
LAW LETTER

August 2008



vennnemeth&hart
ATTORNEYS

While political, social and economic issues hit the headlines, our courts of law deal on a daily basis with commercial and other problems that need to be resolved. This Winter edition of Law Letter looks at some of these – insurance claims, employment terms, property rights and the conduct of trade unions, trustees and government officials. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

FROM THE COURTS

Law of Insurance

■ Bumpy Ride

*"Beneath this slab
John Brown is stowed.
He watched the ads,
And not the road."*

– Ogden Nash (1902 - 1971)

IN TERMS of a policy of insurance, the insurer indemnified the owner of an Audi A4 1.8 Turbo motor vehicle against damage or loss. But when the vehicle was damaged, the insurer repudiated the claim on the basis of an alleged material misrepresentation. It said that the owner had failed to disclose to the insurer that he had been involved in a previous accident. During January 2003 the owner had driven his vehicle into a pothole causing minor damage and as a result he had submitted a claim to his previous insurer and had received payment.

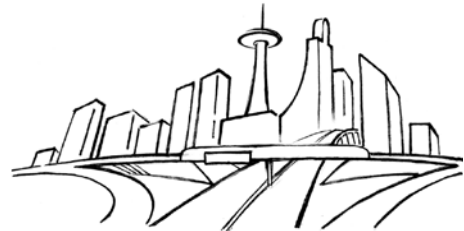
The owner explained to Judge Boruchowitz in the Johannesburg High Court that he had understood the question regarding previous claims to refer to previous accidents in the nature of collisions. As the claim which he had made in 2003 related to driving into a pothole, he did not consider that to be an accident. The judge agreed. One would not in everyday language say that "you had collided" with a pothole. The word "accident" does not necessarily include the pothole incident. It has various shades of meaning and is imprecise. The owner's contention could not be rejected as false or improbable.

The judge referred to an Appeal Court case more than 70 years ago which took this approach:

"Now the questions are framed by the insurance company and it is its duty to make them clear and unambiguous especially when it attaches so much importance to the truth, and such dire consequences to the untruth, of the answers. If, then, the question is capable of two reasonable meanings, that which is the more favourable to the insured will be accepted by a court of law when the truth of his answer is assailed."

The result was that the insurance company had failed to establish the defences of misrepresentation or non-disclosure which it had contended for and judgment was granted in favour of the owner for the claim of R182,289 with interest and costs.

Mahadeo v. Dial Direct Insurance Limited [2008] 2 ALL SA 352 (W).



Law of Property

■ The Long and Winding Road

*"Change is not made without inconvenience,
even from worse to better."*

– Richard Hooker (1554 - 1600)

THE OUTCOME of any court case can be uncertain, because the law can be uncertain. Law is not static and fixed but can be subject to change. This was the experience of two litigants who took their dispute regarding a right of way all the way to the Supreme Court of Appeal in Bloemfontein.

The appellant, whose land was subject to two registered servitudes in favour of a neighbouring property, instituted action in the High Court in which it claimed a declaration that it was permitted to amend the course of the servitudes. The neighbour raised the defence that the declaration could not be granted because the defined route of the registered servitudes could be changed by mutual consent only. The High Court agreed, as a result of which the appellant approached the Supreme Court of Appeal.

Judge of Appeal Heher agreed that according to the existing law it was correct that a defined and registered servitude as in this case could be changed only by mutual consent. In principle such a conclusion was unassailable. However, the Supreme Court of Appeal has always possessed an

inherent power to develop the common law. This power is confirmed in Section 173 of the Constitution "taking into account the interests of justice". A modification of our existing law may better serve the interests of justice when the existing law is uncertain or does not adequately serve modern demands on it. After having reference to French, Swiss, Italian, Greek, Belgian, German and Scots law, the judge concluded that the interests of justice do require a change in our established law on the subject:

"The rigid enforcement of the servitude when the sanctity of the contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to me indefensible. Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment."

On the facts the court then concluded that if the present situation and route of the rights of way continued, the appellant would be materially inconvenienced in the use of its property; a relocation of those routes would not prejudice the owner of the neighbouring property; and if the appellant paid the costs of the relocation including those costs involved in amending the registration of the title deeds, that would be in the interests of justice and it was so ordered. The parties were ordered to pay their own costs in both the High Court and the Supreme Court of Appeal.

Linvestment CC v. Hammersley & Another 2008 (3) SA 283 (SCA).



