



# LAW LETTER

November 2007

**venn**nemeth&hart  
ATTORNEYS

*This Summer edition of Law Letter concentrates on things which can affect ordinary citizens – our homes and neighbours, our children, changing jobs, motor car collisions, crime in the streets, and the urban environment. 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

#### ■ Full up of Filling Stations

*“Gasoline is much more likely than wheat to be a cause of international conflict.”*

– Simone Weil (1909 - 1943)

THE FUEL RETAILERS ASSOCIATION of Southern Africa, an organisation which represents the interests of fuel retailers, objected to an application for the construction of a new filling station in White River, Mpumalanga. When the Mpumalanga Department of Agriculture, Conservation and Environment approved the application notwithstanding the Fuel Retailers Association’s objections, the Association applied to the High Court for the approval to be set aside.

The Association argued that the Department had failed to consider the social, environmental and economic sustainability of the proposed filling station, as required by the Constitution and the **National Environmental Management Act**. The Department, in turn, argued that it had in fact taken into account social, environmental and economic sustainability. It had relied on an evaluation conducted by the relevant municipality when an application was made for the re-zoning of the property on which the filling station was to be constructed. The Pretoria High Court dismissed the Association’s application and the matter ultimately proceeded to the Constitutional Court.

The court found that the Constitution recognises the inter-relationship between the protection of the environment and socio-economic development. The Constitution requires that environmental protection and socio-economic development be integrated through the ideal of sustainable development, which acts as a mediating principle between environmental and developmental concerns. When municipalities consider re-zoning applications, they are required to consider the “need and desirability” of the proposed development. The obligation to consider sustainability is broader than “need and desirability” and includes the obligation to consider the impact of the proliferation of filling stations in the area, the impact of the proposed filling station on existing filling stations and the cumulative effect of the proposed development. The court referred, in this regard, to the limited end-use of filling stations upon their closure.

The court emphasised that considerations of sustainability are not intended to stamp out competition, but rather to ensure the social, environmental and economic sustainability of all developments.

The Department was found to have misconstrued its obligations to consider sustainability. The Department was not entitled to rely on the “need and desirability” evaluation undertaken by the municipality but was obliged to consider broader factors. The court ordered that the Department’s approval of the proposed filling station be set aside and that the Department reconsider the application in the light of the court’s judgment.

*Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province & Eleven Others CCT 67/06.*



## NEW LEGISLATION

### ■ Regulating Reality

*"Why can't they be like we were? Perfect in every way!  
What's the matter with kids today?"*

– Lee Adams

THE CHILDREN'S ACT was promulgated in 2005 and certain sections have now become law. While the remaining sections will be implemented in time, the enacted provisions have a profound effect on, among other things, the status of children and the rights of the biological fathers of children born outside of a marriage relationship.

There has, for some time, been something of a conflict between our Constitution, which defines a child as a person under the age of 18 years, and the **Age of Majority Act** which provides that majority is generally attained at 21 years. The Act has removed this conflict and provides that children reach majority at 18 years. The effect for those with teenage children may be alarming – 18 year olds may now take a number of steps without parental consent, including entering into binding contracts, getting married and litigating!

Perhaps the most controversial aspect of the enacted provisions is that a child over the age of 12 years may now consent to HIV testing without parental involvement. Children under the age of 12, on the



other hand, may consent if the child is assessed as having sufficient maturity to understand the benefits, risks and implications of the test.

Access to contraceptives has also been regulated. No person may, for example, refuse to sell condoms to children over the age of 12 or, where condoms are provided free of charge, refuse to provide condoms to the child. In addition, a child obtaining condoms in this manner is entitled to confidentiality.

The rights and responsibilities of the unmarried fathers of children has always been a contested area for dispute. What rights of access do these fathers have and what are their obligations to maintain the child? The Act provides that unmarried fathers acquire full parental rights and responsibilities if certain conditions are met. These rights and responsibilities accrue if the father was living with the

mother, or in a permanent life-partnership with her, at the time of birth. If this criterion has not been met, parental rights and responsibilities still accrue if the father has consented to be identified as the father of the child, or has contributed towards the child's upbringing or maintenance for a period of time.

Other controversial issues are still to be dealt with including corporal punishment, circumcision and virginity testing. The impact on the annual KwaZulu-Natal Reed Dance celebrations, in which virginity tests for young girls is encouraged, is one example where the application of the Act will be carefully scrutinized.

## Property Law

### ■ Little boxes made of ticky-tacky

LITTLE BOXES on the hillside are the homes of choice for many of us. Complexes and estates offer inviting security and amenities, especially for family and retirement living.

