

In this edition Law Letter examines the way in which our courts deal with complex property and environmental issues. We also highlight recent decisions on tax, credit and trade marks and consider the relationship of legality and morality. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

RECENT JUDGMENTS

Property

■ Slumlord

"Mankind which began in a cave and behind a windbreak will end in the disease-soaked ruins of a slum."

– H.G. Wells

AN ADVOCATE of the High Court rented out rooms for R420 per month to 113 poverty-stricken tenants and their families in an unsafe and inadequate inner city building in Johannesburg. The building was previously a three-storey warehouse or factory consisting of open workshops that was turned into rooms with board partitions. The tenants complained about their living in slum conditions including illegal and unsafe electrical connections, only two unhygienic lavatories without doors and a single water tap for all 500 occupants, accumulation of refuse, broken walls and windows, general decay and disrepair. They averred that their complaints were met by threats by the advocate and the strong-arm tactics of his agents known as the "Bad Boys". The owner of the building was not joined in the proceedings.

The tenants prepared the pleadings as lay persons seeking to interdict the landlord from collecting rentals, refunding rentals received and prohibiting him from contacting them. They were represented by two advocates as *amici curiae* (friends of the court).

The court explained to the tenants that a lease may be valid even though the lessor is not the owner of the property and has no right to let it. All that the law requires is that the landlord gives vacant possession to those to whom he rents and that no one with a superior title will disturb the tenants' use and enjoyment of the property.

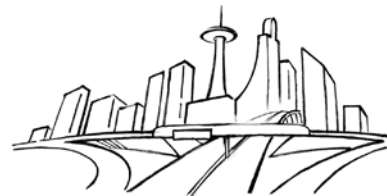
It was common cause that the property had been let for the purpose of providing residential accommodation. The court found that the landlord failed to hand over the dwelling premises in a fit and habitable condition and failed to maintain them in a proper condition of repair. The tenants did not waive their rights to safe and suitable habitation.

The landlord failed to deliver and maintain the property for the purpose for which it was let and the remedies of the tenants were cancellation of the contract, claiming specific performance, damages or a reduction of rental.

The tenants were poor and lacked the skills to make the necessary repairs and it was unrealistic to suggest that they look for accommodation elsewhere since homelessness seemed to be their only alternative. The equities weighed against an order for specific performance because of the non-joinder of the owner of the premises. Where the tenants abided by the lease despite the defects, a reduction of rental proportional to the diminished use would be sensitive to their constitutional rights of access to adequate housing, dignity and privacy.

The court accordingly interdicted the landlord from demanding or receiving rental in excess of R170 per room per month from any occupant of the premises.

Mpange and Others v. Sithole 2007 (6) SA 578 (WLD).



■ A Bottle of Commando

*"Claret is the liquor for boys; port for men;
but he who aspires to be a hero must drink brandy."*

– Samuel Johnson

SIXTEEN well-to-do KwaZulu-Natal farmers and businessmen erected holiday cottages on a stretch of exquisitely beautiful and pristine coastal land on the Transkei Wild Coast since 1994. Their *modus operandi* was to arrange a meeting between the prospective occupant and the Chief of the local tribe in the area 13 km north of Port St Johns. A bottle of Commando brandy garnered the Chief's approval who then assembled the Tribal Authority. After paying a fee of R200, this Authority issued him with a receipt and a fishing site licence application that he submitted to an official in Lusikisiki. This official then accompanied him to the site where the Chief and members of the local community were present. The site was never surveyed but only vaguely identified and those present were asked if they had any objections. No objections were

EDITORIAL COMMENT

A Bill of Values

"The first thing we do, let's kill all the lawyers."
– Shakespeare's *Henry VI*, Part 2

LEGAL and moral systems are normative. Legal norms are more stringently applied than morals because they require total obedience, being enforceable by an authoritative body. The purpose of the judicial process is to regulate human conduct and not to shape the values of society. It also does not relieve the individual from responsibility for personal values, or society from rules of behaviour beyond the ceiling of the legal framework. The notion that if the law has not forbidden something, it must be acceptable, consequently sets the bare minimum as the standard to aspire to.

