



# LAW LETTER

*March 2010*

**venn**nemeth&hart  
ATTORNEYS

*Banks, builders and boats all feature in our round-up of recent court cases in this edition of Law Letter. 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

### Environmental Law

#### ■ Empty Vessels

*"We must protect the forests for our children, grandchildren and children to be born.*

*We must protect the forests for those who cannot speak for themselves such as birds, animals, fish and trees."*

– Chief Qwantsinas of Nuxalk Nation

GLEN DUNCAN appealed against a refusal in 2005 by the Department of Environmental Affairs and Tourism to grant him a commercial licence for traditional line fish. He relied on a substantive legitimate expectation to acquire the fishing licence for his vessel, the *Endeavour*, because he had been granted a licence since 1995 which had thereafter been extended.

The Department's refusal was based on the *Endeavour* not being a "suitable line fish vessel" in terms of a policy document published under the **Marine Living Resources Act** during 2005. The prescribed vessel was described as either a typical ski-boat or a chukkie (wooden deck boat) of approximately 10 metres or less in length and geared for hand line fishing. The *Endeavour* was 16.5 metres in length and belonged to a class described as "freezer boats".

Duncan contended that his licence was renewed in 2001 when a "suitable vessel" was also described as one of less than 10 metres in length, and that nothing material had changed to suddenly make the *Endeavour* non-suitable for a licence. Furthermore the Department had already made exceptions, such as for a vessel called the *Kowie*, that was 13.4 metres long.

The Department's motivation for its decision was that since 1980 the most exploited species of line fish had been depleted to dangerously low levels. To deal with this emergency, the Department changed its policy to only license smaller boats which are less efficient than freezer boats so as to lessen the impact on an already compromised resource. Larger vessels are capable of trips of longer duration and range and able to exploit stocks on the Agulhas offshore bank. Ski-boats and chukkies have to return at the end of each day

necessitating their remaining in the inshore area. The Department's objective was for the Agulhas offshore bank to act as a refuge for the depleted stocks of fish to recover. Exceptions were allowed for less efficient boats like the *Kowie*, which was a traditional wooden deck boat with a holding capacity of less than a seventh of the *Endeavour*.

Duncan knew that his licence had been granted for a limited time. The court was impressed by the Department having formulated its policy after extensive consultations with a wide variety of interested parties. Judge Fritz Brand consequently found that he had failed to prove a legitimate expectation to acquire an extension of his licence in respect of the *Endeavour* and his appeal against the Department's decision was dismissed.

*Duncan v. The Minister of Environmental Affairs and Tourism (2/2009) [2009] ZASCA 168 (1 December 2009).*



#### ■ I see sea shells on the sea shore

AFTER YEARS of delays caused by strife between environmentalists, officialdom, developers and vested interests in general, the **Integrated Coastal Management Act** finally became law on 01 December 2009. It combines diverse stipulations, policies and statutes of different agencies and departments into an integrated unit and updates antiquated legislation to comply with recent environmental and development strategies as well as the Constitution. The various rights and duties in relation to coastal areas and responsibilities of organs of State are defined in seeking to promote, conserve and maintain coastal land- and seascapes, and ensure their ecological sustainable development that is socially and economically justifiable. This Act will prevail in instances relating to coastal management where there are conflicts with other acts.

The body of the Act sets out what is protected in respect of coastal zones and resources, the boundaries of coastal areas, the functions of national, provincial and municipal

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## EDITORIAL

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### ■ More Questions than Answers

*"He who has a why to live can bear  
with almost every how."*

– Friedrich Nietzsche

ESPECIALLY DURING trying times and in adversity people are prone to reflect on the question, "What is the purpose of life?"

Answers to this poser have been suggested over a wide spread of disciplines throughout history.