Anyone living in these types of communities will tell you, however, that it is not all rainbows and roses. For one thing, if you hold sectional title to your property, you need your neighbours' consent to make changes to your unit. Most people happily give consent if the proposed changes are not likely to have a negative impact on their amenity but there is always the exception.

Mr and Mrs Cujé-Jakoby lived in a sectional title scheme

on the Erinvale Golf Country Estate. The Cujé-Jakobys owned a number of units which they rented out, while also undertaking the management, letting and cleaning of other units in the development on behalf of the owners. For this purpose, the Cujé-Jakobys had previously converted three garages to provide ablution facilities for staff, a rest room and an ironing room. Some time later the Cujé-Jakobys sought to convert another garage into a laundry. The Home Owners Association and all the owners consented to the conversion of the garage, all the owners, that is, but Mrs Kaschub. She refused to give her consent, notwithstanding an undertaking by the Cujé-Jakobys to place the laundry in a garage furthestest away from Mrs Kaschub's unit.

The **Sectional Title Act** provides that any owner who believes that the refusal of consent by another owner is "unfairly prejudicial, unjust or inequitable" may apply to a court for relief. In desperation the Cujé-Jakobys approached

the Cape High Court and asked for an order that Mrs Kaschub be deemed to have consented to the conversion.

The court noted that Mrs Kaschub had herself changed the use of her garage, having installed a washing machine, tumble dryer, sink and cupboards. In addition, the court found her objections to be fanciful and irrational. Mrs Kaschub had argued that the arrangement would negatively impact on her security, but her security would clearly be more significantly affected if each owner had to employ their own cleaners. In addition, she complained about her right to privacy being affected, but it was clear from the layout of the garages that there would be no impact on her privacy. In fact, the proposed laundry was beneficial to the entire scheme. The availability of an efficient letting and cleaning service was likely to be attractive to prospective owners who wished to let out their units.

The court ordered that Mrs Kaschub be deemed to have given her consent and the Cujé-Jakobys were free to proceed with converting their garage.

*Cujé-Jakoby v. Kaschub* 2007 (3) SA 345 (C).



## Insurance Law

### ■ Frankenstein's Car

*merx* – merchandise, goods, wares.  
(Cassell's Latin Dictionary)

MOST of us have heard horror stories about seemingly legitimate insurance claims being repudiated by insurance companies. Insurance claims may be rejected for a number of reasons, including the inaccurate description of the insured property in the insurance application form.

Mr Da Costa, a Gauteng businessman, was left with a jaded opinion of insurance companies when Mutual and Federal repudiated his claim following a collision in his Mercedes Benz. Mutual and Federal pointed out that there had been a material misrepresentation. Mr Da Costa's insurance application form referred to a 1991 Mercedes Benz 230e. In fact, Mr Da Costa's Mercedes Benz was something of a hybrid comprising a 1988 Mercedes Benz 200 body, a 1990 Mercedes Benz 230 engine and an AMG kit including various trimmings, parts and accessories.

The dispute came before the Magistrates' Court and the High Court, with both courts ruling that the insurer had to prove that the misrepresentation, which had been made

innocently, was material. The insurer eventually appealed to the Supreme Court of Appeal where the rulings of the Magistrates' Court and High Court were again upheld.

The court found that it was clear that both the insurer and Mr Da Costa intended the insurance agreement to apply to the particular Mercedes Benz in question, hybrid though it may be. The vehicle was, after all, the only Mercedes Benz owned by Mr Da Costa at the time.

The effect of this judgment is that if an insurance claimant has innocently misrepresented any fact relating to the insured property, the insurer will not simply be able to repudiate the claim unless the insurer can show that it would not have insured the property, or would have insured the property at a higher premium, had the property been more properly identified or described.

*Mutual and Federal Insurance Co. Ltd v. Jaf Da Costa* (2007) SCA 89 (RSA).



## Family Law

### ■ Mama, Papa, Baba, Tata

*"This is the devilish thing about foreign affairs: they are foreign and will not always conform to our whim."*

– James Reston

SOUTH AFRICAN companies have been listing on foreign stock exchanges and merging with foreign companies for some time. It seems that the mergers have not only been taking place at the corporate level. South African citizens have also been "merging" with their overseas counterparts. With many youngsters taking a gap year and recent graduates seeking work experience, love is bound to bloom. What are the rights to children should any of these international liaisons turn sour?

The Supreme Court of Appeal recently considered the case of a young South African woman who had married a Dutch citizen while working in the Netherlands. The couple had a child, but their marriage washed up on the rocks a few years later and the mother returned to South Africa with the child.

The father applied to the Pretoria High Court for an order directing the immediate return of the child to the Netherlands saying that the mother had misled him into believing she would be returning to the Netherlands after a

brief visit to South Africa. The mother argued that she had not wrongfully removed the child from the Netherlands. In fact, she said, the father had consented to the removal as they had jointly decided to emigrate to South Africa while the father would remain in the Netherlands for a short while in order to wind up the family's affairs.

