



# LAW LETTER

*February 2008*

**venn**nemeth&hart  
ATTORNEYS



*With the rule of law, our judicial system, courts, judges, prosecuting authorities and crime constantly in the public spotlight, Law Letter in 2008 will continue to bring to our readers an insight into legal matters of importance and interest. In this edition we look at parents and children, husband and wife, neighbours, pets, foreigners in our land, and trade mark abuse. 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

### Constitutional Law

#### ■ Brothers and Sisters

*"Necessity knows no law."  
– Publilius Syrus (1st Century BC)*

THE HAPLESS status of refugees was dealt with in detail in a recent decision before the Constitutional Court.

Justice Kondile observed:

*"Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. The fact that persons are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country. The condition of being a refugee has thus been described as implying 'a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse'. This is reflected in South African legislation governing the status of refugees."*

Justice Albie Sachs then dealt with xenophobia which is "the deep dislike of non-nationals by nationals of a recipient state. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances."

Justice Sachs stated that this prejudice is strong in South Africa. It strikes at the heart of our Bill of Rights. Special care accordingly needs to be taken to prevent it even from unconsciously tainting the manner in which laws are interpreted and applied.

*"If refugees are treated as intrinsically untrustworthy, with their capacity to perform honestly and reliably being placed presumptively in doubt, then xenophobia is given a boost and constitutional values are undermined. Because of the*

*historic isolation of South Africa, our people's perceptions are unfortunately insular, thus making them very susceptible to xenophobia. This is further exacerbated by the fact that there is often a problematic confusion in the minds of people between foreigners who are here illegally and refugees. This confusion is created because these two groups often occupy the lowest economic stratum in our society. They are invariably black and do not speak any local languages."*

The significant and important leadership which the Constitutional Court gives not only in the administration of justice in South Africa, but also in the development and maturing of our democratic values and institutions under the rule of law is well illustrated by these observations of the justices of our apex court.

*Union of Refugee Women v. Director: Security Industry Authority 2007 (4) SA 395 (CC).*



### Family Law

#### ■ Suffer Not

*"Parents learn a lot from their children about coping with life."  
– Muriel Spark*

*"IN MY EXPERIENCE, of all the many onerous tasks facing a judge, possibly none is more taxing than deciding which parent should be awarded custody of their minor children, particularly where both mother and father are good, committed, and caring parents."*

These were the opening words of Judge Eric Leach in the Grahamstown High Court. His judgment gives a good insight into the factors which the court takes into account in dealing with these difficult decisions.

In determining what is in the best interests of the child, the court must decide which of the parents is better able to promote and ensure his or her physical, moral, emotional

and spiritual welfare. This can be assessed by reference to certain factors or criteria, not in order of importance, and also bearing in mind that there is a measure of unavoidable overlapping and that some of the criteria may differ only slightly. These criteria include the following:

- The love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
- The capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
- The ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
- The capacity and disposition of the parent to give the child the guidance which he or she requires;
- The ability of the parent to provide for the basic physical needs of the child, the so-called creature comforts, such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
- The ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
- The ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
- The mental and physical health and moral fitness of the parents;
- The stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the current position;
- The desirability or otherwise of keeping siblings together;
- The child's preference, if the court is satisfied that in the particular circumstances the child's preference should be taken into consideration;
- The desirability or otherwise of applying the doctrine of same sex matching.

The judge pointed out that each case is of course unique and must be determined by its own particular facts and circumstances. Ultimately the court is called upon to make a value judgment bearing all relevant considerations in mind, as to what is in the best interests of the child.

The judge also made this observation:

*"There seems to be little doubt that, in the past, mothers did enjoy a considerable advantage, particularly in respect of custody disputes involving young children. But we live in a changing world where much previously taken for granted can no longer be regarded as valid, and in more modern times the judicial preference to award the custody of young children to*

*their mothers has been diluted by reason of the fact that both parents now often work and the modern father is often more involved in the day-to-day care and raising of his children than was earlier the norm."*

Our Constitutional Court has recognised that, especially in the case of a young child, the biological relationship a mother has with a child whom she has nurtured in her body during pregnancy and often suckled after birth, gives rise to a special bond between them. This is an incidence of the special relationship between mother and child, and acknowledging it does not seem to amount to unfair discrimination. It would indeed be artificial for a court not to have regard to the fact of maternity of the children in making a determination as to the appropriate parent to be awarded custody and it might well amount to unfair discrimination against a mother if the undoubted bond she has by reason of her biological and nurturing relationship of the child is not taken into account. But there is no fixed or inflexible rule which always determines the issue of custody and the issue of maternity is only one of the factors to be considered.

In this case, after carefully considering all the evidence and the report of the family advocate, the judge concluded that both children should remain in the custody of their mother.

