

# LAW LETTER

August 2007

**venn**nemeth&hart  
ATTORNEYS



*This edition of Law Letter showcases a mixed bag from our courts – incompetent lawyers, biased judges, skittish horses, and the pros and cons of arbitration. We also take a fresh look at the advertising of alcohol and sectional title ownership. 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 EDITOR'S DESK

### ■ Advertising Alcohol

*"If all be true that I do think,  
There are five reasons we should drink:  
Good wine – a friend – or being dry –  
Or lest we should be by and by –  
Or any other reason why."*

– Henry Aldrich (1647 – 1710)

SOUTH AFRICA has virtually banned advertising of tobacco products, and imposed severe restrictions on smoking in any building to which the public has access. Tobacco is seen as a hazard to the health of the public, as a result of which these measures have been implemented by the Ministry of Health.



Now there are increased calls to ban or more strictly regulate the advertising of alcoholic products. In the case of alcohol, not only is its widespread use closely linked to many social and health problems, but also to crime.

It is instructive to consider developments in Thailand, where in April 2007 the Alcohol Control Bill was passed in the National Legislative Assembly. This controversial bill provides for a total ban on alcohol advertising, an increase in the age at which people can buy alcohol from 18 to 20, and the designation of alcohol-free zones.

The Public Health Ministry proposed the bill amid strong opposition from alcohol manufacturers and distributors. During the debate, Chamlong Srimuang, a leading campaigner for the bill, said alcohol is no ordinary product. It endangers both drinkers and society, and takes a rising toll on the economy, culture and morality. He said the proposed increase in the drinking age had the support of more than 13 million Thais.

Somphob Charoenkul leant cautious support to the bill, calling the total ban on advertising a double-edged sword. He said the ban deprived the public of freedom to access information and make choices. It also favoured the established brands and gave little room for new producers to reach customers. He said revisions to the tax structure would be a better tool to control alcohol consumption. Advertising bans had failed in many countries such as Norway and Malaysia, which saw a rise in drinking as producers engaged in fierce price wars.

Somkiat Onwimon said it would be better if authorities cracked down on cheap strong liquor because such drinks led to social problems. The bill would affect only expensive drinks that rely on advertising.

Khamnoon Sitthisaman said the bill did not tackle at its core the problem of the increasing number of young drinkers. Instead of restricting drinking to nightspots, the law should set standards for alcohol quality and control the easy availability of cheap alcoholic beverages. He

said the bill would be difficult to enforce. Thai people should be encouraged to make wise choices about which alcoholic drinks were bad for them.

Leading economist Ammar Siamwalla said the bill deliberately lacked tax and punishment measures. Imposing fines would only allow producers to pay for illegally advertising their products. "I am concerned that some brewers and distillers will be able to slash prices when they no longer have to pay for advertising."

Health Minister Mongkol na Songkhla said the legislation was needed because alcohol consumption caused health and family problems, accidents and crime. He agreed to also consider tax measures.

South Africa would be well served at this stage by a comprehensive public investigation into and review of all aspects of the promotion, marketing and distribution of alcoholic beverages in this country.

### Judicial Prejudice

#### ■ Fair and Wild with Showers

*"It is a capital mistake to theorize before you have all the evidence. It biases the judgment."*

– Sir Arthur Conan Doyle (1859 – 1930)

DOCTOR WOUTER BASSON was charged in 1999 in the High Court on 67 counts, including murder, fraud, certain drug offences and conspiracy to commit various crimes, at a time when he worked before 1994 in a division of the South African Defence Force known as the Civil Co-operation Bureau and headed South Africa's bacterial and chemical warfare programmes. In the popular press he became known as "Dr Death". But in April 2002 at the end of a long trial, he was acquitted on all counts.

The State took the matter to the Constitutional Court. One of the issues it raised was whether the conduct of the Judge during the trial proceedings was such as to give rise to a reasonable perception of bias.

The court dealt with the legal test for bias of a judicial officer. In terms of Section 34 of the Constitution everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing. The impartiality of judicial officers is an essential requirement of a constitutional democracy and is closely linked to the independence of our courts. The court set out the law:

- The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case.
- Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice.
- In evaluating whether a perception of bias is reasonable, the court must be sensitive to the different nuances of the live situation in the court, where demeanour or body language, tone of voice, the timing of remarks and the emotional response of participants in exchanges with one another may play a role.
- Fairness of court proceedings requires of the Judge to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources.

- Judges are not silent umpires but may and should participate in the trial proceedings by asking questions, ensuring that litigants conduct themselves properly and making rulings on the admissibility of evidence and other matters as the trial progresses. Inevitably litigants will from time to time be aggrieved about both the content of the rulings made by the Judge and the manner in which a Judge may ask questions or intervene. Such grievances need to be construed in the realisation that trials are often emotional and heated as a result of the disputes between the parties. A court considering a claim of bias should be wary of permitting a disgruntled litigant to complain of bias successfully simply because the Judge has ruled against them, or been impatient with the manner in which they conduct their case.

