



LAW LETTER

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vennnemeth&hart
ATTORNEYS

While high-profile cases involving political and constitutional issues and personalities continue to feature in the popular media, Law Letter takes our readers to some of the regular but important disputes with which our judges have recently had to grapple. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.



LANDMARK CASES

Lawyers & Clients

■ No win, no Pay

*"It isn't that they can't see the solution.
It is that they can't see the problem."*

– G.K. Chesterton (1874 - 1936)

ONCE FORBIDDEN to do so, attorneys are now entitled to undertake litigation upon a contingency basis. This enables litigants to sue without having to meet litigation costs until the claim has been decided. If the litigant wins, the attorney is then entitled to receive payment of all his or her costs from the proceeds of the claim; if the litigant loses, so does the attorney. In accordance with the risk which the attorney takes, he or she is entitled to charge more than the costs normally claimable but nonetheless in accordance with the **Contingency Fees Act** of 1997. The Act also requires the parties to enter into a written agreement and prescribes limits to success fees to prevent any abuse of the system.

Many claims by victims of motor accidents against the Road Accident Fund (RAF) have been funded in this way. In 2007, without any notice to the attorneys handling these cases or to their Law Societies, the RAF announced that it intended to introduce a Direct Payment System (DPS) in terms of which the RAF would make payment of the compensation payable directly to the plaintiffs and effect payment only of ordinary party and party tariff-based costs to the attorneys representing those plaintiffs. This would mean that attorneys would be unable to recover any attorney and client fees (including any additional fees agreed under a contingency fee agreement) directly from the compensation awarded.

The Law Society of South Africa and other interested parties applied to the Cape High Court for an order to set aside the DPS. One of these parties was a plaintiff whose case had been brought on his behalf on a contingency basis but whose rights to representation were jeopardised because the attorney could not continue to act for him without the security of being able to recover his attorney and client fees from the compensation.

The RAF contended that the DPS was necessary to protect litigants against fraud and theft committed by attorneys and that their opposition to the system was intended only to protect their commercial interests. It further suggested that claimants were entitled to get just compensation and that the **Road Accident Fund Act** of 1996 guarantees only party and party costs as part of that compensation. In so far as attorneys then look to their clients for the payment of attorney and client costs, this would amount to theft, fraud or overreaching.

Acting Judge President Jeanette Traverso said that this attitude on the part of the RAF was without foundation and displayed a lamentable lack of appreciation of how the practice of law functions. To suggest that for an attorney



to bill clients is akin to theft or fraud or overreaching is unfounded. The judge did concede that there were attorneys who had exploited contingency fee arrangements unreasonably and some practitioners had committed fraud and theft at the expense of their clients, but such conduct is not the norm.

With regard to the costs of the proceedings, the judge pointed out that if the RAF had implemented the DPS this would have been in violation of the agreements concluded between attorneys and their clients and in violation of the instructions already given by claimants to the RAF that payment be made directly to the attorneys. The introduction of the DPS would, by its nature, deprive indigent and other litigants of access to justice and the court should not permit an organ of State to do so. The attitude of the RAF in seeking to enforce the DPS in violation of the agreements

and in refusing for no good reason to give an undertaking not to do so pending review proceedings, meant it "was hell-bent on paying compensation direct to clients regardless of any agreements or arrangements that are in existence."

The RAF was interdicted from proceeding with the DPS. As a mark of the court's displeasure at the manner in which the RAF had behaved, it was ordered to pay the applicants' costs on the attorney and client scale.

Law Society of South Africa and Others v. Road Accident Fund and Another 2009 (1) SA 206 (CPD).



Damages

■ Floors in the System

A NUMBER OF "slippery floor" cases have appeared recently in the law reports. This one, which was decided in the Supreme Court of Appeal, has a different twist to it in that there were two defendants: one the owner of the shopping mall where the incident occurred and the other, the company engaged by the owner to keep the floors of the mall clean. In the trial court both defendants were held liable, jointly and severally, and both appealed to the Supreme Court of Appeal.

The defence pleaded by the owner was that it had done all that was necessary to render its premises reasonably safe for use by the public by appointing competent contractors to carry out the task of protecting the users of the mall from harm. It has long been accepted in our law that a principal is liable for the acts of his agent where the agent is an employee, but not where the agent is an independent contractor. But in some circumstances the duty to take care cannot be delegated and where that duty has been breached, the principal also will be liable. In such cases, the principal's liability does not arise via the agent but because there was also a duty on the principal which he has not fulfilled. The legal position is that there is a duty not merely to take care but a duty to provide that care is taken. So, for instance, an owner who has undertaken the demolition of a building has a duty to ensure that members of the public in the vicinity of the work are not injured. That duty cannot be delegated to an independent contractor.

In this case the court agreed with the owner of the building that by engaging a competent contractor, it had taken the necessary care to make the premises reasonably safe. There was no way in which it could have known that the contractor's work would be defective.

The court accordingly upheld the owner's appeal, but on the facts found that the contractor had been negligent and was liable to the plaintiff for the loss she had suffered. Judge Ponnann examined the law relating to the liability of a principal for the acts of an independent contractor, warned against extending that liability and criticised the concept of a "non-delegable duty". He said that the proper approach was that everyone should exercise the degree of care required by the circumstances and it was from the breach of that duty that the liability arises.

