



# LAW LETTER

*May 2010*

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ATTORNEYS

*As Winter and the World Cup approach, Law Letter turns its focus onto recent judgments of our courts dealing with housing, insurance, employees tax, credit, company names and partnerships. 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

### Law of Lease

#### ■ Pay Up or Else

A PROPERTY WAS let by a lessor to a lessee for a period of three years with an option to renew for a further period of three years. The rental for the renewal period was not fixed but the lease provided that if the parties were unable to reach agreement as to the new rental, it should be referred to the lessor's auditors for determination. Their decision would be final and binding.

After a determination was made by the auditors in accordance with the lease, the lessee disputed the amount determined, claiming that it was so grossly excessive that it bore no reasonable relationship to the value of a reasonable rental payable for the premises. The lessee issued summons against the lessor, seeking an order from the court to determine a reasonable rental. At the same time, in the light of its attitude towards the rental as determined, the lessee failed to pay the new amount and the lessor cancelled the lease. The lessor then brought proceedings for the eviction of the lessee which countered with the contention that the lease could not be cancelled pending the determination of the rental by the court. This was rejected by the judge and the lessee was evicted.

*Breau Investments (Pty) Ltd v. Maverick Trading 326 CC 2010 (1) SA 367 (GNP).*

#### ■ Selling a Dummy

*"What's the good of a home, if you are never in it?"*  
– George Grossmith (1847 – 1912)

"*HUIR gaat voor koop*" – hire goes before sale is a venerable principle of the Roman-Dutch law. Its simplest manifestation is found in the situation where a property, occupied by a lessee, is sold by the owner/lessor to another. Regardless of whether he has notice of the existence or the terms of a prior lease of the property, the purchaser is bound by it and the lessee is entitled to remain in occupation in accordance with its terms.

The legal implications of the rule have been considered by our courts over the years. In one well-known case decided

in 1989, the Appeal Court explained that the purchaser is substituted for the seller as lessor and acquires all the rights which the seller had in terms of the lease except "collateral rights unconnected with the lease." In considering this exception the court pointed out that options to renew a lease constitute obligations due by the lessor in his capacity as such and are accordingly not "collateral" or "unconnected with the lease".

Options in a lease to purchase the leased property have, however, been the subject of differing judicial opinions. In this recent case, in which the question was in issue, the judges of the Supreme Court of Appeal did not all agree. Judge Maya held that an option agreement existed which was capable of being validly exercised by the lessee. The remaining four judges came to the conclusion that the obligations arising from an option to purchase the leased property, granted by the lessor, are not, by the operation of the *huur gaat voor koop* rule transferred by law to the purchaser of the property.

The majority of the court ruled that the lessee must seek to exercise his option against the seller who granted the option and not against the purchaser. Where, however, the property has been transferred to a purchaser who had knowledge of the option in the lease, the lessee, having exercised his option, should be entitled to claim transfer of the property from the purchaser, not by operation of the *huur gaat voor koop* rule, but because the purchaser took transfer with knowledge of the lessee's prior right to purchase it.

*Spearhead Property Holdings Ltd v. E&D Motors (Pty) Ltd 2010 (2) SA 1 (SCA).*



#### ■ When the Pie was opened

*"All I want is a room somewhere,  
Far away from the cold night air."*  
– from *My Fair Lady* by Alan Jay Lerner (1918 – 1986)

ONE OF the intentions of the so-called PIE Act – **The Protection of Illegal Eviction From and Unlawful**

■ **A Century of South Africa 1910 – 2010**

IT IS not often appreciated that South Africa for the first time became one geographic entity only one hundred years ago. On 31 May 1910 the South Africa Act came into force, creating the Union of South Africa, with the former colonies and Boer republics becoming the four provinces known as Natal, the Cape of Good Hope, Transvaal and the Orange Free State.

The date was significant. It was on 31 May 1902 that the Treaty of Vereeniging had been signed, bringing to an end the bitter conflict of the second Anglo-Boer War of 1899 – 1902. Many years later, after South Africa had left the Commonwealth, the Republic of South Africa came into being on 31 May 1961.

