasonably and in good faith and the purchaser's claim failed.

*Koumantarakis Group CC v. Mystic River Investments 45 (Pty) Ltd and Another 2007 (6) SA 404 (D).*



## Employment Law

### ■ Flight Delay

*"The tumult and the shouting dies -  
The captains and the kings depart."  
- Rudyard Kipling (1865 - 1936)*

ONE OF the remedies which is usually available to the innocent party in the case of a breach of contract is specific performance, that is, an order by the court that the guilty party perform whatever contractual obligation he has wrongfully failed to do. An exception to this rule may be in the case of employment contracts where the service to be rendered would make an order of specific performance difficult to supervise. Services of a personal nature which are required daily to be performed between parties whose relationship as employer and employee has broken down would give rise to the constant danger of disputes and in such cases the alternative remedy of damages is preferable.

In the present case it was an airline pilot who had sought to quit his employment with Nationwide Airlines without giving three months' notice as contractually required. One of the issues before the court was whether Nationwide was entitled to an order that the pilot was required to continue

serving during his required period of notice as a captain of a Boeing 767 aircraft in accordance with Nationwide's duty roster. It was argued that an order for specific performance was not appropriate.

The judge pointed out that there was no fixed rule that specific performance would not be granted in the case of a contract of employment. Each case depended on its own circumstances and relevant factors to be considered included the particular relationship between employer and employee, the nature of the employment contract, the work to be performed, and the possible prejudice to the innocent party if specific performance were not ordered compared to the prejudice to the guilty party if it were.

In finding against the pilot, the court relied upon the case in 2003 of *Santos Professional Football Club (Pty) Ltd v. Igesund and Another* in which the professional coach tried to break his contract for "commercial" reasons. The court in that case found that the coach was no ordinary servant, that he had *carte blanche* in the exercise of his duties and the football club was the only party which would be prejudiced if the coach did not perform his contractual duties. In regard to the pilot, his situation was similar. He was a highly qualified professional who performed his duties in accordance with the **Aviation Act**, and while in exclusive command of his aircraft was not subject to the control of Nationwide. If he left the job without giving proper notice, it would take the airline two to three months to find a replacement with the necessary qualifications and pending its doing so the airline could be short-staffed if, say, one of its other pilots fell ill. This could result in the cancellation of flights at a loss of approximately R1 million per flight.

The pilot was ordered to serve out the required three months' notice.

*Nationwide Airlines (Pty) Ltd v Roediger and Another 2008 (1) SA 293 (W).*



## Law of Marriage

### ■ Breach of Promise

*"Thus grief still treads upon the heels of pleasure;  
Marry'd in haste, we may repent at leisure."  
- William Congreve (1670 - 1729)*

THE PARTIES in this case had had a long-standing relationship in the course of which they had lived together

for a number of years. It was common cause that they had agreed to marry on an unspecified date in the future and the court found that the defendant had breached that agreement. The plaintiff sued for damages and, as the trial judge said: "... it is evident that this case concerns the conversion of the possibility of a blissful and harmonious relationship into a ferociously fought emotional war."

The remedy for breach of promise is an old one and in many jurisdictions (for example, England, Scotland, Australia and most European countries) it has been abolished, but Judge Denis Davis found that it is still part of our law although he added that the continued existence of the action should be reconsidered. Having regard to the diverse forms of intimate personal relationships now recognised by our Constitution it is questionable, said the judge, whether a decision by one party to a relationship should be considered purely as a matter giving rise to a claim for contractual damages.

But, on the law as it stands, the plaintiff was entitled to damages and, having found also that the parties had intended to marry in community of property, the judge made an order which entitled the plaintiff to, effectively, one half of the defendant's assets, valued at R1 330 950. The plaintiff's prospects of marriage to some other man were, however, reasonably good and the damages were ordered to be reduced by 50%. Judgment was granted in her favour for R665 475.

