



LAW LETTER

August 2010

vennnemeth&hart
ATTORNEYS

Our selection of recent cases in this edition of Law Letter illustrates how our judges use principles of law, evaluate the factual evidence placed before the courts, and seek to apply practical common sense in reaching their findings. 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

Environmental Law

■ Hot Spot

*"When a lovely flame dies,
Smoke gets in your eyes."
– Otto Harbach (1873 – 1963))*

DEPUTY PRESIDENT of the Supreme Court of Appeal Judge Louis Harms heard an appeal dealing with environmental issues arising from the provisions of the **Atmospheric Pollution Prevention Act** of 1965. The main purpose of the Act is to prevent pollution of the atmosphere. It contains provisions dealing with the control of noxious or offensive gases, atmospheric pollution by smoke, dust control, and air pollution by fumes emitting from vehicles. It fits in with the Bill of Rights in the Constitution which guarantees the right to an environment that is not harmful to health or wellbeing and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation.

An owner of property erected a coal-fired boiler on its property without the prior consent of the Municipality. The Municipality alleged that this amounted to a contravention of its Smoke-Control Regulations, which regulations were promulgated in terms of the Act. Regulation 3 provides that one may not install any fuel-burning appliance, which includes a boiler, designed to burn solid or liquid fuel in or on any premises, unless the plans and specifications in respect of such installation were approved by the Municipality.

In the Johannesburg High Court the owner claimed that the municipal regulations were invalid and unenforceable. The High Court dismissed that defence. The owner then took the matter on appeal.

Judge Harms upheld the appeal of the owner. He said the municipal regulations were valid and enforceable. Their purpose was to enable the Municipality to determine in advance whether the relevant burner complied with the regulations. If it did, the Municipality had no choice but

to accept the plan. When the owner eventually made an application for approval, the Municipality overstepped the mark. It demanded that the boiler be gas-fired and not coal-fired. In the absence of any regulation to that effect, the Municipality was not allowed to use that as a reason for rejecting the application. When the owner installed the boiler contrary to the provisions of the regulations, the Municipality could have insisted that it be removed. However, it chose not to do so, and instead gave the owner the opportunity to submit plans and specifications. When he did so, the Municipality rejected these plans on unlawful grounds. In those circumstances the Municipality was not now entitled to seek to interdict the owner from using the boiler or to have it removed.

This case again demonstrates how important it is for both regulatory authorities and for affected persons to ensure that due process in accordance with the law is scrupulously followed. Failure to do so can be extremely expensive.

Nature's Choice Properties (Alrode) (Pty) Ltd v. Ekurhuleni Municipality 2010 (3) SA 581 (SCA).



■ Go with the Flow

*"And Noah he often said to his wife
when he sat down to dine,
'I don't care where the water goes
if it doesn't get into the wine.'"*

– G. K. Chesterton (1874 – 1936)

TWO NEIGHBOURS owned adjoining properties within a residential estate. Both properties were situated on a slope, the one higher up than the other. A boundary wall which separated the two properties had been erected by the lower owner prior to the upper owner constructing his residence. After the upper owner had completed his own building, he noticed that rainwater was gathering in the north-western sector of his property and damming up against

■ Keep it Real

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

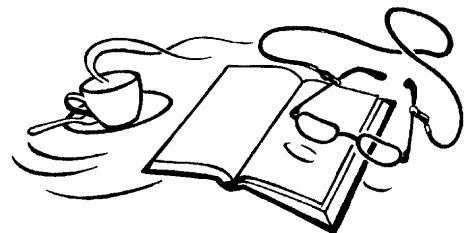
– Francois, Duc de la Rochefoucauld (1613 – 1680)

JUDGE OF APPEAL Belinda Lewis sitting with four other judges in the Supreme Court of Appeal had to decide a dispute about the interpretation of a retirement fund provision between the Ekurhuleni Metropolitan Municipality and the Germiston Municipal Retirement Fund. The judge analysed the dispute. The Fund argued that the matter should be approached with "common sense and perspective". The court accepted the principle that the provision in the contract must be interpreted not only in the light of the contract as a whole, but also to give it a commercially sensible meaning. This requires a court to construe a contract in its context within the factual situation in which the parties operated. The court also had regard to the purpose which the contested provision sought to achieve. The Fund contended that the court should in addition have regard to general practice in the pension fund industry.