But this process of gaining independence did not result in a unified nation nor did it achieve democracy for a still deeply divided country. Apartheid sought to entrench and enforce discriminatory laws and practices. So-called independent bantustans were created and collapsed. Inequalities were perpetuated. South Africans endured states of emergency, repression, international condemnation, civil strife, human suffering and political and social turmoil for generations until eventually a free and democratic South Africa saw the light of day under the Constitution of the Republic of South Africa Act 108 of 1996. Its preamble reads:

We, the people of South Africa,  
 Recognise the insecurities of our past;  
 Honour those who suffered for justice and freedom in our land;  
 Respect those who have worked to build and develop our country; and  
 Believe that South Africa belongs to all  
 Who live in it, united in our diversity.  
 We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- Improve the quality of life of all citizens and free the potential of each person; and
- Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people.

**Occupation of Land Act** passed in 1998 was to prevent land-owners from dispossessing people of their rights of occupation unless other accommodation was available. Very soon it became apparent that the terms of the Act probably went further than had been intended in that, for instance, any lessee, whatever his or her status, was able to avoid eviction at the end of a lease, even if it was cancelled because of non-performance, by simply staying on unlawfully in the leased premises until the lessor had fulfilled all the legal requirements which PIE requires.

The lessor seeking eviction must, among other things, show that alternative accommodation is available for the occupier. This is not usually a problem in the case of a lease which has terminated or been cancelled and the lessee is simply taking advantage of the PIE requirements to remain in occupation. However, in the case of indigent people for whom other places to live are not readily available, the

PIE requirements can place unfair burdens on property owners who have been unable to regain occupation of their premises because the courts have refused to order evictions against unlawful squatters without alternative accommodation.

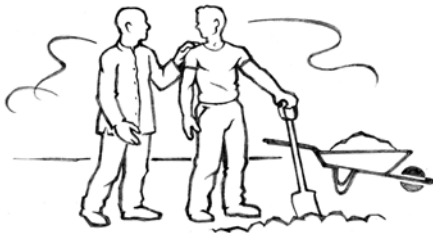
Judge Brian Spilg recently grasped this particular nettle in a case in the Johannesburg High Court. The owner had originally applied for the eviction of squatters from his property in May 2006 and by the time of the judgment in February 2010, the facts had become very complicated. The squatters not only relied on PIE and their constitutional right to housing, but demanded that the City of Johannesburg provide them with accommodation if they were evicted. They joined the City as a party to the proceedings. The City argued that it had no obligation to provide housing for indigent persons facing eviction. However the owner also turned its sights on the City. It

asked that housing be provided for those to be evicted or that a monthly payment to enable them to find their own accommodation be provided by the City.

The judge ordered the approximately 80 squatters to be evicted by the end of March 2010 and that the City of Johannesburg provide them with accommodation or alternatively pay to each occupier or head of household R850 per month.

The judgment will certainly be taken on appeal, but in the meantime it has caused repercussions. Property owners welcome it, but Human Settlements Minister Tokyo Sexwale claims that the ruling will throw housing policy into chaos. He asserts that PIE was meant to stop the perpetuation of apartheid wrongs but has ended up having serious unintended consequences.

*Blue Moonlight Properties 39 (Pty) Ltd v. The Occupiers of Saratoga Avenue and the Council of the Johannesburg Municipality (unreported judgment in the South Gauteng High Court, Johannesburg, delivered on 4 February 2010).*



## Law of Contract

### ■ On the hook, by the book

LOMBARD INSURANCE COMPANY provided a guarantee on behalf of a construction company in favour of the employer. The guarantee bound Lombard to pay the employer if the construction company defaulted on the contract or was placed in liquidation. The respondents in this case had indemnified Lombard if it were called upon to pay the guarantee. This happened when the construction company was placed in liquidation. Lombard duly paid the amount claimed under the guarantee but the respondents declined to indemnify Lombard, contending that the claim had been invalid due to fraud. They alleged that the claim included work which was said to be remedial but went beyond the terms of the contract.

