



LAW LETTER

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ATTORNEYS

2009 promises to be a challenging year, not least for lawyers and their clients. This first edition of Law Letter deals with a variety of recent decisions of our courts which we are confident will enable our readers to keep abreast of legal developments in an entertaining and informative way. 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



Defamation

■ Not Worth It

*"War, he sung, is toil and trouble,
Honour but an empty bubble."
– John Dryden (1631 - 1701)*

THE EDITOR, publisher and distributor of the *Sowetan Sunday World* newspaper appealed to the Supreme Court of Appeal against an award of damages for defamation against them. In a gossip column they were found to have defamed an advocate practicing at the Pretoria Bar in connection with a romantic relationship which he had conducted with a television presenter. In the High Court he was awarded damages of R70,000.

Judge Louis Harms pointed out that too high an award of damages could act as an unjustifiable deterrent to the exercise of freedom of expression and might inappropriately inhibit that right. Further, and in general, the award of damages for defamation is to soothe the wounded feelings of the injured party and not to penalise or deter the wrongdoer. Punishment and deterrence were functions of criminal law and not of a civil court.

The main factors determining the amount of damages was the seriousness of the defamation; the nature and extent of the publication; the reputation, character and conduct of the person harmed; and the motives and conduct of the wrongdoer.

In this case the publication in question had a circulation

of about 90,000 copies and a readership of many more. However as soon as the appellants realised that they could not establish the truth of the defamatory statement, they tendered a published apology which however was not accepted.

Taking into account all the relevant factors, a proper award in the case should have been only R12,000 and the original order was reduced to that amount.

Mogale & Others v. Seima 2008 (5) SA 637 (SCA).



■ No Pain, no Gain

*"Once to every man and nation comes the moment to decide,
In the strife of Truth with Falsehood, for the good or evil side."
– James Russell Lowell (1819 - 1891)*

JUDGE HUGO of the High Court in KwaZulu-Natal had to consider the amount of damages due to ANC deputy provincial chairperson Zweli Mkhize as a result of a defamatory article which appeared in the *City Press* newspaper. The article stated that he had been involved in the assassination of a political figure.

An apology published in the newspaper did serve to mitigate the amount of damages to some degree. The judge however took into account the fact that Mkhize was a well-known political leader with an impeccable reputation, that the publication was fairly wide, with *City Press* having a circulation of about 180,000 copies per week and the fact that the apology had come very late in the day.

Having considered the amount of awards given in other comparable cases, Mkhize was awarded damages of R150,000 together with his costs on the attorney and client scale.

Mkhize v. Media 24 Ltd [2008] 4 ALL SA 267 (N).

■ A Bitter Lesson

MR VISSER who lived in Kimberley approached a security company to provide an armed security guard at his home on a 24-hour basis as protection for himself, his family and his assets as he was often away from home. In terms of this contract, Visser did not have the right to nominate the particular guard to be deployed from time to time, nor did he have any say about the manner in which the security guard was to perform his duty. The security company was an independent contractor who had in the past, without incident, provided Visser with security services at another location.

During the early hours of a Saturday morning, 16 year-old Gideon Saayman, who was drunk at the time, together with a friend decided to play a prank by overturning a pot-plant on Visser's property. The result of this episode is that he was shot in the back and the neck with a 12-bore shotgun by the security guard, Mr Sylvester Morebudi, who was stationed at Visser's house in terms of his security contract. As a consequence, Gideon sustained serious injuries.

Judge Navsa remarked:

"This case is a very sad and dramatic illustration of how steps taken by an increasingly desperate and hapless populace to protect their lives and homes against the crime wave in this country can have negative effects."

The parents of Gideon brought an action against Visser to try to hold him liable for the action of the security guard and the security company which had gone out of business. The questions for determination were whether



a reasonable man would have foreseen the risk of danger in consequence of the work he employed the contractor to perform. If so, would a reasonable man have taken steps to guard against the danger, and were such steps taken.

Having regard to the evidence, the Supreme Court of Appeal found that no blame could be attributed to Mr Visser. The general rule of our law is that an employer is not responsible for the negligence or the wrongdoing of an independent contractor utilised by him. Gideon Saayman and his parents might have had recourse against the security company but as it had no assets, that did not assist them.

Judge Navsa also commented:

"This case demonstrates how far the consequences of rampant crime extend and how easily life can be lost in South Africa. It also serves as a warning to those who advocate a resort to lethal force (irrespective of circumstances) to thwart the threat of crime, against the awful results of such force, that are unfortunately all too predictable. On the other hand it should also serve to prompt government to harness every available resource, as a matter of pressing priority, to end the scourge of crime before confidence in our constitutional order is lost or abandoned."

The claim was dismissed with costs.

Saayman v. Visser [2008] 4 ALL SA 245 (SCA).



Insolvency

■ Failing the Test

"Nobody speaks the truth when there's something they must have."