The judge concluded that having regard to the context of the rules of the Fund, the nature of the Fund, the general practice of pension funds, and the purpose and effect of the contested rule, the only commercially sensible meaning to be given was that argued for by the Fund which had been accepted by the High Court from which the appeal was brought.

The Municipality's appeal was dismissed with costs.

Ekurhuleni Metropolitan Municipality v. Germiston Municipal Retirement Fund [2010] 2 All SA 195 (SCA).



■ Duty Bound

"Few men have been admired by their servants."

– Michel de Montaigne (1533 – 1592)

IN 2006 an owner of land signed a building contract, in terms of which a construction company was to erect a dwelling on the owner's property. The owner appointed an architect for the project. The architect was as a result the principal agent in terms of the agreement. In 2008,

the boundary wall shared with the lower owner. The upper owner discussed the problem with his neighbour and suggested that the boundary wall should be breached in some way to allow this rainwater to drain off onto the lower property. This suggestion was met with a letter of objection, the lower owner taking the view that it was the upper owner's building operations that had resulted in an increase in the flow of rainwater draining northwards off the upper owner's property and that the lower owner was not obliged to accept or to deal with this problem.

The upper owner then instituted action against his neighbour, claiming an order to the effect that the upper owner was entitled to insert a series of drainage pipes into the base of the boundary wall at ground level and at sub-surface levels to allow rainwater to flow from the upper property onto the lower property. The upper owner's contention was that the owner of the lower lying property was obliged to accept such water.

In response, the lower owner denied that the water which the upper owner sought to discharge onto his property would have flowed there naturally. He suggested that the flow of excess water be discharged directly onto the street.

The Johannesburg High Court took the view that the owner of the lower property was obliged to accept excess natural water from the upper property.

When the matter came before the Supreme Court of Appeal in Bloemfontein, Acting Judge Hurt pointed out that even in Roman-Dutch Law, it was recognised that it was sometimes necessary to limit the lower owner's obligation to accept water flowing from his more elevated neighbour by excluding any increased flow arising as a result of artificial works carried out on the upper property.

The court pointed out that the upper owner has no inherent right to concentrate the flow of water at a particular point or at particular points. Although the quantity of water so discharged may be equal to that which would have crossed the boundary if the land had been undisturbed, the lower owner would nevertheless be called upon to cope with a pattern of flow which would not naturally have occurred. The upper owner can only impose such a burden on his neighbour if there exists in his favour an express servitude entitling him to do so. The envisaged pipes in the boundary wall would act as conduits for a concentrated flow of water at the points at which they emerged from the wall onto the lower property. That was an arrangement which the upper owner had no right to impose on the lower owner.

At best for the upper owner, his right only extends so far as to require the lower neighbour to accept the "natural flow". Where the upper owner sues to enforce this right, he has the onus to prove the amount of water constituting the "natural flow". As no evidence had been led in that regard, the case of the upper owner had to be dismissed.

Pappalardo v. Hau [2010] 2 All SA 338 (SCA).

his mandate was terminated by the owner, and he was replaced by another architect.

The owner subsequently became involved in a dispute with the contractor, and this was referred to arbitration. The owner then required his previous architect to account for his administration of the project, and furnish explanations for some of the actions taken while he was the duly appointed architect.