*K v. M [2007] 4 ALL SA 883 (E).*



## ■ Feeling Down Under

*"Accidents will occur in the best regulated families."*  
– Charles Dickens (1812 - 1870)

NOT ONLY the litigants in an application in the Durban High Court but also Presiding Judge Gavin Morley found themselves up the creek without a paddle. The facts were that at a time when a young mother was financially unable to take care of her son, being unmarried and having suffered a nervous breakdown, her parents, the boy's grandparents, adopted the boy. The grandparents raised their adopted grandson but he was always aware who his mother was. Eventually the mother married and gave birth to a daughter. The boy and his half-sister for a time grew up together and developed and maintained a strong and loving relationship.

The mother and her new husband and daughter then emigrated to Australia in 2002. The adopted son went on holiday to his mother's new family in 2002 and the following year she and her family spent a holiday in South

Africa. Close contact continued to be maintained between the biological mother and the son that she had given up for adoption to her parents.

The grandparents maintained their adopted grandson throughout his life and he remained financially dependent upon them while busy with his studies at university. He then decided that he also wished to emigrate to Australia and complete his studies there. The grandparents and his biological mother in Australia all agreed that it was in his best interests to do so. His mother undertook to support him financially, now being in a position to do so, and the grandparents were happy to assist where necessary.

So far so good. But it now appeared from enquiries made that the adopted son would only be entitled to admission into Australia provided it could be shown that he is the natural and legal child of his mother who already lived there and that he is dependent upon her for support. In order to achieve this situation the adoption order would have to be rescinded. His mother could not simply re-adopt him because he was no longer a minor. The grant of the original adoption order was not challenged as being invalid in some way.

The difficulty was that in terms of the **Child Care Act of 1983** there are very limited and specific grounds on which an adoption order which was made may be rescinded, none of which were applicable in the present situation.

The judge was compelled to conclude that the law does not provide for the rescission of an order by agreement or once a minor attains his or her majority. There was no basis on which the adoption order could be set aside. The boy was no longer a "child" within the meaning of the Child Care Act and the High Court was no longer his upper guardian. In the circumstances the court could make no order to assist the parties.

*Ex Parte Leask & Others [2007] 4 ALL SA 1018 (D).*

## ■ Rules of Engagement

THE NATURE of marriage came under the scrutiny of Judge Marais of the Johannesburg High Court recently where a wife in a divorce action alleged that her husband was not capable of engaging in normal sexual relations and accordingly had breached the contract of marriage between the parties. As a result she claimed she had suffered various contractual damages including R30 000 being the wasted expenses of the wedding ceremony, R100 000 for the loss of financial benefits of the marriage, R26 500 being loss of the income of the wife who had agreed to resign from her job and a further R50 000 for damage to her personal dignity and reputation.

The judge pointed out that although marriage is an agreement between the parties, it is certainly not an

ordinary contract in the sense of an agreement creating obligations. While it is true that marriage does give rise to obligations such as the reciprocal duty of support, the primary goal of marriage is not the creation of obligations. Many of the normal principles of the law of contract do not apply to marriage. Moreover, many of the consequences of marriage cannot be expressed purely in terms of legal rights and duties.

The **Divorce Act** provides that various orders may be granted when a marriage is dissolved by divorce. Section 7 provides for the division of assets and granting of maintenance between the parties. Section 9 provides for forfeiture of certain benefits of the marriage in certain circumstances. But nowhere does the Divorce Act provide for a normal contractual remedy to be available to either spouse for a breach of the relationship created by the formal entering into of the marriage.

If marriage were a simple contract, it could, according to every principle of the laws of contract, be rescinded by mutual consent, but it cannot. *"There is a contract before marriage which is a contract to marry, but marriage is the fulfilment of the contract, which is then satisfied and ended, and there is no further contract."*

Judge Marais observed that the wronged spouse has no action against an unfaithful spouse in respect of adultery, whatever the effect of such adultery may have on the relationship between the parties. This demonstrates the principle that the ordinary contractual remedies are not available for a breach of the duties assumed when a marriage is entered into, whether such duties be of a contractual nature or not. The wife's claims for damages were struck out.

*Deolall v. Deolall, 8422/2006 (WLD).*



## Damages

### ■ Woofers and Tweeters

*"The dog, to gain some private ends,  
Went mad and bit the man.  
The man recovered of the bite,  
The dog it was that died."*

– Oliver Goldsmith (1728 - 1774)

CHRIS FOURIE was the owner of a rottweiler dog known as Bruno which on the day in question and at the premises

### ■ Tear Down this Wall

*"For what do we live, but to make sport for our neighbours, and laugh at them in our turn?"*

– Jane Austen (1775 - 1817) in *Pride and Prejudice*

THE DUST flew in the Port Elizabeth High Court when Judge Froneman had to deal with feuding neighbours. Building had taken place in contravention of title deed restrictions on the property registered in favour of the neighbours. These provided that the property was zoned for residential use for a single dwelling for a single family. It was accepted that restrictive conditions in the title took precedence over the municipality's zoning and planning scheme. Consequently, any permission by the municipality to build or use buildings contrary to the title deed conditions cannot be lawful. The evidence revealed what the judge called the owner's "*appalling history of disregard of not only the legitimate interests of its neighbours, but also its disregard of requirements set by the municipality over a very long period.*"