– Elizabeth Bowen (1899 - 1973)

MR FOURIE had been a director and shareholder of an authorised dealer in certain motor vehicles. A financial crisis faced the company which led him to engage in the unlawful conduct of double financing vehicles, so as to generate sufficient cash to pay its obligations. When the fraud was uncovered, the company was shut down, Fourie was held liable as surety for the company's debts, his estate was sequestrated and he was charged with fraud.

Some years later Fourie approached the Durban High Court to be rehabilitated in terms of the **Insolvency Act** of 1936.

Acting Judge Naidu pointed out that the court has a discretion to either grant or refuse an application for rehabilitation. Its discretion has to be exercised judicially and not arbitrarily. The onus is on the insolvent to show that the discretion should be exercised in his favour.

The judge pointed out that an application for rehabilitation is not a mere formality. It requires frankness and a full disclosure of all relevant facts. The court was not satisfied that Fourie had been entirely candid about the extent to which he had made a complete surrender of his estate and the extent to which his trustee had been satisfied that he

had made a complete disclosure. He also claimed that he was unaware of the nature of his criminal convictions and sentences and that he had been unable to find the court file relating to his criminal conviction. It appeared that when he was convicted of fraud, he had been fined R20,000 and a prison term of two years was suspended for five years. The judge stated that an insolvent ... "cannot content himself with a half-hearted and feeble attempt to place all relevant facts relating to his criminal conduct, conviction and sentence before the court hearing the application for rehabilitation."

The judge pointed out that he has to consider whether the insolvent ought to be allowed to trade with the public on the same basis as any other honest person. That depends entirely on how he conducted his trade before he became insolvent. He had to show that he had learned the lesson which requires him to deal with the public and society in general and the business world in particular in an honest manner. The court was careful not to take an attitude which would punish the insolvent twice but concluded that in the exercise of its discretion, the application for rehabilitation should be refused at this stage.

Ex Parte: Fourie [2008] 4 ALL SA 340 (D).



Banking Law

■ No Small Change

A COMPUTER SYSTEM generated four cheques, all drawn on the Standard Bank, and all bearing the same date. They were intended to be post-dated but the system used for printing of cheques could not produce such cheques so the date on each was altered in handwriting to reflect the intended date of payment, and the alteration was signed by the same two signatories who were authorised to sign the cheques on behalf of the drawer.

At a later stage two of the cheques were dishonoured by the bank. The dispute eventually came before the Supreme Court of Appeal where Judge Conradie and four other judges confirmed that a change, in handwriting, of the pre-printed date on the face of a cheque to a later date constitutes a material alteration, altering its business effect, and as a result precluding the holder of the cheque from being a holder in due course as defined in Section 27(1) of the **Bills of Exchange Act** of 1964. That Section provides that a holder who has taken a cheque, only becomes a holder in due course if the cheque was "complete and regular on

the face of it". But if there has been a material alteration to the cheque, that is an irregularity. Any alteration of the cheque will be considered to be material if it would alter the business effect of the cheque if used for any ordinary business purposes.

The result of this judgment confirms that one would be wise not to accept any cheque in payment where there has been any alteration on the face of the cheque, both front or back, and any amount in figures or in words, or the date of the cheque, or the name of the payee has been changed, altered or amended in any way, no matter how small, even if the alteration has been duly initialled or signed in full by the drawer of the cheque.

Melamed Finance (Pty) Ltd v. VOC Investments Ltd 2008 (6) SA 506 (SCA).



Tax

■ Lost in Translocation

"Men prefer any load of infamy, however great, to any pressure of taxation, however light."

– Sydney Smith (1769 - 1845)

METROPOLITAN LIFE appealed to a full bench of the Cape High Court from a judgment against it in the Special Income Tax Court. As a life insurance company, it used various overseas consultants, business advisors and computer services. Its view was that where such services were physically rendered outside of South Africa, no VAT is payable in terms of the **Value-Added Tax Act** of 1991, and those international suppliers should be zero rated in terms of Section 11(2)(k) of the Act.

The Commissioner of South African Revenue Services (SARS) took the view that Metropolitan Life had received "imported services" as defined in the Act and claimed VAT on such services to the extent that those services were used or consumed in South Africa.

Judge Dennis Davis agreed with the Commissioner. The services rendered were imported and attracted VAT at the rate of 14%. The provisions in the Act providing for zero rating in respect of services physically rendered abroad was not applicable to the kind of service in question in this case. The appeal was dismissed with costs.

Metropolitan Life Ltd v. Commissioner, SARS [2008] 4 ALL SA 558 (C).

Law of Insurance

■ Striking a Match

"There is no right to strike against the public safety by anybody, anywhere, any time."