Lombard sued in the Cape High Court. There it was held that the guarantee should be construed in conjunction with the construction contract and that Lombard was only liable to pay a claim in terms of the guarantee if the claim fell within the terms of the contract. It was accordingly held that Lombard had not been obliged to pay in accordance

with the guarantee and thus had no claim against the respondents under the indemnity. Lombard appealed.

The Supreme Court of Appeal explained that the guarantee creates an obligation to pay on the happening of an event. The reference in a guarantee to the construction contract is for the purpose of convenience only and does not create an accessory obligation or suretyship which depends upon the validity of a main obligation. It is like an irrevocable letter of guarantee issued by a bank in international trade, establishing an obligation on the bank to pay which is wholly independent of the underlying contract of sale. Provided that the conditions specified in the letter are met, the bank is bound to pay and can only escape liability if there is proof of fraud on the part of the beneficiary. That exception is, however, narrowly defined and applies only where the seller fraudulently presents to the bank documents which the seller knows misrepresent the true facts.

In the same way, Lombard was liable once the conditions specified in the guarantee were met – in this case, by the liquidation of the contractor. Lombard succeeded in its appeal against the respondents.

*Lombard Insurance Co Ltd v. Landmark Holdings (Pty) Ltd and Others 2010 (2) SA 86 (SCA).*

## Company Law

### ■ Room for One

*“All happy families resemble one another,  
each unhappy family is unhappy in its own way.”*

– Leo Tolstoy (1828 – 1910)

AFRICAN Harvest Growth Assets Managers (Pty) Ltd was a company which, as its name implies, carried on business to provide an investment service for its clients, mainly South African institutions, public and private companies and individuals. In 2003 it changed its name to Polaris Capital (Pty) Ltd and this was registered by the Registrar of Companies on 3 June 2003. Within the period of a year provided for in Section 44(1) of the **Companies Act, 1973**, an objection to the name was lodged by Polaris Capital Management Inc, a company incorporated in the USA. In terms of Section 44(1) the Registrar upheld the objection on the ground that the name was undesirable. He gave as his reasons that the name of the USA company was wholly incorporated in the name of the South African company, that the two companies' business activities were identical and that Polaris Capital Management Inc had built a reputation and goodwill since 1996, long before the local company's change of name.

Polaris (South Africa) applied unsuccessfully to the Cape High Court in terms of Section 48 of the Act for the

Registrar's order to be set aside. It then appealed to the Supreme Court of Appeal, which quoted with approval the judgment in a previous case decided in 1995 in which the likelihood of confusion was considered to render the registration of a new company name undesirable. The passage quoted was:

*"... When there is a likelihood that the public, or a section thereof, might be misled by the similarity of the names under consideration, or that there is 'a serious risk of confusion of the public', then it ought to be held that a name is undesirable."*

Save for explaining that the phrase "a serious risk of confusion" meant no more than a probability of confusion, the Supreme Court of Appeal endorsed the reasoning. On the facts it held that there was such a risk. The decision of the Registrar of Companies was upheld.

*Polaris Capital (Pty) Ltd v. Registrar of Companies and Another* 2010 (2) SA 274 (SCA).



## ■ Unscrambling the Egg

THE PLAINTIFF, Hughes, instituted an action against the defendant, Ridley, and two others. He claimed that he and Ridley had entered into an oral agreement to conduct a transport business in partnership from which they would profit equally. It was also agreed that the business of the partnership would be conducted through the medium of a limited liability company. A company was formed and the business was transacted in its name. Disputes arose between the two and Hughes sought, unsuccessfully, to wind up the company. Having failed to do so, Hughes instituted his action against Ridley personally, basing it on the alleged partnership. He demanded a statement of account of the partnership business to establish whether and in what amount it was liable to him. Ridley claimed that the action was bad in law because it was clear that the business was that of the company and not of any partnership. That had been agreed between the parties and it is established law that a registered company is a legal entity distinct from the members who comprise it.