Chartaprops 16 (Pty) Ltd and Another v. Silberman 2009 (1) SA 265 (SCA).



Spoliation

■ Blade Runner

*"Two wrongs don't make a right,
but they make a good excuse."*

– John Millington Synge (1871 - 1909)

SPOILIATION, or to give it its old Dutch name, *mandament van spolie*, is a very important remedy allowed by the law to protect those who are in possession of property from being unlawfully dispossessed. It does not matter that the person taking the thing from the possessor is the lawful owner or that the right to possession is disputed. If dispossession is proved the courts will order the return of the object to the possessor. Thereafter, any quarrels about who, in law, is rightfully entitled to possession can be sorted out. In this way self-help is discouraged and the fight is conducted in the proper place, namely the courts.

In this case the owner of a helicopter had leased it to the lessee in December 2007. Two months later, one K, a director and shareholder of the owner, approached the lessee and stated that he wanted to take the aircraft for a test flight. The lessee agreed but K flew the helicopter to Cape Town International Airport and, on the next day, delivered a letter to the lessee, purporting to cancel the lease and requiring immediate return of the aircraft. The lessee immediately sought a spoliation order in response to which the owner raised two defences. Firstly, it alleged that the lessee had consented to the removal of the helicopter but the court had little difficulty in finding that it had been taken from the lessee under false pretences.

The second defence was one which is available to a spoliator in a proper case, namely that it was impossible to restore possession. The owner said that possession had been transferred to a third party who had taken it in good faith. In fact the helicopter had been delivered to the third party for repairs. The owner argued that the third party had a right to retain the aircraft until the cost of such repairs was paid. To this defence, too, the court gave short shrift. Judge Essa Moosa of the Cape Town High Court held that the right of retention endured only while the repair costs remained unpaid. The owner had a legal duty to pay those costs and nothing prevented it from doing so and terminating the repairer's right of retention. The spoliation order was confirmed, and the owner had to return the helicopter to the lessee.

Chopper Worx (Pty) Ltd and Another v. WRC Consultation Services (Pty) Ltd 2008 (6) SA 497 (CPD).

Amnesty

■ No Turning back the Clock

*"The moving finger writes,
And having writ, moves on.
Nor all thy piety nor wit
Shall cancel half a line,
Nor all thy tears wash out a word of it."
– The Rubaiyat of Omar Khayyam,
by Edward Fitzgerald*

THE APPELLANT in this case, Mr Du Toit, had been a director in the South African Police Services (SAPS) until, in 1996, he was convicted on four counts of murder and sentenced to 15 years imprisonment. In terms of Section 36(1) of the **South African Police Services Act** of 1995 he was deemed to have been discharged from the SAPS. Although he appealed against his conviction and sentence, his appeal was postponed because he had made application for amnesty in respect of the murders in terms of the **Promotion of National Unity and Reconciliation Act** of 1995 (known as the Amnesty Act). That application was ultimately successful and on 23 December 2005, the proclamation granting him amnesty was published.

He then claimed reinstatement in the SAPS on the basis that Section 20(10) of the Amnesty Act provides that where any person who has been convicted of an offence involving an act or omission associated with a political objective has been granted amnesty in terms of the Act, any entry or record of that conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes be deemed not to have taken place. Armed with this piece of legislation Du Toit applied for reinstatement in the SAPS. When this was not approved, he applied to the Pretoria High Court for an order entitling

him to be reinstated. The court refused, holding that although Section 20(10) had extinguished the conviction and sentence it had not undone their consequences.

Du Toit then appealed to the Supreme Court of Appeal, contending that because he was deemed never to have been convicted and sentenced, it followed that he was never discharged from the SAPS. The effect of this submission was that Section 20(10) would operate retrospectively, so as to make the law in the past that which it was not at the time. Pointing out that there is a strong presumption in our law that legislation is not intended to operate retrospectively, the court confirmed that Section 20(10) did not operate retrospectively so as to undo consequences that had come into effect before the amnesty was granted. Du Toit's discharge from the SAPS had therefore not been reversed.

His appeal was dismissed.

Du Toit v. Minister of Safety and Security and Another 2009 (1) SA 176 (SCA).



Insurance Law

■ Entity Identity

OUR LAW of insurance recognises the doctrine of subrogation in terms of which an insurer who has compensated an insured for damage wrongfully done to him by a third party, has the right to sue the guilty party to recover the loss. The insured himself has the right to do so, of course, but having been paid by the insurer, is unlikely to take any action. The issue in this case, however, was whether the proceedings against the wrongdoer should be brought in the name of the insured, or whether the insurer was entitled to sue in its own name. In the trial court it had been held that the action should have been in the name of the insured and dismissed the claim brought by the insurer.

On appeal, the Supreme Court of Appeal ruled otherwise. The English law of insurance has, over many decades, had a strong influence over our law and, indeed, the doctrine of subrogation was imported into South African law in 1918. The doctrine is not without difficulties. The court quoted Lord Hoffman (previously a South African lawyer) in the House of Lords when he said: "*the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion*".