Science provides an empirical framework for a factual consideration of the question. In contrast, religious reasons for being, like the golden rule to love God and fellow mortals as you should be loved, are based on belief systems to strengthen the relationship between humanity and its gods. Philosophical interpretations range from Plato's highest form of knowledge, through Bentham's greatest happiness to the greatest number of people, to existentialism concluding that it is absurd to search for external values in an indifferent world that has no meaning.

The question has many nuances in popular culture and preferences and differences, such as between success and significance, are commonplace. In our present post-modern times everything is relative and "whatever" is often the answer. At the end of the Monty Python comedy, *The Meaning of Life* its title is explained when an envelope is opened with the note: "Well, it's nothing very special. Uh, try to be nice to

people, avoid eating fat, read a good book every now and then, get some walking in, and try and live together in peace and harmony with people of all creeds and nations."

The psychiatrist Victor Frankl survived Nazi death camps in which his wife and family had been killed. In his book, *Man's Search for Meaning*, he argues against abstract answers and concludes that significance is found in every moment of living and that meaning can even be found in the worst suffering.

Life's purpose is officially reflected in legal principles. Law is a set of authoritative social norms prescribing behaviour, but also takes on the quality of what ought to be done – with the reasonable person as its measure and not merely self-interest, and justice the ideal to strive for. The abstraction of the essence of justice from the conduct of law, however, raises timeless conflicts and issues that defy reduction to a trite phrase. Justice is a wide concept and the ancient quest to find a universal standard of justice has never been fully realised.

Legal practice is more attuned to daily activities, techniques of the law in action and experience gleaned from life, with the result that abstract theories of law and justice only hover in the background.

That does not mean that lawyers should not remain sensitised to the place and function of law in society as well as their role in the process. Attitudes that determine the choice rather to give to life than to take what you can get from it, combined with responsibility towards yourself and others, is fundamental to the fulfilment of a true professional vocation.

agencies, coastal management programmes, pollution control including dumping at sea, enforcement and general powers and duties.

An important provision of the Act for seaside property owners is the new coastal protection zone which includes any land unit situated wholly or partially within one kilometre of the high-water mark, zoned for agricultural and undetermined use, or such land that has not been zoned and formed part of a human settlement when the Act came into force. All land within 100 metres of the high-water mark and any privately owned land below the high-water mark is in any event part of the protection zone. It also covers the "littoral active zone" being land adjacent to the seashore that is unstable because of

natural processes, such as dunes and beaches whether unvegetated or partially vegetated. The protection is required to generally manage the ecological integrity, natural character and aesthetic value of the coastal ecosystem.

It seems that protected land that has not been zoned as a township may not in future be capable of being zoned as such. Provision is also made for the establishment or change of coastal set-back lines by publication of regulations in the Provincial Gazette, to prohibit or restrict buildings or alterations to established structures seaward of such lines.



The objectives of the Act will play an increasingly important role in future developments along the coast.

## ■ Crash Crisis

*"Well, here's another nice mess you've gotten me into."*  
– Laurel and Hardy

MR NGCEZA wanted to buy a motorcar but did not qualify for credit from a financial institution. He then asked his friend, Mr Hofman to assist him. Hofman entered into an instalment sale agreement on the understanding that Ngceza would take delivery and possession of the car and pay the required instalments and insurance premiums.

The car was damaged in a collision with a taxi. Hofman sued the taxi driver and taxi owner for the costs of repair. A defence was entered that Hofman did not have the right or legal standing to be heard in court as he was neither the owner nor the possessor of the car.

In the court's view the risk of damage to the car was only formally undertaken by Hofman but in fact always lay with Ngceza. Hofman's real interest in the transaction relied on a contractual claim against Ngceza due to his financial exposure under the instalment sale agreement and not on ownership of the car. The cost of repair to the car had no connection to the existence or value of Hofman's monetary claim against Ngceza.

Judge Ashley Binns-Ward therefore held that Hofman lacked the requisite right to sue for damage to the car.