Alexander Solzhenitsyn criticised the litigious, legalistically organised life in Western society. In a lecture at Harvard University he said:

"I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale than the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. . . . Wherever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralysing man's noblest impulses".

Values originate more from an orientation of the "heart" than a mentality of the "mind". In our country they find a basic expression in the *ubuntu* principle of "I am because we are", affirming the intrinsic dignity of every person. It is similar to the golden rule of ethical traditions throughout history: "What you do not wish done to yourself, do not do to others."

This philosophy resonated in the values set out in the first clause of our Bill of Rights. Our Constitution moved the foundations of our society from privilege to rights, resulting in a change of culture from authority to accountability. Problems have been experienced with the discipline inherent in this change, when individual rights have been equated with self interest. Fundamental rights must not be perceived as tools of exemption from legal wrongs. They also should not be perverted to excuse moral blame, for example, by relying on the principle of innocent until proven guilty in matters of conscience.

Taking personal responsibility for actions with a consciousness of duty remains essential for a strong society. Initiatives like that of Chief Rabbi Warren Goldstein and Dumani Mandela who have been campaigning for a Bill of Values, apart from the Bill of Rights, are worthy of consideration.

The glue that holds any country together is values. They are shaped by an altruistic perspective of justice and are not moulded from egocentric legalism, requiring nothing more than being right from a legal point of view. Rights without morality cannot long endure.

ever raised which signaled the end of formalities. The new occupant then supplied a lot of drink and food for a celebration enjoyed by all. The 16 occupants were assured that "nobody could take their piece of heaven away from them".

Different state departments of the national government and the Province of the Eastern Cape relied on a decree issued by the former Transkei prohibiting any development on state land without a requisite permit as well as the common law ground that the occupants were in unlawful possession of State land. The government obtained an eviction order in the Mthatha High Court directing them to demolish and remove all structures built on the sites within four months. They appealed against this order on various grounds.

The occupants firstly contended that the government's claim for the enforcement of its property rights was based on a debt that had prescribed. The court disagreed, pointing out that the occupants' conduct did not only occur in the past, but was a continuous wrong depriving the government of its property and that its claim had not prescribed.

The second defence was that the government had failed to establish its ownership of the land. The court concluded that since all land originally belonged to the State, land which had never been transferred into private ownership remained State land.

The occupants also claimed that the provisions of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)** had not been complied with. The court found that PIE only applied to the eviction of persons from their homes. The term "home" required an element of regular occupation in the context of PIE. Cottages erected for weekend and holiday purposes for persons who had their habitual dwellings elsewhere, therefore did not qualify as homes.

The occupants also could not prove that the Chief and Tribal Authority gave legally valid consents and their appeal consequently failed.

Barnett and Others v. Minister of Land Affairs and Others 2007 (6) SA 313 (SCA).

■ Anarchy and Absurdity

*"Make war not on terrorism but on ignorance,
on sickness and on environmental degradation."*

– Kurt Vonnegut

ENVIRONMENTAL authorities issued compliance notices in terms of the **National Environmental Management Act** and the **Environmental Conservation Act** to developers to cease all construction on two adjacent properties on an undeveloped section of Silverton Ridge in Pretoria. Environmental policy guidelines have adopted a "no-go" or low impact development policy for the ridges of Gauteng. The erven were near the Botanical Gardens in Pretoria in a sensitive ecological system important for the survival of certain endangered plant species.

The developers intended to erect a series of three or four-storey cluster units. They took the stance that the compliance notices were invalid and of no force and effect and their attorneys notified the environmental inspectors that they would ignore their directives. They proceeded with the development of the property resulting in the environmental authorities seeking an interdict to stop them. The developers lodged a counter application to review the compliance notices and directives.