*Sepheri v. Scanlan 2008 (1) SA 322 (C).*

## Damages

### ■ It's a Dog's Life

*"Men are generally more careful of the breed of their horses and dogs than of their children."*

– William Penn (1644 - 1718)

THE PLAINTIFF'S four-year-old daughter was bitten on the face by a Chow dog, Taz, owned by the defendants. The plaintiff sued. On the afternoon of the attack, the plaintiff's older daughter had gone to visit her boyfriend at the defendants' home and had taken her little sister with her. The younger girl was acquainted with Taz and had played with him both previously and on the day in question. On that day, however, after Taz had been fed and was eating from his bowl, she pulled at his nose, whereupon Taz bit her once on the face. The injury required stitches.

The plaintiff's claim against the defendants was based on the common law and on an allegation of negligence. The old Roman action attributes strict liability to the owner of a domesticated animal which causes damage to a human, because an attack by a domesticated animal is regarded

as contrary to its nature and, therefore, unreasonable and wrongful. The court considered very carefully whether Taz had, in snapping at the girl, acted contrary to his nature as a domesticated animal. Judge Kathy Satchwell said she had no personal expertise in canine psychology and pointed out the difficulties in determining the standard of dog behaviour against which it had to be determined whether Taz had acted from "inner vice" or against its nature. She pointed out that there are many different breeds of dog and there are dogs which are trained for particular tasks. There are well-treated and happy dogs and abused and unhappy dogs; some are old and crotchety, others young and playful. Quoting from an article by the late Professor Hunt on the topic, the judge referred to "dolce fox-terriers, tempestuous collies, elephantine St Bernards and trap-jawed bulldogs".

The crisp question was, however, whether it is contrary to the nature of a dog which is a household pet to bite a child in the garden of that house and the judge found this to be so. But that was not the end to the enquiry. An act against its nature may be forgiven if the animal is provoked. The girl pulled Taz's nose while he was eating and, in doing so, apparently, pulled a scab off the dog's nose. That was provocation, but she was only four years old and it is a principle of our law that a child under the age of seven is not capable of committing a legal wrong. Did this mean that her provocation of Taz had to be disregarded? The judge sensibly decided that the provocation does not need to emanate from a person legally capable of committing wrong or, indeed from any human agency, and accordingly the girl's lack of legal capacity was irrelevant.

The plaintiff's claim based on negligence also failed and neither Taz nor his owners were held to be at fault.

*Green v. Naidoo and Another 2007 (6) SA 372 (W).*



## Motor Law

### ■ Load Shedding

*"Travel, in the younger sort, is a part of education; in the elder, a part of experience."*

– Francis Bacon (1561 - 1626)

BENJAMIN PRETORIUS was a matric student just short of his 17th birthday. On 2 March, 2002, he was one of four teenage passengers on the open back of a bakkie owned by Mr Wessels. The bakkie was being driven at the time by

Albert Wessels, his 16-year-old son. Albert was unlicensed. On the Mareetsane road in the Lichtenburg area and while travelling at about 40km per hour on a dirt road, Albert "threw a wheelie" or "handbrake turn" causing the vehicle to slew to a stop in its original direction of travel after turning through a full circle. Unaware that Albert was about to perform the manoeuvre, Benjamin was not holding on to any part of the vehicle at the time. He was thrown out and injured.

One of the claims made by Benjamin's father for the damages suffered by the boy was against Mr Wessels upon the basis that he had been negligent in allowing Albert to drive the bakkie. Contrary to Mr Wessels' assertion that he had not given Albert permission to drive, the Supreme Court of Appeal found that he had. Although, he had not given his son permission to drive negligently, the court said that: "*it is notorious that when groups of teenage boys (with or without girls) come together in circumstances where there is opportunity to show off or assert themselves, the potential for overstepping the bounds of reasonable behaviour is present.*"

Mr Wessels was found to have been negligent in giving unrestricted access to the vehicle to a boy who lacked both maturity and judgment in circumstances where it should have been obvious that peer pressure might adversely affect his decisions in driving that vehicle.

*Wessels v. Pretorius [2008] 1 ALL SA 131 (SCA).*



fee was for R19 million and was never paid. The second fee was for R11 million and was paid by the client shortly after the end of the taxpayer's 2001 year of assessment.

