



LAW JOURNAL

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vennnemeth&hart
ATTORNEYS



In this edition, Law Letter turns its spotlight onto the often difficult question of legal liability – when your often careless, negligent, or even intentional acts or omissions cause harm or loss, are you always legally liable? 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

■ Lend Me Your Ears

“The approval of the public is to be avoided like the plague.”
– André Breton

THE JUDICIARY should not interfere with the autonomy of Parliament unless mandated to do so by the Constitution. The Constitution is binding on all branches of government and the Constitutional Court is its ultimate guardian.

Doctors For Life applied directly to this court for a declaratory order that Parliament did not fulfill its constitutional obligation to ensure public involvement in its legislative processes relating to the passing of certain health related statutes. The duty to facilitate public involvement would in appropriate circumstances require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that would govern them.

No evidence was produced that the National Council of Provinces or all the provinces had held public hearings or invited written representations on the relevant Bills. The **Dental Technicians Amendment Bill** did not generate any interest when it was first published for comment. The court held that it was reasonable not to invite written representations or to hold public hearings on this Bill and that the challenge thereto failed.

Justice Ngcobo took the view that it would have been desirable to hold public hearings and to have invited and considered written representations in respect of the **Choice on Termination of Pregnancy Amendment Bill** and the **Traditional Health Practitioners Bill**. Care had to be taken not to disturb the balance between the separate powers of government with improper intrusions into the domain of Parliament. Therefore only applicants who have made diligent and proper attempts to be heard, should be entitled to rely on the failure to facilitate public involvement. Doctors For Life had actively and persistently sought an opportunity to be heard on the Bills without success.

The failure to have granted them an adequate audience rendered the resulting legislation invalid.

The matter was remitted to Parliament to re-enact the law. The order of invalidity was suspended for 18 months to enable Parliament to enact the two statutes afresh in accordance with the provisions of the Constitution.

Doctors For Life International v. Speaker of the National Assembly and Others 2006 (6) SA 416 (CC).



Ownership Rights

■ Home-Sweet-Home

“Thou shalt not covet thy neighbour’s house.”
– Exodus 20:17

WHEN THE West Coast National Park next to the Langebaan lagoon was expanded in the 1980s, negotiations for the purchase and transfer of land had to deal with complex ownership patterns and provision had to be made for the needs of the local population. The late Dr Anton Rupert played a significant role in the enlargement of the park.

The farm Stoffbergfontein next to the town of Churchhaven was one such case where there were 29 owners of the farm. Mrs Griessel was the most significant owner with a 25% share whereas certain owners only had a 1/640th share. In 1991 the Parks Board bought the farm in a convoluted agreement wherein some shareholders in the farm were allocated specific plots in two traditional settlement villages on the farm. Other shareholders received the existing farmhouses. In terms of the agreement, the original farmhouse built in 1826 called Die Stroois, was allocated to Mrs Griessel. A supplementary agreement was entered into in which Griessel agreed that the existing occupiers of farmhouses have usage and occupation rights. Die Stroois

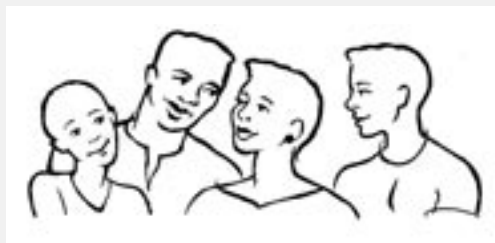
FROM THE EDITOR'S DESK

■ The Essence of Justice and Community

"Having looked the past in the eye, having asked for forgiveness and having made amends, let us shut the door on the past – not in order to forget it but in order not to allow it to imprison us."

– Desmond Tutu

DUE to the cynical nature of their profession, lawyers generally do not regard innocence as freedom from guilt or evil but as a lack of legal blame. The interests of their clients will often decide their views on justice for a specific situation. Our courts, legal academics and government have to regard it in a more objective light and the ultimate expression thereof is found in our Constitution. The Constitutional Court has made great strides to temper the narrow letter of the law approach of justice that has previously been prevalent in our courts. This court's sense of magnanimity and generosity of spirit has become an admirable feature of our legal system and community.



Justice and humanity also feature as central themes in John Allen's biography of Archbishop Emeritus Desmond Tutu, *Rabble-Rouser for Peace*. It tells of the influential role that Tutu played in shaping modern history, giving expression to an African model for the nature of human society.

Tutu contrasted the Western with the African notion of being human by countering the well-known maxim of René Descartes – "I think therefore I am" – with *ubuntu's* – "I am because you are; you are because we are." Conversely, competitive capitalistic societies are wary of principles in which individual excellence plays a secondary role to the interests of the community at large.

At the core of Tutu's vision for the Truth and Reconciliation Commission was a sentence in the postamble to the Constitution: "There is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation."

An important part of Tutu's legacy is that he enhanced the values underpinning our Constitution, including human dignity, with his deep-rooted and unreserved concern about the restoration of broken relationships. Hopefully his efforts in seeking to rehabilitate both victim and perpetrator will remain part of our collective conscience.

was only transferred to Griessel in 2002 due to a massive amount of paperwork.

