



LAW JOURNAL

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ATTORNEYS



This early Winter edition of Law Letter looks at how our judges conduct themselves in court, and what they have recently decided on family law issues – divorce, adoption and abuse – as well as motor accidents and labour law issues. 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

Judges at Work

■ Cell Phone Blues

“What I like best about using the telephone is that it keeps you in touch with people, particularly people who want to sell you magazine subscriptions in the middle of the night.”

– Dave Barry

THESE DAYS almost everyone has a cell phone and, unfortunately, many people use their phones indiscriminately. No matter where you are or what you are doing, you are almost certain to be unwillingly exposed to someone’s private conversation. It’s almost as if a cell phone ring constitutes an irresistible lure and, once responded to, the user forgets that he or she is in a public place. One such inconsiderate cell phone user was Mr Lewis.

Lewis was seated in the crowded public gallery of the Johannesburg High Court whilst the court roll was being heard. This is a notoriously quiet time in court and one can usually hear a pin drop. Signs on the courtroom door made it clear that cell phones were not welcome, but Lewis had failed to switch off his cell phone or place it on “silent”.

The court’s proceedings were suddenly interrupted by the jarring sound of Lewis’ cell phone. All eyes, including those of an increasingly irate judge, were quickly focused on Lewis. Instead of blushing and quickly switching off his phone, Lewis stood up and began making his way through the seemingly endless gallery, the cell phone ringing all the way. Seized with fear that he would miss the call, Lewis aggravated the situation by then answering his cell phone and commencing a conversation before he had even left the courtroom.

The judge was outraged by Lewis’ disregard for the dignity of the court and was later heard to remark that, “it was as if there was nothing of significance occurring in his presence other than the conversation he was engaged in on the phone”.

A court orderly was dispatched to seize the inconsiderate cell phone user. A surprised Lewis was promptly placed in the witness stand and questioned by the judge as to

why he should not be convicted of contempt of court. The judge felt that Lewis’ bland apology was unacceptable and summarily found him guilty of contempt of court. Lewis was sentenced to one month’s imprisonment. We might add that it was not clear at the time whether Lewis would have access to his cell phone whilst in jail.

Not satisfied with the manner in which justice had finally caught up with him, Lewis took his conviction to the Supreme Court of Appeal. He argued that his constitutional right to a fair trial had been infringed by the manner in which the judge chose to hear and convict him for contempt of court. The Supreme Court of Appeal agreed with Lewis and his conviction was overturned. We imagine, though, that many would celebrate a victory for cell phone etiquette, however brief.

Keri Gwyn Lewis v. The State case 610/06 (SCA).



■ Sticks and Stones

“Judge – a law student who marks his own examination papers.”

– H.L. Mencken

JUDGES are expected to be impartial. Where parties to litigation fear that a judge is in fact partial to the other side, they are entitled to make application for the judge to recuse himself. The judge is then required to review his own conduct. The test is whether a reasonable person observing the judge’s conduct would have had a reasonable apprehension of bias. Judges are required to be impartial, but are not expected to be completely neutral.

In recent litigation involving the SABC, the judge asked questions, and made comments, suggesting that the SABC lacked integrity and was “intimidating the little people”. The judge had also displayed irritation during cross-examination by the SABC’s advocate.

Judge Blieden observed that a judge should not be seen as a silent referee. Judges are in fact under a duty to be active

participants in the proceedings and attorneys are expected to inform clients of this, especially if the client is not familiar with the “rough and tumble world of court litigation”.

Furthermore, a judge displaying irritation and expressing an initial view of the merits of the case, does not in itself amount to bias. In Judge Blieden’s own words:

“I have on occasion during this trial manifested signs of irritability and impatience at what I perceived to be needless, superfluous, irrelevant and repetitive cross-examination . . . because my body language at some stage or other indicates my admitted irritation or impatience, this is because of the way proceedings are being conducted and cannot be construed as bias”.

In the end the application for recusal was denied. The moral of the story seems to be that if, as a litigant, you develop a sneaking suspicion that the judge may be less than impartial, make sure that the judge is not simply participating appropriately in the proceedings or demonstrating a justifiable irritation. If there are no clear indications to the contrary, dust yourself off and proceed on with the case.