The English common-law doctrine of subrogation requires the insurer to sue in the name of the insured, but the Supreme Court of Appeal found that this approach did not accord either with South African constitutional values or with Roman-Dutch law.

Applying this finding to the case before it, the Supreme Court of Appeal allowed the appeal.

Rand Mutual Insurance Co Ltd v. Road Accident Fund 2008 (6) SA 511 (SCA).



Practice & Procedure

■ You sleep, you weep

A LITIGANT WHO intends to sue the State or certain organs of the State is required to give due notice of its intention to do so in accordance with the **Institution of Legal Proceedings against certain Organs of State Act** of 2002. In terms of Section 3(1) of the Act no legal proceedings may be brought against an organ of State unless the claimant has given the requisite notice or the organ of State has consented in writing to the institution of such proceedings without such notice or has agreed to accept a notice which does not comply with the terms of the Act. Amongst other requirements prescribed by Section 3(2) is one that the notice must be given within six months of the date when the claim arose. In terms of Section 3(4) a claimant who has failed to file due notice may apply to the court for condonation.

In this case the plaintiff had been advised in October 2005 that his claim, which had arisen at the end of October 2002, had reasonable prospects of success. Needing to commence proceedings before the end of October 2005 to avoid prescription, the plaintiff issued summons without giving any notice as it was no longer possible to comply with the six-month period prescribed in Section 3(1). The defendant raised the section as a defence and in March 2006 the plaintiff made application for condonation. This was granted by a single judge of the Natal High Court.

On appeal to it, a full court of that division did not agree. It held that Section 3(1) was peremptory. For Section 3(4) to apply it had to be shown that the claim had not prescribed, that good cause existed for condonation and that the organ of State would not be unduly prejudiced by the failure to give the notice. The court held that because the application had not been made before the claim prescribed, one of the

essentials had not been met. Condonation was accordingly refused.

Legal Aid Board and Others v. Singh 2009 (1) SA 184 (NPD).



A different view from that set out above was taken by a judge in the Northern Cape High Court. In this case the incident giving rise to the plaintiff's claim occurred on 1 July 2002. Summons was served on or about 22 July 2004, well within the three year prescriptive period but no notice had been given in terms of Section 3(1). An application for condonation under Section 3(4) was not made until 2 July 2007. The defendant argued that because the summons had been issued without the requisite notice having been given, it was defective and so did not interrupt the running of prescription. It followed that the claim had prescribed on 30 June 2005 and the application for condonation should therefore fail.

Judge Lacock did not agree. He held that Section 3(1) was not peremptory. Accordingly, the non-compliance with its provisions did not render the "premature" summons void or legally ineffective. The service of the summons had therefore interrupted the running of prescription and the plaintiff was entitled to seek condonation in terms of Section 3(4).

Dauth and Others v. Minister of Safety and Security and Others 2009 (1) SA 189 (NC).

The conflicting views of these two courts has now been resolved by the Supreme Court of Appeal in *Minister of Safety and Security v. De Witt 2009 (1) SA 457 (SCA)* which held that a creditor may apply for condonation after institution of proceedings provided that the debt has not been extinguished by prescription.



LEGISLATION

Tax

■ Tax on Passive Holding Companies

THE REVENUE Laws Amendment Act of 2008 inserts a Section 9E into the **Income Tax Act**. The new section deals with the concept of "passive holding companies". It is

linked to the conversion of secondary tax on companies to dividend tax and will be effective from the same date as the provisions that introduce dividend tax.

The passive holding companies regime has arisen from a perception that individuals may choose to earn passive income, such as dividends, in a company rather than in their own hands, for tax reasons. It is possible to defer the imposition of dividend tax, if dividends are received and accumulated by a company, rather than being received directly by individuals in the first instance. The 28% company income tax rate, as opposed to the 40% maximum marginal income tax rate for individuals, has also been identified as offering an arbitrage opportunity.

The new provisions seek to eliminate the abovementioned practices. Passive holding companies will be taxed 10% on dividends received (as would an individual shareholder) and 40% (instead of 28%) on other revenue. The income that has been taxed as part of the passive holding companies regime will not then be subject to dividend tax when it is distributed.

A company will constitute a passive holding company if more than 80% of its gross income is from financial instruments and five or fewer South African resident natural persons (together with any of their connected persons) directly or indirectly have more than a 50%

interest in that company. This is a more objective approach than was proposed in early drafts of the legislation. If a company forms part of a group of companies, then the calculation as to whether more than 80% of gross income is from financial instruments, will be done with reference to the group as a whole.

There are certain exclusions from the passive holding companies regime, such as listed companies and their groups, banks, long and short term insurers, collective investment schemes, public benefit organisations, recreational clubs, foreign companies and venture capital companies.

Any shareholder or director of a passive holding company that is regularly involved in the management of its overall financial affairs, will be personally liable in respect of any tax, additional tax, penalty or interest for which it is liable. There is also provision for estimated assessments if SARS does not believe that a passive holding company has paid its tax liabilities in full.

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