The taxpayer's client subsequently disputed its liability to pay any of these fees (claiming also a repayment of the amount of R11 million already paid). The dispute proceeded to arbitration and was resolved in the client's favour. The taxpayer's claim for the R19 million fee was dismissed and the client's claim for repayment of the R11 million fee was upheld. The arbitration award was given in the taxpayer's 2004 year of assessment.

In the Tax Court, the taxpayer contended that these amounts did not accrue to it during its 2001 year of assessment. This was on the basis that, as found by the arbitrator, the taxpayer was never entitled to such amounts. It was SARS' argument that the amounts did accrue to the taxpayer during its 2001 year of assessment and that this was unaffected by the subsequent arbitration award. SARS took the position that each year of assessment should be treated separately. The arbitration was regarded as an act in a subsequent year, which resulted in the amounts then not being due to the taxpayer. In SARS' view, the amounts were correctly included in the taxpayer's gross income for its 2001 year of assessment and the taxpayer should have claimed a bad debt allowance in its 2004 year of assessment.

The Tax Court agreed with the taxpayer's argument that the arbitrator's award confirmed the position that had always existed with regard to the amounts claimed. The amounts claimed then did not "become bad" when the arbitrator made his award – they were never due to the taxpayer and the arbitrator simply confirmed this to be the case. On this basis, the amounts should not have been included in the taxpayer's gross income for its 2001 year of assessment.

*TCC11961 (Unreported judgment of the Pretoria Tax Court heard on 23 February 2007).*

## Tax Law

### ■ Income that Never Was

*"There is no art which one government sooner learns of another than that of draining money from the pockets of the people."*  
– Adam Smith (1723 - 1790)

THE TAX Court in Pretoria recently delivered a judgment on the effect of an arbitration award on amounts previously included by a taxpayer in its gross income.

The taxpayer had entered into an agreement with a client for the provision of certain financial risk management services, for which it would receive performance related fees. In respect of its 2001 year of assessment, the taxpayer included two such amounts in its gross income. These represented fees for which it had invoiced its client. The first



### ■ Income that Was Taxable

*"Money is like a sixth sense without which you cannot make complete use of the other five."*  
– W Somerset Maugham (1874 - 1965)

THE DEDUCTIBILITY of certain interest by a company was recently considered by the Witwatersrand High Court. This involved an application of Sections 11(a) and 23(f) and (g) of the **Income Tax Act** to the particular facts.

In 1999, Sallies was a listed but dormant public company. It then concluded an agreement with a US company to acquire all of the issued shares in a South African mining company, for R74.75 million. Sallie's new subsidiary, re-named Witkop Fluorspar Mine (Pty) Ltd, owned a fluorspar mine in the Northern Province. The acquisition by Sallies of the Witkop shares was funded by a share issue and a loan of US\$6.5 million obtained from RMB Australia. It was the deduction of the interest incurred on this loan that was at issue. Sallies and Witkop also concluded an agreement in terms of which Sallies was appointed as Witkop's sole marketing agent. Witkop was obliged to pay Sallies an initial fee of R3 million and an annual fee of R200 000. Witkop had to pay all costs incurred in the performance of Sallies' services.

The court was effectively required to determine whether Sallies acquired the Witkop shares in order to produce income. The fees earned by Sallies would constitute income, but dividends would not constitute income (being exempt). If Sallies acquired the Witkop shares in order to earn the fee income, then this would support the deductibility of the interest. If the purpose of the acquisition was the earning of dividend income, then this would preclude the deduction of the interest.

In evidence given on behalf of Sallies, it was stated that its intention in acquiring the Witkop shares was to generate

fees – in terms of the marketing agreement and for other services. It was further stated that no dividends were expected from Witkop for many years to come. Sallies' operating strategy was set out as involving the acquisition of further mining companies.

In two separate judgments, the full bench of the Witwatersrand High Court found that Sallies had not incurred the interest expense in the production of income. The facts did not support Sallies' contentions as to its intentions in acquiring the Witkop shares. The fee income was small compared to dividends that were actually anticipated. The court emphasised that evidence given on behalf of a taxpayer will be "*tested against the probabilities and inferences normally to be drawn from the established facts*".

*Sallies Ltd v. Commissioner South African Revenue Services. (Unreported judgment of the Witwatersrand High Court delivered on 28 November 2007).*

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