Having exhaustively considered all the individual and cumulative complaints of the State, the court ruled:

*"We are unable to conclude on the papers before us that any specific ruling or finding of the Judge, or all the rulings or findings identified by the State viewed cumulatively, either show actual bias, albeit subconscious, or give rise to a reasonable perception of bias on the part of the trial Judge. As we have said, it may be that some of the rulings made by the Judge were mistaken and that some of his remarks were ill-considered. The remarks and rulings of which the State complains, however, must be seen in the context of a marathon trial with all its complexities and human frustration. In our view, viewed in this context, we cannot agree with the State that the conduct of the trial Judge as recorded in the record could or should have given rise to a reasonable apprehension of bias on the part of an observer, nor does it suggest actual bias, albeit subconscious, on the part of the Judge."*

*S v. Basson* 2007 (3) SA 582 (CC).



#### ■ From Bad to Purse

*"The price one pays for pursuing any profession is an intimate knowledge of its ugly side."*

– James Arthur Baldwin

JUDGE E M PATEL of the Pretoria High Court came down heavily on the attorneys for both sides in a matter which came before him. He said:

*"This is one of the worst cases of utter disregard of the Rules and practice of this Court. Rules are crafted for the Court whose function it is to secure the conduct of proceedings in an*

*orderly manner to serve the just needs of the parties and the efficient administration of justice. Rules and practice of Court must be observed to facilitate due and proper compliance, since non-compliance merely encourages casual, easy-going and slipshod practice which often leads to compromising the highest standards of practice which the Court requires of practitioners."*

The Judge dealt with the application papers before him. He said that the advocate for the plaintiff "arrived late and he was unable to explain why the matter was on the roll". The Judge observed that the plaintiff's application "is totally misconceived and irregular". He spoke of the "appalling carelessness with which the plaintiff's attorneys persisted in this sterile application", their "slackness", and their "total failure to acquaint themselves" with the facts. He concluded, "it is clear that the attorneys were negligent and their conduct was unreasonable".

The Judge then turned to the attorneys for the defendant. He said their papers were "incomplete" and the "shortcomings" in their case made it impossible to hear the matter. The Summons and the Particulars of Claim were missing from the court file. He pointed out that the Rules and Procedures of Court are there "to assist practitioners to know what is expected of them so as to avoid failures, delays, frustration and the resultant wasted costs".

Judge Patel concluded that the court ought not to countenance "shortcuts". He said it was "unforgivable" that the defendant's attorneys had conducted themselves "in this slovenly manner which demonstrates nothing but disdain for the Rules and Practice of the Court".

In conclusion, the Judge said, "it is time to sound a stern warning that lawyers who undermine the practice and administration of justice will incur the displeasure of the court". He ordered the plaintiff's attorneys to personally pay all the costs of the defendant and the defendant's attorneys to pay all the costs of the plaintiff.

*Makuwa v. Polson 2007 (3) SA 84 (TPD).*

## Damages

### ■ Bridle Couple

*"There is no secret so close as that between a rider and his horse."*

– R. S. Surtees (1803 – 1864)

"HORSES will be horses," said Appeal Court Judge Belinda Lewis in a matter which recently came before the Supreme Court of Appeal. Sandra Redhouse, an English visitor to South Africa, visited a guest farm at Walkersons Estate in Mpumalanga. One of the leisure activities offered to

guests is horse riding. Before mounting a horse, she signed an indemnity form and went on the ride. In the course of the ride the horse, Maverick, bolted. Ms Redhouse fell off and was dragged on the ground by the horse because her one foot was caught in the stirrup and she suffered certain injuries.

When Ms Redhouse sued the owner of the guest farm for damages arising from her injuries he raised as a defence the terms of the indemnity. It provided that the guest house, its owner or staff would not be liable for "any loss or damage sustained as a result of my death or injury to my personal property in the course of my horse riding about the property of Walkersons. I acknowledge that I am aware of the risks involved in horse riding and accept such risks."

There was a dispute on the facts as to what had happened on the ride, whether Maverick bolted for no reason, whether he was startled and instinctively ran off, or whether Ms Redhouse, who let go of the reins and placed her arms around the horse's neck, had caused the horse to panic.

The court concluded that there was no evidence of negligence or any wrongdoing on the part of the owner of the guest house or his staff. The purpose of the indemnity was to avoid the risk of liability should accidents happen and was a complete defence to the claim. As a result the claim was dismissed with costs.

*Walker v. Redhouse 2007 (3) SA 514 (SCA).*



## Arbitration

### ■ You Choose, You Lose

*"And diff'ring judgments serve but to declare  
That truth lies somewhere, if we knew but where."*

– William Cowper (1731 – 1800)

APPEAL COURT Judge Louis Harms and four other Judges were called on to consider an appeal arising from the review of arbitration proceedings. He examined the relationship between the **Arbitration Act 42 of 1865** and the **Constitution**. Section 34 of the Constitution provides:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum."