The court found that the central issue was consent. Had the father consented to the permanent removal of the child to South Africa? The consent must be real, positive and unequivocal and the onus of establishing that the father had in fact consented rested with the mother. The court considered, amongst other things, the fact that the mother had travelled on a return ticket, had only two suitcases with her and had left most of her possessions in the Netherlands. In these circumstances it was found that the father had not consented.

The court went on to reiterate the age-old rule that it had to consider what would be in the child's best interests. Although the child was only five years old, there was no evidence to suggest that the return of the child to the Netherlands would place the child in an intolerable situation. The court ordered that the child be returned to the jurisdiction of the Central Authority for the Netherlands so that the appropriate court in the Netherlands could determine the issues of custody and access to the child.

*Central Authority v. Houwert [2007] SCA 88 (RSA).*



## Employment Law

### ■ Jumping Ship

JUDGE DENIS DAVIS of the Cape Town High Court recently again set out the law relating to the enforcement of restraints of trade. In this case a long-serving employee who had signed a clear restraint of trade, resigned and walked across to join the opposition. His employer sought to enforce the restraint of trade.

The judge confirmed that the law places the onus on an employee to show the unreasonable nature of the restraint of trade clause if he wishes to escape its clutches. However, the contract in restraint of trade must protect the legitimate proprietary interests of the employer who seeks to enforce it. Such interests may take the form of trade secrets, confidential information, goodwill or trade connections.

A protectable interest in the form of customer connection does not come into being simply by having contact with the employer's customer. What is required is the establishing of relationships of such a nature that the employee could easily induce customers to follow him to a new business. Whether such a relationship has come into being is a question of fact and depends on:

- the nature of the employee's duties;
- the employee's personality;
- the frequency and duration of the contact with customers;
- where such contact takes place;
- what knowledge the employee gains of the customer's requirements and business;
- the general nature of the relationship, and how personal it is;
- how competitive rival businesses are;
- the type of product being sold;
- whether there is evidence that customers were lost after the employee left.

The length of time for which the restraint will be enforced and the area in which it will be enforced is also a question of fact and depends upon all the relevant circumstances. In this case the Judge accepted that there was a reasonable apprehension of injury or irreparable harm to the employer and granted an interdict enforcing the restraint of trade.

*North Safety Products (Africa) v. Nicolay and others [2007] 2 ALL SA 647 (C).*



## Damages

### ■ Cops and Robbers

*"The end cannot justify the means for the simple and obvious reason that the means employed determine the nature of the ends produced."*

– Aldous Huxley (1894 - 1963)

BREE STREET in Johannesburg was turned into a scene of urban mayhem in March 2001 when Inspector Nemengaya

suspected an armed robbery at a shop on his patrol route. The suspects were emerging from the shop into the crowded street when the Inspector announced his presence and ordered the suspects to stop.

The suspects ran off down the crowded street, firing a shot at the Inspector. Inspector Nemengaya then shot one of the suspects in the leg and arrested him. When he returned to the scene of the robbery, he found that Johannes Mohofe, who had been passing by with his children, had been shot. Mr Mohofe was rushed to hospital, but died the same day. Mr Mohofe's mother claimed damages against the Minister of Safety and Security, for loss of support for herself and his children. Mrs Mohofe claimed that the Inspector, in alerting the suspects to the fact that he was a policeman, had caused the suspects to shoot into a crowd of innocent bystanders thereby causing Mr Mohofe's death.

The trial court took the view that the Inspector had a legal duty to protect Mr Mohefe and that he had breached that duty. The case eventually came before the Supreme Court of Appeal which concluded that, in deciding whether the Inspector was negligent, the court must determine whether the Inspector's conduct in calling out to the suspects had resulted in Mohofe's death. The question was ultimately one of reasonableness – what would a reasonable policeman have done if placed in the Inspector's position?

The court held that a reasonable policeman in the position of the Inspector would have taken steps to fulfil his duty to protect the public and to apprehend criminals. The Inspector had been forced to act quickly and to protect the public from fleeing robbery suspects.

The court found that the Inspector had acted in terms of standard police procedure and that the procedure was neither ineffective nor inappropriate. A policeman, when confronted by armed and dangerous criminals, is not expected to remain silent and covertly follow the suspects until they reach a place where there are no bystanders. If this were so, criminals would thrive in every busy place. Instead, policemen are expected to take active steps when confronted with any criminal or potential criminal activity. Mrs Mohofe's claim was accordingly dismissed with costs.

*Minister of Safety and Security v. Mohofe* 2007 (4) SA 215 (SCA).

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