Law of Interpretation

■ I don't mean maybe

*"If a man will begin with certainties, he shall end in doubts;
but if he will be content to begin with doubts,
he shall end in certainties."*

– Francis Bacon (1561 - 1626)

BE BOP A LULA MANUFACTURING & PRINTING CC ordered 60,000 T-shirts from Kingtex Marketing (Pty) Ltd. Most of these were delivered and invoiced at over a million rand. Various payments were made and a credit passed leaving a balance owing. A dispute then arose about the quality of the T-shirts. A cheque was tendered in payment

and carried the words "full and final settlement of account" underlined and written at the foot of the cheque across its face. The cheque was deposited by the recipient for special clearance. But the manufacturer then instituted action in the High Court for the balance which it claimed was still due to it. The defence was raised that by accepting the cheque and depositing it, a compromise had been reached and the manufacturer had no further claim.

Five judges of the Supreme Court of Appeal in Bloemfontein eventually had to consider the dispute. They decided that on the facts the cheque objectively constituted an offer of compromise and amounted to an invitation to deposit the cheque to indicate acceptance of that offer. In this case once the cheque had been deposited, its proceeds were retained in the trust account of the attorneys of the manufacturer. But it was not held pending the outcome of the dispute or for the benefit of both parties. In fact, fees and expenses were deducted from this money so appropriated.

Acting Judge of Appeal Malan said that the manufacturer had to accept or reject the offer of compromise. It could not add any conditions to it and still retain the money. It had no right to do so and should have paid the proceeds back to the drawer of the cheque. By retaining the proceeds of the cheque and appropriating it the manufacturer became bound by the terms of the offer. In those circumstances, although actual agreement between the parties may have been lacking, the drawer of the cheque acted reasonably in relying on the impression given that the manufacturer was accepting the offer of compromise and thereby comprising its claim.

Be Bop a Lula Manufacturing & Printing CC v. Kingtex Marketing 2008 (3) SA 327 (SCA).



Law of Insolvency

■ Fly by Night

*"We seldom attribute common sense
except to those who agree with us."*

– François, Duc de la Rochefoucauld (1613 - 1680)

THE COMMISSIONER for the South African Revenue Service (SARS) wanted to sell a Falcon 900B executive jet stationed at an airport in France and the proceeds kept in trust pending the finalisation of an action instituted by the Commissioner against David King and a number

of corporate entities. The Commissioner contended that King and one of his companies have a substantial income tax liability and that the other parties were being used by King to conceal his assets. The High Court had granted a preservation and anti-dissipation order in relation to the jet. The problem was that the jet was not being used and was deteriorating and its value reducing.

Appeal Court Judge Louis Harms took the view that considering the purpose of a preservation order, all the High Court had been asked to do was to authorise the conversion into cash of a deteriorating asset, which was already the subject of a preservation order. The sale of the jet would not amount to a deprivation of the asset. No one would be divested of anything on a permanent basis. The value of the asset would be retained for both the owner and those creditors who, eventually, might be entitled to execute. The money would be kept in trust on behalf of the owner of the jet. The attempt to prevent the sale of the jet was dismissed with costs.

Carmel Trading Co Ltd v. Commissioner, South African Revenue Service & Others 2008 (2) SA 433 (SCA).



Labour Law

■ Prison Break

"The quality of moral behaviour varies in inverse ratio to the number of human beings involved."

– Aldous Huxley (1894 - 1964)

JUDGE PLASKET in the Eastern Cape High Court did not mince his words when hearing a case brought before him by the trade union POPCRU and 75 of its members who were employed as correctional officers at the Middledrift Prison until their dismissals in early January 2005 for refusing to work over the Christmas and New Year holiday period. They brought an application for review of the decision taken by officials of the Department of Correctional Services to dismiss them.

After having dealt with the merits of the matter the judge said that the conduct of the trade union *"reflects an arrogant and disgraceful contempt for the court empowered by the Constitution, the law that acquires its force from the Constitution, the democratic order that is created by the Constitution, the public interest that the Constitution is designed to further and the Constitution itself... It has shown scant regard for the*

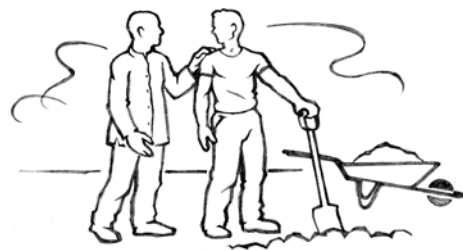
responsibilities that go hand in glove with that recognition and those protections. It and the remaining applicants in this case have treated the department and its management with a singular lack of respect, evidenced by devious double-dealing, bad faith and downright dishonesty: while claiming to have a right to refuse to work overtime, and while clearly engaged in concerted action in furtherance of a set of demands which were being dealt with by way of arbitration, they all spuriously claimed to have been ill over the Christmas period and the New Year period respectively."

The judge then turned to the officials of the department and said they were far from blameless:

"They acted with no regard for the disciplinary code and procedure that they were bound to apply. In so doing they acted cynically and in bad faith: they, as senior administrators in the department must have known that what they were doing was not permitted, yet they proceeded, not even attempting to comply with their clear duty. The respondents are public officers, clothed with statutory powers that they hold in trust on behalf of the public, and subject to statutory and constitutional duties. For them to have approached this matter as they did was not only unconstitutional but also unacceptable from the perspective of political morality: the State and, self-evidently, the officers through which it exercises its powers and performs its functions, are meant to serve as role-models for the populace."