– Calvin Coolidge (1872 - 1933)

A FULL bench of five judges in the Supreme Court of Appeal had to consider whether a policy of insurance covered damage to a truck which was set alight by striking workers. The insurer, SASRIA, repudiated the claim, arguing that the owner of the truck had not established that the fire had been caused by any riot, strike or public disorder, or any activity which was calculated or directed to bring about a riot, strike or public disorder, as provided for in the policy.

SASRIA argued that the definition of "riot, strike or public disorder" did not include the circumstances here where three unidentified men had purchased a small quantity of petrol and a box of matches from the shop at the truck stop. Shortly thereafter the truck was set alight and destroyed. This happened at the time of a strike and two of the unidentified men were wearing dark blue overalls of the same type as worn by the striking drivers.

The judges unanimously decided that, giving the words their ordinary meaning, it was clear that the destruction of the truck was an act directly related to a strike and that it was caused by a peril listed in the policy. SASRIA was found liable to indemnify the truck owner, and ordered to pay the costs of the appeal.

SASRIA v. Slabbert Burger Transport [2008] 4 ALL SA 255 (SCA).

actually being appointed. He argued that the Department had arbitrarily and unfairly discriminated against him, and that this amounted to an "unfair labour practice", as intended in Schedule 7 to the **Labour Relations Act** of 1995.

The Department contended that the black male had been appointed in the furtherance of equality, as intended by Section 8(3)(a) of the 1993 interim Constitution. But it appeared that the Department did not have an affirmative action policy or plan in place at the time of the appointment.

The matter went to the Labour Appeal Court and eventually came before the Supreme Court of Appeal. Judge Mlambo pointed out that the Department did not have an affirmative action policy, plan or programme in place, nor was the application of affirmative action one of the criteria applicable in the selection of candidates. Clearly the appointment was simply an arbitrary act. It could never itself amount to a "measure" within the contemplation of the interim Constitution nor part of a practice or policy as envisaged in the Labour Relations Act. The Department had been obliged to comply with the legislative framework applicable at the time, which emphasised that suitable candidates could not be denied appointment if they complied with the stipulated requirements, even though representivity was the objective, and that there had been no justification for not appointing the white male.

The Department was accordingly ordered to pay the white male the difference between what he would have earned had he been appointed to the post on the effective date and what he actually earned for the period from the effective date to the date of his retirement, together with interest and his costs.

Gordon v. Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA).



Labour Law

■ Law of the Bungle

"We have talked long enough in this country about equal rights. It is time now to write the next chapter, and to write it in the books of law."

– Lyndon Baines Johnson (1908 - 1973)

A WHITE MALE was turned down when he applied for a post in the Department of Health, KwaZulu-Natal. A black male was appointed instead, notwithstanding the selection panel's finding that the white male was the most suitable applicant for the post. He then approached the Labour Court for "protective promotion" as defined in the Public Service Commission Staff Code, which amounted to his being provided with all the benefits he would have received had he been appointed to the post, without

The Legal Profession

■ The Whole Truth

"All men that are ruined, are ruined on the side of their natural propensities."

– Edmund Burke (1729 - 1797)

ACTING JUDGE SUTHERLAND had harsh words to say in the Johannesburg High Court regarding the conduct of an attorney Mr Zehir Omar who appeared before him. In an urgent application, where the judge had little time

to read the papers and prepare for the hearing, Mr Omar failed to draw to the judge's attention a case in which Omar himself had appeared but which was directly in opposition to his argument. The judge stated:

"In my view it is the obligation of counsel to never mislead a court. Care must be taken that this does not occur through ignorance or negligence. It is self-evident that to mislead a court deliberately is a very serious breach of that obligation. A judge is entitled to take counsel at their word. When an argument is advanced and authority is cited, there is a tacit representation by counsel that no contradictory authority is known to him. Where such a representation is made and there exists a reported superior court's decision in point disapproving the authority cited in support of a proposition, counsel commits an act of negligence if he is ignorant thereof. Where counsel has actual knowledge of the superior court's decision, and remains silent and relies on the disapproved dictum, in my view, counsel misleads the court."

As a result, Judge Sutherland referred his judgment for investigation to the Law Society with a direction that the Law Society report on Mr Omar's conduct to the Deputy Judge President on its decision about such conduct. The judge stated further:

"It will be rare that a judge is familiar with every branch or topic of law. Counsel really is required to research the law and

present an honest account of the law. Counsel is at liberty to try to persuade a court to prefer one decision over another, or to distinguish cases, or to offer novel interpretations, but can never deliberately suppress a reference to an authority that disfavors his case, and even more obviously, counsel can never rely on a dictum in a decision which to his certain knowledge, has itself been compromised by a superior court's disapproval."

The judge concluded that the application before him was "meritless and launched recklessly", dismissed it and ordered the applicant to pay the costs on the attorney and client scale.

Ulde v. Minister of Home Affairs & Another 2008 (6) SA 483 (WLD).

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