Coop & Others v. SABC 2006 (2) SA 212 (W).



Labour Law

■ Better Late Than Never

“If you don’t say anything, you won’t be called upon to repeat it.”

– Calvin Coolidge

ADVOCATES often form small groups or associations in which they conduct their practices separately, but share a secretary and office facilities. Four such advocates of the Johannesburg Bar called their secretary into a meeting and advised her that they had decided to dismiss her in view of her frequent absenteeism.

The secretary, apparently undaunted by the legal minds arrayed against her, pointed out that she had not been given a hearing before her dismissal. The advocates, after considering the matter, offered the secretary a disciplinary hearing chaired by an independent person of her choice. The secretary rejected the offer, pointing out that “they could do as they pleased as she had already been dismissed in an unfair manner”.

A claim for unfair dismissal was referred to the Commission for Conciliation, Mediation and Arbitration. The CCMA found that the advocates had clearly had good reason to fire the secretary – she was guilty of absenteeism. The dismissal was, however, procedurally unfair because the secretary was not given a hearing before her dismissal.

The advocates took the matter further, but upon receiving an unsympathetic response from the Labour Court, then approached the Labour Appeal Court. The advocates argued that a hearing offered to an employee after dismissal was fair, especially as the hearing was to be chaired by an independent chairperson of the employee’s choice. The secretary replied that the offer was too little, too late, as it had been made after the decision to dismiss her.

The Labour Appeal Court found that, although a hearing should generally be conducted before the decision to dismiss, a subsequent hearing could be fair. If the subsequent hearing was as fair, or even fairer, than a hearing that an employee might otherwise have had before dismissal, and if a fresh decision could be taken at the subsequent hearing, the requirements of procedural justice had been met.

The court held that the dismissal was procedurally fair. The secretary should have taken up the offer to “have her say”, even if the opportunity was only offered after the decision to dismiss.

Semenya & Others v. CCMA & Others 2006 27 ILJ 1627 (LAC).



Damages

■ Hit and Miss

“Guidelines for bureaucrats:

- (1) When in charge, ponder.*
- (2) When in trouble, delegate.*
- (3) When in doubt, mumble.”*

– James H. Boren

ROAD TRAFFIC accidents are almost as abundant in South Africa as the common cold. The Road Accident Fund, although not a new concept, was introduced to provide motor vehicle accident victims with compensation for injuries sustained as a result of negligent driving by another person. This protection extends even to hit-

and-run accidents, where the victim cannot identify the negligent driver.

Mr Engelbrecht was involved in a hit-and-run accident with a truck on 22 February 2002. His attorneys submitted a letter, setting out details of the accident, to the relevant police station on 1 March 2002. Regulations made under the **Road Accident Fund Act** require that an affidavit be submitted to the police within 14 days of the accident or as soon as it is reasonably possible to do so. The required affidavit was, however, only submitted to the police on 4 May 2002. The Road Accident Fund rejected Engelbrecht's claim, on the basis that his affidavit had been lodged after the 14-day deadline.



Engelbrecht approached the Constitutional Court. He claimed that the 14-day deadline was unconstitutional as it imposed an unreasonable and unjustifiable limitation on his right of access to the courts. The Road Accident Fund opposed the challenge, pointing out that the regulations had introduced a new claim for compensation by hit-and-run accident victims. The Fund argued that, as there was no pre-existing common law right for compensation in those circumstances, the regulations had not, strictly speaking, restricted Mr Engelbrecht's right of access to the courts.

The Constitutional Court unanimously agreed with Engelbrecht. The court held that hit-and-run accident victims did, in fact, have a pre-existing common law right to compensation. Even though the culprit might not be identifiable, the victim had a right not to be injured in a hit-and-run accident and, consequently, had a right to compensation when so injured. This constituted a pre-existing common law right.

The court felt that 14 days was an extremely short time limit, and was unfair and unreasonable. It did not allow a "real and fair" opportunity to exercise the right of access to our court system.