The court found that the developers could not simply ignore the notices and directives and were obliged to comply with them. If they wished to challenge their validity, there were provisions in the environmental acts to lodge objections or they could take the notices on judicial review. The court concluded that the notices were validly issued as the development posed serious and irreparable harm to the environment, ecology and biodiversity of the ridge with far reaching consequences for the broader society. A final interdict was granted.

Khabisi NO v. Aquarella Investment 83 (Pty) Ltd [2007] 4 ALL SA 1439 (T).



■ An associated case with remarkable similarities had been instituted earlier but its final appeal was decided later. HTF Developers (Pty) Ltd tried to set aside the environmental authorities' directions that deemed the clearing of the sensitive environment on a Gauteng ridge ecosystem with the same type of endangered plant species as illegal. The basis of the developer's challenge was that an exercise

of power under Section 31A of the **Environmental Conservation Act** was subject to a 30 day notice period and comment procedure in terms of Section 32 of the same Act. The developer was only given 48 hours notice.

The developer succeeded in the Supreme Court of Appeal. It read the two sections literally and held that the procedural prerequisites of Section 32 could not be ignored. It therefore ruled that the directions issued in terms of Section 31A were invalid for failing to comply with the provisions of Section 32.

This decision was overruled by the Constitutional Court. Its judges looked at the issues from a broader perspective. The purpose of Section 31A is to prevent imminent and immediate threats to the environment caused by a particular person. It should not be constrained by the rigid requirements of Section 32 facilitating public involvement, as that would hamper the ability of the designated functionaries to respond appropriately to harmful situations. The two sections must be consistent with the overall framework of the Act and read to allow for procedural fairness and flexibility to cater for urgent circumstances and to avert absurdities. The notice was considered as adequate.

MEC: Department of Agriculture, Conservation and Environment and Another v. HTF Developers (Pty) Ltd (CCT 32/07) (2007) (ZACC) (6 December 2007).



■ To Evoke Posterity

QUALIDENTAL LABORATORIES had to obtain a permit from Heritage Western Cape to demolish a villa with landmark status and its annex in Mossel Bay. They were older than 60 years and protected in terms of the **National Heritage Resources Act**. Only the demolition of the annex was approved on condition that this authority also had to approve the final plans for the intended development on the property as it had to be subsidiary to the villa in terms of scale, siting and location. The Mossel Bay Municipality's approval of the building plans was also made subject to approval of the heritage body. This body did not approve the final plans because part of the proposed apartment block would obscure the most important aspect of the villa and it would be intrusive and out of character with the other buildings in the surrounding area.

Qualidental demolished the annex and commenced building the apartment block despite the lack of final approval. A senior heritage inspector issued a stop works order and threatened criminal prosecution. Qualidental

approached the court for a review of the conditions of the permit and the setting aside of the stop works order.

Qualidental argued that the heritage body only had powers to protect buildings from demolition and alteration but not to regulate any other construction on the property.

The villa was not declared a national or provincial heritage site but fell in an area identified by the Municipality as worthy of urban conservation. The Act's objective is the identification, protection, preservation and management of heritage resources for posterity. The court decided that any new development that would detract from the villa and its surrounds would be against the heritage body's obligation to protect and conserve the villa's landmark status. The condition imposed by this body had a conservation objective and was in line with the principles and overall scheme of the Act. The stop works order was therefore confirmed.

Qualidental Laboratories v. Heritage Western Cape (2007) SCA 170 (RSA).



Tax Upheaval

"All money nowadays seems to be produced with a natural homing instinct for the Treasury."

– Prince Philip, Duke of Edinburgh

A CONTROVERSIAL tax law judgment has become the cause of uncertainty in respect of interest-free loans outside an employment relationship that previously did not attract tax. The effect of it is that all such loans are potentially taxable in the hands of persons enjoying its interest-free use. Until the South African Revenue Service (SARS) issues a practice note on the status of these loans, it is not possible to state whether they would be deemed accruals in the hands of taxpayers on principle in all instances.