*"If two persons agree,"* said Deputy Judge President Levinsohn of the Pietermaritzburg High Court, *"that they wish to form a company, that each is to become a shareholder, each is to make a separate specific contribution to the company and the company is to carry on business, that agreement is, in my view, not consistent with a partnership."*

The court concluded that on a proper construction of the particulars of claim, Hughes had not alleged the facts necessary to show that a partnership agreement, properly so called, had come into being. It followed that he could not claim an accounting from the alleged partnership.

*Hughes v. Ridley and Others* 2010 (1) SA 381 (KZP).

## Credit

### ■ Terms and Conditions Apply

*"Life is what happens to you while you're busy making other plans."*

– John Lennon (1940 – 1980)

A CREDIT provider intending to claim what is owing under a credit agreement must give notice in writing to the consumer in terms of Section 129(1)(a) of the **National Credit Act, 2005**. The notice must advise the consumer that it is in default under the credit agreement and must propose that the consumer refer the credit agreement to a debt counsellor, dispute-resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or agree on a plan to bring the payments under the agreement up to date. Having given this notice to the consumer, the credit provider may after at least ten days have elapsed "since the credit provider delivered a notice to the consumer as contemplated . . . in Section 129(1)" and if the consumer has not responded to it, approach a court for judgment in the amount owed.

In this matter BMW Financial Services gave notice to the purchaser of a motor vehicle who was in arrears with his payments, obtained default judgment against him and intended to execute on the judgment by selling the vehicle. At that point the consumer applied for a rescission of the default judgment. He alleged that he had not been aware of the summons issued by BMW which had been served at the *domicilium* address he had chosen in the credit agreement but from which he had moved. He also claimed that the notice in terms of Section 129(1) had not been received by him because that, too, had been posted to the *domicilium* address after he had left there.

His application failed when Judge Malcolm Wallis in the Durban High Court held that the section does not require that the consumer receives the notice. The Act requires that the notice must be made available through one or more of six specified mechanisms. These include ordinary mail, fax or e-mail, and the consumer (usually in the credit agreement itself) must choose the mechanism by which delivery will be made to him or her. In this case, the consumer had stipulated that the notice be delivered by hand or sent by registered post to the consumer's *domicilium*. Once that was shown to have been done, it was irrelevant that the

notice was not, in fact, received by the consumer. The terms of the National Credit Act had been complied with.

*Munien v. BMW Financial Services (SA) (Pty) Ltd and Another 2010 (1) SA 549 (KZD).*

## Tax

### ■ Missing the Target

*"Oops, I did it again."*

– Britney Spears

VACATION EXCHANGES International (Pty) Ltd, trading as RCI, carries on a timeshare exchange business. Its members may "bank" their timeshare rights in exchange for points that they can then use to obtain timeshare rights at other resorts. RCI granted a number of these points to its employees which allowed them to utilise the resorts. South African Revenue Service (SARS) raised an estimated employees' tax assessment against RCI on the basis that the points granted to them constituted a taxable benefit for the employees. SARS determined a market value for the points.

RCI contended before the Tax Court, firstly, that although the points constituted a deemed taxable benefit, they

had no cash equivalent and were therefore not subject to employees' tax. Secondly, it contended that SARS had adopted the wrong remedy by assessing RCI rather than the employees. The Tax Court dismissed these contentions and found in favour of SARS. RCI appealed to the High Court.

The tax legislation entitles SARS to re-determine the tax due on the assessment of employees if it believes that their employer did not correctly determine the cash equivalent of a taxable benefit. RCI claimed that this was the only approach available to SARS in the present case. But SARS argued that it was only one of the approaches it could follow and that its assessment of RCI was permissible. The High Court agreed with RCI. It held that the specific remedy of re-determination on the assessment of employees was an exclusive one and the remedy of assessing RCI was not permitted. The assessment against RCI was set aside.

*Vacation Exchanges International (Pty) Ltd v. Commissioner, South African Revenue Services (2009) 71 SATC 249.*

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