Griessel then sought to evict a brother and sister who claimed ownership rights to Die Stroois. Their father, Callie Pauw, occupied Die Stroois since 1973. They maintained it and used it as a holiday and weekend cottage after his death in 1982. The wedding reception of one of the sister's daughters was for example held on the property. As defences against the eviction action they claimed to have become owners on the basis of acquisitive prescription, alternatively that they had acquired the right to perpetual occupation by virtue of the supplementary agreement with Griessel.

Section 1 of the **Prescription Act** of 1969 provides that for the acquisition of ownership by prescription, the person in question has to possess the thing "openly and as if he were the owner thereof for an uninterrupted period of 30 years".

Judge Hennie Erasmus of the Cape High Court found that because Callie Pauw was one of the co-owners of

Stofbergfontein, albeit of a very small portion thereof, he could not have acquired prescriptive title thereto. It was impossible to obtain prescriptive title to a property one already owned. Therefore prescription only began to run in 1982 when the siblings took possession of the property. Both of them therefore fell short of the required 30-year period.

The siblings did not accept the benefits of protected occupiers with usage and occupation rights when the supplementary agreement came to their notice. They did so because they asserted title as owners of Die Stroois and were not inclined to accept a lesser, contractual right. The court declined to grant them a right that they had waived.

The judge decided that even if possession of the 30-year period could be proved, the siblings indicated a willingness to negotiate with Griessel for the purchase of Die Stroois. By doing so, they acknowledged her rights as owner and thereby ceased to possess the property as owners.

The eviction order was consequently granted.

Ploughmann NO v. Pauw and Another 2006 (6) SA 334 (CPD).

■ Tinderbox Hazard

*“And it burns, burns, burns,
That burning ring of fire.”*

– Johnny Cash

A LANDOWNER in our law is under a duty to control or extinguish a fire burning on its land. A fire broke out in the Wemmershoek River Valley immediately below the Wemmershoek dam wall. It started on an elevated piece of land, owned by the City of Cape Town, that separated the old and new river courses when the dam was built, called ‘the island’. The fire spread to the plantations of The South African Forestry Company (SAFCOL) and in turn to the properties of Nature Conservation, a Mr Durr and the Taylor trust.

Employees of the Working for Water Project had cleared the Wemmershoek riverbed of alien invasive flora. They caused an extreme fire hazard by stacking felled wattle trees in heaps on the island and in the riverbed. During February 1999 when hot, dry and windy conditions were conducive to the outbreak and spread of fires, the stacks ignited and spread to surrounding properties. The Minister of Water Affairs and Forestry was the employer and Nature Conservation the agent in control of these workers.

Durr and Taylor sued the Minister, Nature Conservation, Cape Town and Safcol for pure economic loss resulting from the fire on the basis of liability for unlawful omissions. The approach of the court was stated as:

“A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this Court in Kruger v. Coetzee, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would have acted to avert it.”

Durr and Taylor therefore had to establish that the omissions complained of were

- wrongful;
- negligent;
- and that they were causally connected to the loss suffered.

Safcol escaped liability on the basis that it had shown that once the fire spread onto its land, it would not have been able to prevent it spreading further, even with the exercise of reasonable care.

Cape Town was held liable as the fire originated and emanated from its property. It could not rebut the statutory presumption of negligence in the **Forest Act** of 1984 that saddles landowners with the responsibility to ensure that fires occurring on their land do not escape their boundaries.

The Minister and Nature Conservation were held vicariously liable for the workers creating a severe fire hazard in stacking wattle in the prevailing weather conditions. This was compounded when they did not take any preventative measures after being informed by Safcol more than once of the danger created by their workers. They owed the surrounding landowners a legal duty to avoid negligently causing them harm.

Minister of Water Affairs and Forestry and Others v. Durr and Others 2006 (6) SA 587 (SCA).



■ Neither a Borrower, Nor a Lender Be

*“Life is a gamble at terrible odds –
if it was a bet, you wouldn’t take it.”*

– Tom Stoppard

TSOGO SUN HOLDINGS runs a gambling operation, known as Montecasino, at Fourways in Sandton. An altercation that started in the VIP section of the casino between a loan shark, one Shao, and a patron who owed him money, one Shan, was continued outside in the parking area. Shao then fired three shots at Shan, wounding him badly.

Shan sought damages for his injuries from both the casino and Shao.

Shao was a regular patron and holder of a platinum card at the casino. When he entered the VIP section, he was asked by guards whether he carried any weapons and he lifted his jacket to show that he did not. Shan’s case against the casino was that it owed a legal duty to reasonably ensure the safety of gamblers on its premises. He claimed that it was reasonable to foresee that one gambler could pose a risk to others. The failure to body search Shao when he entered the casino was negligent, as the guards would have found the firearm. This dereliction was causally linked to the shooting.

The High Court of Appeal overturned a High Court decision holding the casino liable. Judge Louis Harms

criticised the High Court for falling into “the quagmire of the ‘duty of care’ doctrine, by failing to distinguish clearly between the different requirements of delictual liability.” Negligence and wrongfulness became intertwined and causation did not receive the necessary consideration.