*Raga v. Hofman 2010 (1) SA 302 (WCC).*

## ■ Enough is Enough

*"To be 'satisfied' in the good sense of this word means to have found sufficiency in something."*  
– Karl Barth

JUAN JACOBS' brother-in-law, Pierre Jacobs, left his Vito Mercedes Benz at a service centre of the Imperial Group for repairs. An owner's risk notice was prominently displayed at the passenger vehicle office, the reception entrance and the cashier's window. It disclaimed liability by stating: "Vehicles are left at owner's risk."

The vehicle was stolen while in Imperial Group's custody. Juan instituted an action for damages against it. The court accepted that Pierre did not see the disclaimers displayed on the notice boards. In addition, Juan contended that he was not bound by the disclaimers and furthermore that Pierre did not have authority to bind him to the disclaimers.

The court concluded that there was nothing limiting Pierre's authority when he handed over the vehicle. This

included binding Juan to the owner's risk notice. As far as sufficiency of the notice was concerned, the court quoted the following passage from a 1999 case: *"The answer depends upon whether in all the circumstances the appellant did what was 'reasonably sufficient' to give patrons notice in terms of the disclaimer."*

Judge Mlambo was satisfied that Imperial Group had brought the disclaimer to the attention of its customers in a reasonable manner and it did not assist Juan that Pierre did not see it. Imperial Group was therefore not liable for the loss of the vehicle.

*Jacobs v. Imperial Group (Pty) Ltd (693/08) [2009] ZASCA 167 (1 December 2009).*



## ■ No Soft Landing

*"The buck stops here."*  
– U.S. President, Harry S. Truman

RUSSELL BROWN and Joseph Sloep were guests at the house of Pieter Pienaar in Green Point, Cape Town to celebrate the birthday party of his life partner. When a car alarm went off they went out on to a balcony to see what was happening. The balcony collapsed and they were fairly seriously injured.

Liability in this case involved three parties: Pienaar had instructed a contractor, Mr Classen, to build the balcony who assigned the work to a sub-contractor, Mr Lamberts. The matter was complicated by the failure to obtain approval of the building plans and specifications from the local authority. All three knew that harm could be caused to third parties if the work was not properly done and they were all held to be liable in court. Only Pienaar and Classen appealed against this ruling.

The legal test to be applied is whether a reasonable man would have foreseen the risk of danger of the work he employed a contractor or sub-contractor to perform, and whether steps should have been taken to guard against that danger.

Judge Bob Nugent of the Supreme Court of Appeal in Bloemfontein found that the expert evidence indicated that it was not the failure to submit plans that caused the balcony to collapse, but the manner in which it was fixed to the wall. Pienaar had no expertise in the field and passed the work to an experienced building contractor,

in the expectation that he would pass it on to a person whom he considered to be an expert.

The contractor Classen could not be held to be vicariously liable for the negligence of Lamberts on the basis of the general rule that an employer is not responsible for the wrongdoing of an independent contractor employed by him. His responsibility did not, however, stop with his passing of the work to Lamberts. Classen was also required to ensure that it was properly done. But Classen had made it clear from the outset that he did not have any skill or expertise in the erection of steel balconies and there was no proof that he had the means of evaluating that Lamberts had used inadequate fastenings or placed them in the wrong positions. The appeals of both Pienaar and Classen consequently succeeded.

*Pienaar v. Brown (48/2009) [2009] ZASCA 165 (1 December 2009).*



## Banking Law

### ■ Rich Man Poor Man

*"How does it feel  
To be without a home  
Like a complete unknown  
Like a rolling stone?"*

– Bob Dylan

FOUR CASES, in which banking institutions applied for orders to declare the houses of poor homeowners executable for relatively small debts outstanding on mortgage bonds, as well as attorney and client costs, had an outcome different than anticipated.