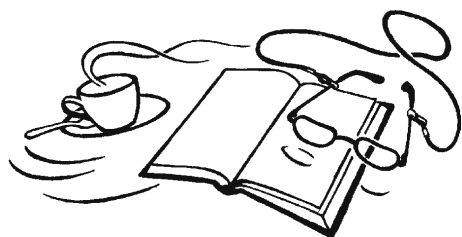
The question which arose was whether a decision by an arbitrator complies with the Constitution as being an independent and impartial tribunal or forum.

Judge Harms said that there is nothing to prevent parties from defining what is fair for purposes of their dispute. The Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements.

The rights contained in Section 34 may be waived unless that waiver is contrary to some other constitutional principle or otherwise against public morality. Parties to a private dispute may, for instance, compromise and settle their dispute and thereby forego all their rights under Section 34. By agreeing to arbitration, parties waive their rights to a public hearing and may even waive their right to an independent tribunal.

By agreeing to arbitration, parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the **Arbitration Act** and nothing else. Typically, they agree to waive the right of appeal. Furthermore, by agreeing to arbitration the parties limit interference by courts. This is not unconstitutional, and does not fail to comply with the requirements of Section 34 of the Constitution.

*Telcordia Technologies Inc v. Telkom SA Ltd [2007] 2 ALL SA 243 (SCA).*



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## PROPERTY

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### Sectional Title

#### ■ Bits and Pieces

*"It is not what they built. It is what they knocked down.  
It is not the houses. It is the spaces between the houses.  
It is not the streets that exist.  
It is the streets that no longer exist."*

– James Fenton

THERE ARE various ways in which one may own a flat in a block, or for that matter an office. One of these is sectional title. One purchases a unit in a sectional scheme.

The sectional scheme would be the flat or office block that is situated on one or more stands of adjoining land. It is a combination of joint and individual ownership in that the inside of the flat or office (known as "a section") is individually owned, but comes packaged together with joint ownership of the external part of the flat or office and the balance of the common property. Effectively what one purchases is a unit, which in itself is made up of a section, together with an undivided share in the common property. This common property would include the outer skin of the section, the roof, gardens, passageways, stairs, lifts, swimming pools, private roads, car parks and other shared amenities.



Together with this, and in accordance with the element of collective ownership, comes membership of the "body corporate". This is a club from which, like the Hotel California, one may never resign, nor may one be expelled – for as long as one owns a unit in the scheme. Being a member means that one is bound by the rules of this "club". The most obvious duty of a member is to pay one's subscription fees – in this case termed "levies" on a regular basis. Similar to most clubs, which are managed by a committee elected by the members, this "club" is managed by "trustees" elected by the members. The duly elected trustees may rely on professional managers to assist with the day-to-day management of the scheme.

Perhaps the most important implication of sectional title ownership though is the financial aspect. Here an analogy may be drawn with the purchase of a business as a going concern. In doing so one would be sure to scrutinise the financials and the management team very carefully. The same principle applies here. As a member of the body corporate one not only shares in the fruits, but also becomes liable for any debt that may exist. Purchasers are often impressed by low levies, when in actual fact higher levies feeding healthy reserves ought to be far more impressive. Often one purchases into an existing debt. This is not some kind of latent defect, but something that will be very obvious from the most cursory examination of the financial statements. A well-managed scheme, with competent management and healthy reserves is an excellent investment. Advice from an expert in this area is worth its weight in gold.

Sectional title ownership in the inner city of Johannesburg gives a chilling example of what may go wrong if sound financial and legal management is not exercised. Owners have found themselves in a position where they have actually abandoned their ownership when it began to cost

more than it was worth. Ironically these owners may still be held liable for the debts accrued, even though they no longer exercise their rights to ownership. By thinking of an investment in sectional title as the purchase of a business one can avoid this kind of pitfall. As long as purchasers remain uninformed or fail to seek proper advice this form of ownership remains risky. However, with the right focus it need not be the case at all.

In summary, purchasing into a sectional title scheme entails a combination of joint and individual ownership of property, membership of an exclusive club and the investment in a business. There are many potential pitfalls for the unwary, but splendid benefits for those who do their homework. Due diligence is essential.

few individuals could afford on their own. A unit trust pools the resources of many individuals who then jointly own shares in a number of companies.

Fractional ownership allows for joint ownership of property that is already, in part, jointly owned. The object of both is affordability. Current property prices make it prohibitively expensive for smaller investors or home owners to enter the market. Just as unit trusts cater for those who cannot afford to own a portfolio of shares, fractional ownership caters for prospective property investors in the same manner.

## *Fractional Title*

### ■ Slice of the Action

A RELATIVELY new concept, that of "fractional title" is also applicable to sectional title units. An analogy may perhaps be drawn with the concept of unit trusts. A public company is jointly owned by its shareholders, whose combined funds allow for the purchase of assets that very



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