The result of all this was that all of the dismissed employees were reinstated with full benefits in terms of their contracts of employment. All the parties were ordered to pay their own costs.

Police and Prisons Civil Rights Union & Others v. Minister of Correctional Services & Others (No 1) 2008 (3) SA 91 (ECD).



Restraint of Trade

■ No Idling Motors

"Work banishes those three great evils – boredom, vice, and poverty."

– Voltaire (1694 - 1778)

JUDGE DENNIS DAVIS in the Cape Town High Court had to consider the validity and enforceability of a restraint of trade agreement included in an employment contract which a 33-year-old woman was required to sign. She left

that employment and her previous employer sought to enforce that restraint.

She argued that the restraint of trade agreement was hopelessly too wide and thus invalid and the employer did not have a protectable proprietary interest. The judge pointed out that the courts have a duty to develop the common law to promote the spirit and objects of the Bill of Rights in our Constitution. Whether a term in a contract is contrary to public policy must now be determined by



a reference to the values that underlie our constitutional democracy as given expression to by the provisions of the Bill of Rights. A term in a contract which cannot be reconciled with the values enshrined in our Constitution is contrary to public policy and is therefore unenforceable.

The judge then referred to a consideration which has to be taken into account, namely the dignity of work:

“What is at stake is more than one’s right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of the society based on human dignity as contemplated by the constitution. One’s work is part of one’s identity and it is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as profession and to make that activity the very basis of his or her life and there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of the person’s existence.”

The court then determined that the terms in the contract were so wide and far-reaching that they offended against public policy and were unenforceable. It was not the function or duty of the court to separate out of the contract those terms which were unacceptable, and only enforce the remainder. If that were the case, it could lead to an abuse of the process of the court. Parties could simply insert whatever they wish into a contract, good or bad, and then leave it to the court to “separate the chaff from the wheat.” Not only could this lead to slovenliness in the drafting of agreements, but it would also provide fruitful ground for the exploitation of the unwary, the unenlightened and the disadvantaged. A clause having that effect would in itself be contrary to public policy.

As a result the application was dismissed with costs.

Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v. Kuhn & Another 2008 (2) SA 375 (CPD).

■ Calling the Shots

“It is much safer to obey than to rule.”

– Thomas á Kempis (1380 - 1471)

A TRADE UNION adopted a resolution that purported to impose certain obligations on the trustees of benefit funds established by the trade union who had been elected or appointed by it or its members. One of these funds was the pension fund of the trade union which approached the High Court in Johannesburg to declare that the resolution was unenforceable, contrary to law and contrary to public policy in that it attempted unlawfully to interfere in the proper exercise of the lawful duties and obligations of the member-elected trustees and that the resolution was in conflict with the fiduciary duties which the trustees owed to the pension fund.

Acting Judge Freund pointed out that each of the fund’s trustees is required to exercise an independent judgment as to what constitutes the best interests of the fund. The applicable legal principles are the same as those which apply to directors of companies. He referred to a previous judgment of the same court which held:



“The director’s duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the company to the exclusion of the interests of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save in so far as there may be a contract for the board to vote in that way in the interests of the company, and, as a director, he cannot be subject to the control of any employer or principal other than the company.”

The judge also referred to English law:

“It cannot be emphasised too strongly that the trustees of a pension scheme must be in a position to perform their duties wholly free from extraneous pressure, whether such pressure is applied by the other directors of the employers, or in the

case of an employee-trustee by an employer or other members of the workforce."

The court concluded that the resolution in question reflects a belief that the members' trustees' primary duty is to represent the union and its members when taking decisions regarding the fund. This is perhaps an understandable belief, but it is a belief that is wrong in law. Both the members' trustees and the employers' trustees share a common duty to act in the best interests of the fund, its members and beneficiaries. None of the trustees represent the party which appointed them when they take decisions



regarding the fund's affairs, nor may they place the views or interests of such party above the interests of the fund or its members. The union was wrong in believing that the members' trustees are "accountable to it". The union had no right to impose an obligation on the members' trustees to

take mandates from the union before and after they attend board meetings, nor to oblige them to take mandates from union members.

The judge accepted that there is nothing unlawful or improper in the union expressing its views on issues to be decided by the fund's trustees or even in seeking to persuade the fund's trustees to accept its views. However, in his view it was unlawful for the union to seek to compel members' trustees to "take mandates" which they are required to implement, failing which they risk disciplinary steps against them.

The judge concluded that the resolution was contrary to public policy and unlawful.

PPWAWU National Provident Fund v. Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU) 2008 (2) SA 351 (WLD).

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