The wider implications of the High Court finding would have been to create a new class of virtually limitless vicarious liability for owners or occupiers of public facilities that are controlled by security guards. The casino did not have a duty of care to protect patrons against one another. Further, there was an absence of negligence as it was not reasonably foreseeable that a regular patron at the facility could be a danger to another patron. In any event, the casino took reasonable steps by inquiring from Shao whether he carried a firearm. Lastly, legal causation had not been established. The failure to body search Shao was too remote to be legally connected to the shooting incident.

Tsogo Sun Holdings (Pty) Ltd v. Qing-He Shan and Another 2006 (6) SA 537 (SCA).



■ Heads I Win Tails You Lose

“We can do business together.”

– Margaret Thatcher
(of Mikhail Gorbachev)

SIMON KATZ and his son, Samuel Katz, invested amounts of R500 000 and R300 000 respectively in a scheme conducted by Amanda Martinson of Klerksdorp. They did so through a syndicate of other investors in the scheme, managed by Charles (*not Mark*) Thatcher and Michael McCabe. The Katzes were brought under the impression that they had invested in a lawful micro-lending scheme to mineworkers. Shortly afterwards the scheme collapsed and transpired to be a massive pyramid scheme.

The Katzes preferred for financial reasons to sue the syndicate rather than the owners of the scheme. The representations made by Thatcher and McCabe were false but they intimated that they had obtained the information from Martinson and believed it to be true. They denied negligence or that damages were suffered as a result of their acts or omissions.

Judge Bennie Griesel of the Cape High Court concluded that notwithstanding the managers of the syndicate having informed investors of the high risk inherent in the scheme and linking it to disclaimers and disavowals of liability, they expressly stated that “the lender has been informed

that all prudent measures have been taken by the operators of the portfolio to reduce the risk to an acceptable level for all members of the syndicate”. They also categorically stated that all lending activities were completely legitimate. These statements constituted express warranties that had been breached and on which the Katzes were entitled to rely. The syndicate was therefore liable on contract.

Thatcher and Another v. Katz and Another 2006 (6) SA 407 (CPD).



Offer of Compromise

■ Don't Mean Maybe

BE BOP A LULA Manufacturing and Printing CC purchased T-shirts from Kingtex Marketing (Pty) Ltd in an amount of R229 846. Be Bop A Lula claimed that a large portion of the T-shirts were defective and only paid R107 196 with a cheque dated 28 February 2002. The member who signed the cheque inserted the words “Full and Final Settlement of Account” directly below his signature.

On 1 March 2002 the attorneys of Kingtex wrote to Be Bop A Lula placing the credit request in dispute and stating that payment was not accepted in full and final settlement. They confirmed that the amount would be paid into their trust account and that the cheque must be stopped if this was not acceptable.

Be Bop A Lula made arrangements to stop the cheque as soon as it received this notice, but was too late to stop the bank from paying it out. It then claimed that its offer of compromise had been accepted.

The court found that Be Bop A Lula had failed to prove that its tender of the cheque was intended as an offer of compromise. It was tendered with a view to making payment of the amount it believed was in fact owed to Kingtex. Payment was not made with the intention of concluding a new contract and when Be Bop A Lula was given the option to stop the cheque, it attempted to do so. Further, the reply by the attorneys for Kingtex was not compatible with the acceptance of any offer of compromise. Consequently no agreement of compromise had been proved.

Be Bop A Lula Manufacturing and Printing CC v. Kingtex Marketing (Pty) Ltd 2006 (6) SA 379 (CPD).

Defamation

■ Speak No Evil

"As far as criticism is concerned, we don't resent that unless it is absolutely biased, as it is in most cases."

– John Vorster

MS TSATSI is an advocate and the manager of the Johannesburg Magistrate's Court. She had several clashes with the trade union NEHAWU (National Education, Health and Allied Workers Union) about labour relations in respect of union members working at the court.

The branch secretary of the union, a senior interpreter, prepared a report for a general meeting of its members at the court. In this report he compared Adv. Tsatsi's managerial style with her predecessor whom he stated "was doing very well in rooting out corrupt officials instead of embracing them". Adv. Tsatsi claimed that the statement was defamatory and that NEHAWU was vicariously liable for her damages.

Acting Judge of Appeal Nkabinde held that although the statement that Adv. Tsatsi colluded with or condoned fraudsters tarnished and discredited her, the branch

secretary had the right to make allegations and impart them to the union members. The truthfulness or otherwise of the statements had no bearing on their relevance. The statements were relevant and reasonably appropriate to the occasion as value judgments and were consequently protected by qualified privilege. NEHAWU was consequently not held liable for the defamation.

The court quoted the following passage with approval from one of its previous judgments:

"The assessment of whether a defamatory statement was relevant to the occasion to which it relates is therefore essentially a value judgment in respect of which there are guiding principles but which is not governed by hard and fast rules. And in arriving at that judgment due weight must be given to all matters that can properly be regarded as bearing upon it."

NEHAWU v. Tsatsi 2006 (6) SA 327 (SCA).

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