What this means for hit-and-run accident victims is that they are no longer restricted by a 14-day time limit in which to submit an affidavit to the police. The removal of this restriction applies even to those victims whose claims have already been submitted, but not yet finalised. It's a step in the right direction in the quest for the right of access to the courts.

Engelbrecht v. RAF and Another CCT 57/60 Constitutional Court.

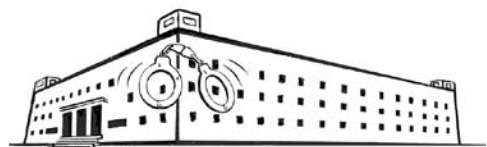
■ Truck and Trailer

A PERSON who has been conveyed as a passenger in a motor vehicle has a claim limited to R25 000 in case of death or injuries consequent upon an occurrence to which the **Road Accident Fund Act** applies. The claim by the driver of such vehicle is, however, not so limited. In this case the widow of the deceased, who sustained fatal injuries when the vehicle in which he was travelling overturned, claimed fully for the loss suffered by her and the minor children of her marriage to the deceased. At the time of the accident the deceased was at the wheel of a vehicle being towed by another, driven by Mr Constable.

The Road Accident Fund argued that the deceased was a passenger and that the widow's claim and that of the children should be limited to R25 000 each. The court decided, however, that the deceased was not a mere passenger. While being towed, the drive shaft of the vehicle was not disconnected, its steering mechanism was fully operational and all four wheels remained on the road surface at all times. It was not attached to the tow vehicle by a rigid metal bar but was connected by means of a tow rope or chain. Forward propulsion was provided by the tow vehicle but the deceased was in the driver's seat of the towed vehicle for a purpose. He was obliged to steer the vehicle, he was to apply its brakes, if necessary, to slow it down or stop it, and he was able to operate its gears.

The court concluded that the combined actions of the drivers of the towing vehicle and of the towed vehicle were jointly necessary for the exercise of proper control over the towed vehicle. The deceased was accordingly not a passive passenger. Having also found that the driver of the tow vehicle, Constable, was negligent and that his negligence was a cause of the occurrence, the court determined that the claims by the widow and the children were not limited.

September v. Road Accident Fund 2007 (1) SA 159 (SECD).



Family Law

■ A Hostile Environment

IN OUR law, a person found guilty of murder will typically be sentenced to life imprisonment, unless "substantial and compelling circumstances" require a lesser sentence.

Our courts have, for some time, grappled with defining the circumstances which would justify a lesser sentence

for murder. Two cases have provided us with some idea of what “substantial and compelling circumstances” might be and, although not very recent cases, they deserve some reflection.

The Supreme Court of Appeal in *S v. Ferreira* was asked to consider the sentencing of Ms Ferreira, who had arranged to have her partner murdered. Ms Ferreira had been abused by her first husband, and had suffered serious emotional and physical abuse from her murdered partner over a number of years. The partner made excessive sexual demands, verbally abused her and raped her. He had even threatened Ms Ferreira, on the night of his murder, that he would allow his employees to gang rape her.

The court found that Ms Ferreira’s history of abuse, at the hands of her first husband and her partner, and the resultant infringement of her constitutional rights, provided “substantial and compelling circumstances”. In view of this, the court imposed a lesser sentence. Ms Ferreira had already served three years in prison, and the court imposed a six-year sentence, of which three years were suspended.

In a similar case, Mrs Engelbrecht, a nurse with a single child, murdered her husband after nine years of marriage. Mrs Engelbrecht tied her husband’s hands behind his back using thumbcuffs, and then proceeded to suffocate him.

The court found that Mrs Engelbrecht’s abusive childhood and the history of physical and psychological abuse at the hands of her husband constituted “substantial and compelling circumstances”. Mrs Engelbrecht’s constitutional rights had been infringed over a number of years. The court, again, imposed a lesser sentence. Finding that the time already served by Mrs Engelbrecht was adequate, she was sentenced to detention until the rising of the court.

Domestic violence and the “battered woman syndrome” are clearly factors which the court will take into account when determining appropriate sentencing. A proven history of abuse may constitute “substantial and compelling circumstances” requiring a lesser sentence for murder.