The court heard that renovations to some of the buildings were done without plans being submitted or approved beforehand. Other buildings on the property were built without giving neighbours the required notice of the proposed building. A warning letter was sent to the owner and an inspection by the municipality disclosed the unlawful contravention of building and accommodation requirements. The owner gave assurances that the unlawful activities would be rectified but these assurances "*did not bear fruit*". The judge concluded that on the papers before him the owner "*has shown a flagrant and sustained disregard not only for the legitimate interests of its neighbours, but also for local authority requirements, over a very long period of time.*"



The judge then had to consider whether a damages claim would be appropriate, rather than a demolition order. After having considered the facts, he ordered the owner to take all the necessary steps to demolish the entire northern building on the property within 60 days and to demolish and remove the top storey and the staircase leading to it of the other building on the property.

An indication of the animosity which this case had caused was the fact that the judge had to make an order that the occupants of the offending property were not to throw objects into the neighbour's property, or tease the neighbour's dogs or otherwise make a noise or other

of Fourie attacked and savaged Mrs Susanna Swart, a domestic servant in the employ of Fourie. A 67 year-old neighbour Mr Dominique Naranjo rushed to Mrs Swart's aid.

He succeeded in distracting Bruno from her, but sadly for him, he was then attacked and bitten first by Bruno and thereafter by a second rottweiler that was on the premises, whose name transpired to be Cindy. All this was observed by poor Mrs Naranjo.



Naranjo and his wife sued Fourie and the owner of Cindy, Mr Neethling, for damages for pain and suffering, medical expenses, emotional shock and distress.

In their pleas, Fourie and Neethling each denied that his dog had bitten Naranjo, claiming that he had been bitten by the other dog.

The evidence revealed that Naranjo and his wife had been on friendly terms with their neighbours, the Fouries, for a number of years. They knew that Fourie kept the dog known as Bruno and had been aware of this since Bruno was a puppy. Naranjo testified that Bruno had been accustomed to him and had always obeyed him.

On occasions when Bruno had managed to get out of the Fourie's property and had barked at passers-by, he had been able to call Bruno and easily put him back onto his property. He also testified that on occasion he had fed Bruno while his owners were away. Fourie admitted this. On one occasion Naranjo had walked his dog together with Mr Fourie who was walking Bruno.

When Naranjo went to the aid of Mrs Swart, he had no idea that there was a second dog on the property. When Fourie and Neethling gave evidence, it transpired that Neethling had brought his dog Cindy, a bitch, to the property in order for her to be covered by Bruno, who was said to weigh between 50kg and 60kg.

The Cape High Court dealt with the law which imputes liability to the owner of a dog which acts contrary to its nature. It found that there was no contributory negligence on the part of Naranjo who had not acted negligently or unlawfully in entering Fourie's property to come to the aid of Mrs Swart.

Judges Roger Cleaver and Wilf Thring dismissed the appeal of Mr Fourie.

*Fourie v. Naranjo & Another* [2007] 4 ALL SA 1152 (C).

disturbance that interferes with the neighbour's privacy and peace and quiet of the neighbourhood. The offending owner was also ordered to pay the legal costs.

*Van Rensburg & Another v. Nelson Mandela Metropolitan Municipality & Others* [2007] 4 ALL SA 950 (SE).

## Trade Marks

### ■ Sorry Sole Out

*"When a lot of remedies are suggested for a disease, that means it can't be cured."*

– Anton Chekhov (1860 - 1904)

APPEAL JUDGE Louis Harms and four other judges in the Supreme Court of Appeal had little sympathy for the appellant in a trade mark case which came before them for determination. Judge Harms stated bluntly:

*"There are cyber-squatters and there are those who squat on the trade mark register. Judged by the papers in this case the Trust is an entity that used the Register to stifle competition and not for its statutory purpose. The fact that there is no opposition to an application for registration or that there is not already something similar on the Register does not mean that the application should be granted. This practice*

*gives intellectual property law a bad name. It also throws serious doubt on whether this part of the law covers anything intellectual. This case is not really about trade marks. It is about the suppression of competition. The appellants are upset because a former employee went into competition with them."*

Going ahead and dealing in detail with the dispute, the judge concluded:

*"It will be obvious from a mere glance that not one of the devices has any trade mark significance and that they would be perceived by the public as sole tread designs, whether functional or aesthetic. Because these marks are accordingly not capable of distinguishing in the trade mark sense they have to be expunged from the Register."*

The appeal was dismissed with costs including the costs of two counsel.

*Lubbe NO & Others v. Millennium Style (Pty) Ltd & Others* 2007 (6) SA 241 (SCA).

Electronic copies are available on request from:  
mail@vnh.co.za

© Copyright 2008

Law Letter is produced jointly with other firms.

Faithful reproduction with acknowledgement welcomed.

# 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.**

Port Shepstone

**Truter James de Ridder Inc.**

Empangeni and Richards Bay

**De Jager Baqwa Maritz Inc.**

Newcastle