Three companies developed retirement villages using a common practice in that industry. To finance the construction of the villages, they obtained interest-free loans in exchange for granting life occupancy of the units to the lenders. Ownership of the units remained with the taxpayer companies. On cancellation of the agreements or the death of the lenders, the loans would be repaid and the occupation rights revert to the companies.

SARS taxed the companies on the basis that the right to use the loans interest-free had a money value that formed part of their taxable income. The companies contended that notional income that could not be freely transferred

or ceded did not constitute income that could be taxed. But the Supreme Court of Appeal found that although the loan was not income, the value of the right to use a loan interest-free for a period of time was. Such right was valued with reference to the weighted prime overdraft rate for banks.

The facts in the *Brummeria* case were specific being a barter transaction in the property field where the recipients of the interest-free loans provided a *quid pro quo* to the persons who advanced the loans. It may therefore still be possible to distinguish the reason for this decision from other types of interest-free loans, such as to family trusts or by parents to their children.

CSARS v. Brummeria Renaissance (Pty) Ltd and Others 2007 (6) SA 601 (SCA).



National Credit Act

THE FIRST reported case on the **National Credit Act** deals with the question whether the jurisdiction of the high court to adjudicate applications for default judgment in terms of the act, has been fully or partly excluded.

Nedbank issued summons for debt arising in terms of a mortgage bond and for an order of execution of immovable property. Section 90 of the Act declares consent to jurisdiction of the high court by a consumer in a credit agreement unlawful if a magistrate's court has concurrent jurisdiction. Section 127 of the Act dealing with the surrender of goods provides that a credit provider may approach the magistrate's court for judgment enforcing a credit agreement.

Nedbank's mortgage bond provides for the consumer consenting to magistrate's court jurisdiction, but reserved the bank's rights to approach the high court, which it did in this matter.

The court held that any inference that the jurisdiction of the high court is ousted, must be clear and unequivocal and that the Act contains no such express provision. The relevant sections therefore did not affect the jurisdiction of the high court and it could not refuse to entertain the matter. But in approaching the high court on a claim justiciable in the magistrate's court, Nedbank could only recover costs on the magistrate's court scale. Judgment was accordingly granted.

Nedbank Ltd v. I.G. Mateman and Others Case no 36472/2007 (7 December 2007) (TPD).

Trade Marks

■ Transparency

"Signs are the only things man has with which to orient himself in the world."

– Umberto Eco

COMMERCIAL AUTO GLASS supplies windscreens for motorcars, including unauthorised fits for different BMW models. BMW did not complain about this practice, but objected to the way in which Auto Glass advertised, listed and labeled its wares by referring to specific BMW models and thereby using its registered trade marks.

Auto Glass contended that it used the trade marks to inform the public that it was selling windscreens that fitted BMW cars and not that they were original BMW windscreens. It averred that this was constitutionally protected speech and not trade mark use misleading the public.

The court decided that at best this use was capable of two constructions. It may be interpreted by the public as the advertising of unauthorized windscreens that fit BMW cars that would not constitute infringement, but may also

mean that BMW windscreens were supplied. On balance, a substantial number of customers may have been given the impression that the windscreens emanated from or were in some way connected with BMW.

The court disagreed with Auto Glass' contention that their use of the marks amounted to *bona fide* and reasonable use consistent with fair practice in terms of the **Trade Marks Act**. To qualify for this distinction, Auto Glass should have made it unequivocally clear that the goods did not originate from BMW. It could have done so with a few words so the court drew the inference that it did not want to inform the public of the true position and that its use was therefore not *bona fide*.

An interdict was granted against Auto Glass infringing on the trade mark rights of BMW in relation to windscreens and windows for motor vehicles.

Commercial Auto Glass v. BMW AG 2007 (6) SA 637 (SCA).

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LAW LETTER

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