Judge Meer in the Cape Town High Court considered the question of whether a previous agent, once his mandate is terminated, has any further obligation to provide explanations about the contract, as may be reasonably required by the employer. The judge said that the architect was so obliged. A principal is entitled to be informed by an agent of matters which are of his or her concern. The duty of the agent extends to accounting to his principal for all that he knows and all that he has done in the execution of the mandate. This is a substantive legal duty which requires the agent to justify his or her actions and conduct. By implication, the obligation applies after the termination of the mandate in respect of work done during the mandate.

Furthermore, as the explanations required from the architect relate to what occurred during the course of the mandate, the architect is under an obligation to account and explain, and to do so for no additional payment. The objections of the architect were dismissed with costs.

Move On Up 254 (Pty) Ltd v. Martin Kruger Associates CC & Another [2] [2010] 2 All SA 369 (WCC).



■ Oil Solution

BP SOUTHERN Africa (Pty) Ltd entered into a sale of property on which it had erected a petrol filling station, together with a supply agreement for petrol and related products and an equipment loan agreement. A dispute then arose between BP and the other party to the agreements on their different understandings of their rights and obligations under the three contracts.

BP supplied the other party with products until it discovered that the other party was selling the products of other suppliers in contravention of its supply agreement. BP removed its dispensing equipment from the premises and called upon the other party to comply with its obligations under the supply agreement, tendering return of the equipment. The other party then indicated that it did

not want the pumps reinstalled and would not operate a filling station any longer from the premises.

Appeal Judge Carole Lewis had to determine the meaning to be given to certain provisions in the agreement of sale, read with the supply agreement and the equipment loan agreement. She then had to consider whether there had been a breach of the supply agreement by either of the parties.

In considering the matter, the judge confirmed that it is settled law that a contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract. It is also clear that a provision must be given a commercially sensible meaning.

Setting out the history of the dispute, the court concluded that it was not BP that had repudiated the sale and supply agreements but the other party who had repudiated both contracts in refusing to perform its obligation to operate a filling station on the property. In the circumstances, BP was entitled to cancel the agreements. BP succeeded in its appeal and was awarded costs.

BP Southern Africa (Pty) Ltd v. Mahmood Investments (Pty) Ltd [2010] 2 All SA 295 (SCA).



Law of Succession

■ Fluttering Candle

*“A mind not to be changed by place or time,
The mind in its own place, and in itself
can make a Heaven of Hell, a Hell of Heaven.”*

– John Milton (1608 – 1674)

THE DECEASED died of cancer in Cape Town on 08 September 2008, leaving a will made a few weeks previously on 13 August 2008. The deceased’s life partner and mother of his two children challenged the validity of the will in which she was a beneficiary together with others. According to her, the deceased lacked the necessary testamentary capacity at the time of making the will, as he was close to death and on medication. As a result, she contended, he was mentally incapable of appreciating the nature and effect of his act.

Section 4 of the **Wills Act** of 1953 provides:

“Every person of the age of 16 years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.”

Acting Judge Andrew Breitenbach in the Cape Town High Court referred to legal authority which provides that the test to be applied in deciding the question of testamentary capacity is whether the testator was at the time of sufficient intelligence, possessing a sufficiently sound mind and memory, to understand and appreciate the nature of the testamentary act in its different bearings. At the time of making the will the testator must have been capable of comprehending the nature and extent of his property, of recollecting and understanding the claims of relations and others upon his favour and upon his property and of forming the intention of granting each of them the share in the property set out in the will or excluding them from any share of his property.

The medical and other evidence was comprehensively examined and ultimately the judge concluded that the onus of proof had not been discharged. The application to have the will set aside was dismissed.

Naidoo NO & Another v. Crowhurst NO & Others [2010] 2 All SA 379 (WCC).



Family Law

■ Out of the Mouths of Babes

“One stops being a child when one realises that telling one’s troubles does not make it better.”

– Cesare Pavese (1908 – 1950)

JUDGE CHETTY in the Port Elizabeth High Court had to deal with difficult and sensitive issues where parents who had been divorced had joint custody of their four minor children. The mother then wished to move to Dubai to be re-married, and applied for the variation of the joint-custody award so as to take her children with her.