In each case the homeowner was resident on the property and the arrears varied between R2000 and R5000, except in the one matter where it was R76000. The court was concerned that an injustice might be done to the homeowners, who did not defend the actions. They had been paying instalments in reduction of their bonds for periods of 17, 14, 19 and 13 years respectively before they fell into arrears. The properties were more valuable than the outstanding balances and the arrears were trifling in their significance to the banking institutions. The prejudice suffered by the homeowners would be disproportionately large to that of the banks being denied immediate payment of the bond balances.

The homeowners fell within the category of 'low income persons' as contemplated in the **National Credit Act** but the banks' letters of demand did not expressly warn them that their homes would be sold in execution if they did not pay the outstanding amounts. There may have been many factors at work as to why they failed to respond to these letters, such as ignorance of the protection afforded by the **National Credit Act** and other legal remedies at their disposal. Circumstances beyond their control such as the present economic climate could also have contributed to their inaction.

Judge Claassen felt duty bound to intervene to protect the interests of the historically disadvantaged homeowners and to consider all the relevant circumstances as required by the Constitution, before an eviction of persons from their homes could be ordered.

The court consequently exercised its discretion against the banks, dismissed their applications and interdicted them from instituting actions for the recovery of the debts and obtaining execution orders in the High Court. Should the banks decide to proceed in the Magistrate's Court, a special order was made that the homeowners first had to be personally served with a copy of this judgment, simultaneously with being apprised of their rights and benefits provided by the protective measures of the **National Credit Act**.

*Firststrand Bank Ltd v. Maleke and Three Similar Cases 2010 (1) SA 143 (GSJ).*

## Law Enforcement

### ■ Fight or Flight

*"I know well what I am fleeing from  
but not what I am in search of."*

– Michel de Montaigne

AN ARREST *suspectus de fuga* is a common law measure aimed at preventing a debtor from fleeing to avoid paying a debt. A court order for the arrest and detention at the Sandton Police Station of a Belgian citizen, Mr van Wesembecq, based on this measure was subsequently set aside because flight as a motive of his intended departure from South Africa had not been proved. However, Judge Mathopo went further and questioned the continued legality of such an arrest.

On the basis that civil imprisonment was considered to be unlawful by the Constitutional Court and that the Supreme Court of Appeal had stated that there is no legal justification for an arrest to establish jurisdiction, Judge Mathopo likewise deemed this common law measure in violation of the personal freedom of a debtor and at variance with the Constitution. His view was however incidental as the judgment was not based on it

and notice of an intention to declare an arrest *suspectus de fuga* to be invalid, had not been served on other interested stakeholders, such as the Minister of Justice.

*Amrich 159 Property Holding CC v. Van Wesembeeck 2010 (1) SA 117 (GSJ).*

## Copyright

### ■ The Day the Music Died

*"Music is spiritual. The music business is not."*  
– Van Morrison

THE EXECUTOR in the deceased estate of the well-known singer, Brenda Fassie, claimed damages on the basis of copyright infringement from EMI Publishing (Pty) Ltd and EMI Music (Pty) Ltd. It related to the composition of music and writing of lyrics of 157 pop songs in which Brenda Fassie collaborated with others. The executor asked for an enquiry aimed at establishing damages equivalent to the royalties that would reasonably have been payable by a licensee of the copyright.

The two EMI companies lodged exceptions against the claims on the basis that the estate could not sue them

on its own without proof that the joint authors had ceded their copyright to it. The estate countered that the claim was only directed at obtaining a pro rata share of a reasonable royalty. According to the court, this would have involved more than just a fair evaluation of the claims and introduced a measure of speculation. A claim for punitive damages was also included that would ultimately have to be assessed as a lump sum figure to be shared pro rata by the joint co-authors. If the total amount was paid to the estate, the EMI companies would remain exposed to similar claims by one or more of the other co-authors.

Judge Hurt therefore upheld the exceptions but the estate was given leave to amend its claim by joining the co-authors to the action or making out a case for its entitlement to sue on its own.

*Feldman NO v. EMI Music Publishing SA (Pty) Ltd 2010 (1) SA 1 (SCA).*

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