S v. Engelbrecht 2005 (2) SACR 41 (W).

■ Properly Planned Parenthood

“A celebrity is one who works hard all his life to become well-known and then goes through back streets wearing dark glasses so he won’t be recognized.”

– Fred Allen

THERE HAS been considerable hype in the media relating to inter-country adoptions by Hollywood celebrities. A recent case in the Witwatersrand Division of the High

Court has focused the spotlight, although admittedly a far less glitzy spotlight, on the adoption of a South African child by an American couple.

The De Grees family asked the High Court for the sole custody and guardianship of two-year old Ruth Webb, a South African child. The De Grees family hoped to take little Ruth back to their home in the Blue Ridge Mountains to what would, by all accounts, be a blissful rural upbringing. After obtaining sole custody and guardianship, the De Grees family intended formally adopting Ruth in the United States.

The court found that the De Grees should have approached the Children’s Court for an adoption order, rather than requesting the High Court to grant sole custody and guardianship. The proper procedure in adopting a child, whether or not an inter-country adoption is contemplated, is to make application to a registered child welfare society.

If the application is approved in terms of the society’s policy, the Children’s Court should then be approached for an adoption order.

The court acknowledged that the High Court has inherent powers as the upper guardian of children, which powers it exercises in the best interests of the child. The High Court could grant a sole custody and guardianship order where it is in the best interests of a child, but only in very exceptional cases. The usual procedure was to apply to the Children’s Court for adoption, rather than to ask the High Court for mere custody and guardianship.

The Children’s Court is entrusted with examining the qualifications of applicants for adoption and with granting adoption orders in appropriate cases. The Children’s Court is in the best position to verify the qualifications of applicants and this procedure should not be circumvented except in exceptional cases.

Interestingly, the court noted that one of the reasons for restricting adoptions to the Children’s Court is that adoptions ordered through that court are registered and archived. This process ensures that the child and his or her biological family can later trace one another if required. Custody and guardianship orders issued by the High Court, on the other hand, are not subject to such registration and archiving.

Although seemingly bureaucratic in its approach, the High Court’s decision was strongly influenced by the desire to ensure that South African children are not adopted by unscrupulous foreign nationals. While the De Grees by all appearances would make excellent adoptive parents for little Ruth Webb, they were still required to approach the Children’s Court and follow the required adoption procedures.

De Grees and Another v. Webb & Others 2006 SASI Witwatersrand Local Division.



Matrimonial Law

■ Pension Problems

*"It was partially my fault that we got divorced...
I tended to place my wife under a pedestal."*

– Woody Allen

SPOUSES married in community of property have a single, joint estate. All assets acquired during the marriage fall into the joint estate and, upon divorce, each spouse is entitled to half of the joint estate.

Mr and Mrs Naidoo were married in community of property. Mr Naidoo worked at Clairwood Hospital and, as such, was a member of the Government Employees Pension Fund. He resigned from his position at the Hospital, and automatically ceased to be a member of the Pension Fund, in February 2004. Several months later, Mr and Mrs Naidoo were divorced. The divorce order provided that Mrs Naidoo was entitled to one half of Mr Naidoo's pension benefit, calculated at the date of the divorce, but payable when the pension benefits were paid out to Mr Naidoo.

The Pension Fund refused to comply with the court order and, amongst other things, pointed to Section 21(1) of the

Government Employees Pension Law, which provides that "no pension benefit is liable to be attached or subjected to any form of execution under judgment or order of a court of law". The matter eventually reached the Supreme Court of Appeal which was asked to decide whether the Pension Fund could be forced to comply with the court order.

The court found that Section 21(1) of the Government Employees Pension Law did not apply to Mrs Naidoo as she was not a creditor seeking to execute a judgment against her former husband's pension benefit. Given that Mr Naidoo had resigned from his position and ceased to be a member of the Pension Fund, prior to his divorce, his pension benefit had already accrued to the joint estate before divorce. Mrs Naidoo was entitled to an undivided half share in the benefit before divorce and, upon divorce, she was entitled to half the pension benefit.

Government Employees Pension Fund v. Naidoo & Another 2006 (6) SA 304 (SCA).

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