The judge pointed out that the guiding principle in matters involving children is that the interests of the children are paramount. This is entrenched in Section 28 of the **Constitution**.

The **Children’s Act** of 2005 sets out in detail that all proceedings, actions, or decisions concerning a child must respect, protect, promote and fulfil the child’s rights and the best interests of the child.

Section 10 of the Act has brought about a fundamental shift in the parent/child relationship which now not only vests a child with certain rights, but gives a child the opportunity to participate in any decision-making affecting him or her. Section 10 provides:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

The court had regard to the reports of social workers and clinical psychologists and the views of the children who had been separately interviewed. The benefits on the one hand and the potential detrimental effects on the children should the variation order be granted were considered in detail and the judge ultimately concluded that it would not be in the best interests of the children to order a change to the present parenting plan in existence.

There was an agreement that each of the parents would bear his and her own costs and that order was made.

HG v. CG 2010 (3) SA 352 (ECP).

Law of Property

■ Feel it, it is clear

APPEAL JUDGE Bosielo considered two appeals simultaneously, both from the Cape Town High Court, dealing with the proper interpretation of Section 4(2) of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act** of 1998 (known as the PIE Act). This provides that in actions for eviction of an unlawful occupier of property, written and effective notice of the proceedings must be served at least 14 days before the hearing on the unlawful occupier and the municipality having jurisdiction.

The merits were not in dispute but various technical defences were raised, for example, that notices were not contained in separate and distinct documents and not served separately.

The judge concluded that the appellants were unable to indicate any prejudice suffered by them due to the failure to serve separate notices on separate occasions on them. Viewed against the main purpose of the Act, the real issue was not so much whether or not there were two separate

notices. The real and proper enquiry should be whether there was effective notice of the proceedings on the occupiers in the sense that a court was satisfied that the occupiers were fully informed of the impending eviction, the grounds therefor, the date and place of hearing and the right to appear in court and be represented.

All five judges in the Supreme Court of Appeal were satisfied that effective notice had been given to the occupiers and their appeals were dismissed.

Theart & Another v. Minnaar NO; Senekal v. Winskor 174 (Pty) Ltd [2010] All SA 275 (SCA).

The Courts

■ Death Duties

THE CONDUCT of litigation through our courts can be a time-consuming and expensive process. What happens if the judge hearing the matter dies? Do the parties have to begin the trial all over again? This happened recently in the Cape Town High Court in a dispute between an insurance company and its insured client. The judge who had presided at the trial died before she could deliver judgment. By agreement between the parties, a transcript of

the evidence, together with the documentary exhibits, was placed before another judge who heard further argument. The judge found in favour of the insured, but subsequently granted leave to appeal.

The Supreme Court of Appeal confirmed that there is precedent for the replacement of a deceased judge in such circumstances, and it is eminently sensible. There may of course be circumstances where, for example, the demeanour of witnesses and the impression they made on the judge while giving evidence, are not adequately reflected in the transcript of the evidence. Where no agreement can be reached between the parties, it may also in the particular circumstances result in the hearing having to commence anew before a different judge, but if the refusal to agree is ultimately considered to have been unreasonable, the party responsible runs the risk of having an adverse costs order granted against it.

St. Paul Insurance Co SA Ltd v. Eagle Ink System (Cape) (Pty) Ltd 2010 (3) SA 647 (SCA).

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vennnemeth&hart

ATTORNEYS

CONTACT DETAILS

PO Box 600
Pietermaritzburg
3200

281 Pietermaritz Street
Pietermaritzburg
3201

Tel +27 (0) 33 355 3100
Fax +27 (0) 33 394 1947
E-mail mail@vnh.co.za
Docex DX10

ASSOCIATE FIRMS

Barry Botha Breytenbach Inc.
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