



LAW LETTER

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ATTORNEYS

This Spring edition of Law Letter concentrates its focus on some of the technical but tricky issues that have come before our courts recently, and the way our judges deal with them – using logic, principles, precedent and policy. 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



Spoliation

■ Wrong Pin Number

AS WAS discussed in an article entitled “Blade Runner” in the May 2009 edition of *Law Letter*, a spoliation order is one of the most powerful procedures available to a party who has wrongfully been deprived of possession of property. However the temptation to resort to spoliation proceedings sometimes leads to that procedure being adopted when it is inappropriate.

In this case a close corporation, Olkru Handelaars CC ran a convenience store in Worcester. It had contracted with a company, ATM Solutions (Pty) Ltd for the installation of an automated teller machine (ATM) on the Olkru premises. In terms of the contract the company was entitled to “use and occupy” the premises for the sole purpose of placing and operating an ATM. This was placed at a mutually agreed location. The company was responsible for its installation, operation and maintenance. Olkru provided the necessary electricity and the company arranged connectivity to the banks. Olkru was not entitled to permit the removal of the ATM from the premises and the company had the right of reasonable access to the machine during normal business hours or other agreed times to service or repair it. Without the consent of the company, Olkru disconnected the electricity supply to the ATM and moved it to a storeroom on the premises. In its place, an ATM belonging to ABSA Bank was installed.

The company applied to the Cape Town High Court for a spoliation order against Olkru and joined ABSA on the basis that it was a co-spoliator. The application did not succeed but the company then appealed to the Supreme Court of Appeal.

The appeal did not succeed. The company had never had actual possession of the ATM within Olkru’s premises. The floor space on which the ATM stood was at all times in Olkru’s possession and under its control. Only Olkru had keys to its premises and, indeed, to the ATM itself. Furthermore it was Olkru that controlled access to the ATM and one of its employees stocked the machine with money, changed the paper rolls for receipts and effectively operated the ATM. This demonstrated that the company did not have actual possession of the ATM and, in consequence, its spoliation claim had to fail.

The rights of the company against Olkru were purely contractual and it should have claimed an order for specific performance.

ATM Solutions (Pty) Ltd v. Olkru Handelaars CC and Another 2009 (4) SA 337 (SCA).



Litigation

■ Just Because

A NEGLIGENT act or omission that causes damage to a person is often discussed in *Law Letter*. It is usually the nature of the act or omission which is in issue. But an essential aspect of the enquiry is causation. In a recent case it was the deciding factor in a claim by a trust against a financial services company based on an alleged negligent misrepresentation.

The company had promoted an off-shore investment. The alleged misrepresentation upon which the trust relied was that the investment structure which incorporated the protective measure of a cession to secure the debt could be implemented lawfully and in accordance with the foreign-exchange requirements of the Reserve Bank. Unexpectedly, however, and contrary to the predictions of the experts, the rand strengthened against the US dollar so that when the investment was repaid it had suffered a capital loss of

■ New Lamps of Justice for Old

ONE HUNDRED years ago, the British Parliament passed the **South Africa Act** which created the then Union of South Africa. The Act established the original four provinces of the Cape of Good Hope, the Transvaal, Natal and the Orange Free State. A Supreme Court was also brought into being comprising provincial divisions for each of the provinces plus the Eastern Districts Local Division of the Cape, the Witwatersrand Local Division (WLD) of the Transvaal and the High Court of Griqualand West (in Kimberley). In Natal (as it then was) the Durban and Coast Local Division (DCLD) was established. Both the WLD and the DCLD had jurisdiction, together with the respective provincial divisions, over a defined area in the province in question. The provincial divisions had jurisdiction over the whole province. Over the years the court of the Eastern Cape became the Eastern Cape Division which had sole jurisdiction over that area and later had its own local division known as the South Eastern Cape Local Division. During the apartheid era separate courts were set up in the various "independent homelands" of Transkei, Bophuthatswana, Venda and Ciskei.

After the new Constitution in 1996 established nine provinces in place of the old four, the Supreme

Court was renamed the High Court but the names of the various divisions and the "homelands" courts remained unchanged. This has now been remedied and as from 1 March 2009 the various courts in the Republic have been given names which more clearly indicate their separate geographic locations and the areas over which they exercise jurisdiction. They are as follows:

Eastern Cape High Court, Bisho
Eastern Cape High Court, Grahamstown
Eastern Cape High Court, Mthatha
Eastern Cape High Court, Port Elizabeth
Free State High Court, Bloemfontein
KwaZulu-Natal High Court, Durban
KwaZulu-Natal High Court, Pietermaritzburg
Limpopo High Court, Thohoyandou
North Gauteng High Court, Pretoria
North West High Court, Mafikeng
Northern Cape High Court, Kimberley
South Gauteng High Court, Johannesburg
Western Cape High Court, Cape Town.

Otherwise than in formal court documents, the names of these courts will probably be shortened, for ease of reference, to the name of the town or city which is the seat of the court, such as Bisho High Court, Pietermaritzburg High Court, and Johannesburg High Court.

R3.8 million. The trust succeeded in its claim against the company for the loss it suffered but in an appeal from the Cape Town High Court, the Supreme Court of Appeal decided differently.

Dealing with the element of causation the court pointed out that this involved two distinct enquiries, namely factual and legal causation:

Factual causation is usually determined by the so-called "but for" test. This requires a hypothetical enquiry into what would probably have happened but for the wrongful conduct of the company. In this case it was decided that but for the representation of legality the trust would not have invested with the company.

The question of legal causation is more difficult because the trust had to prove that the wrongful act was linked sufficiently closely or directly to the loss for legal liability to follow. The answer to this enquiry is determined by considerations of policy. That is to say, would right-minded people regard the imposition of liability in all the circumstances as untenable despite the presence of all the other elements of liability such as wrongfulness and negligence.

The Supreme Court of Appeal concluded, on the evidence

regarding the trust's finances, that although it was the misrepresentation regarding the legality of the scheme that had induced the trust to invest in the company's scheme, the trust would nonetheless probably have made a similar off-shore investment through the agency of some other institution. That being the case, the real cause of the loss was the strengthening of the rand against the US dollar and causation had not been proved. The company's appeal succeeded.

mCubed International (Pty) Ltd and Another v. Singer and Others NNO 2009 (4) SA 471 (SCA).

Arbitration

■ A Fair and Final Forum

"The quickest way of ending a war is to lose it."

– George Orwell (1903 - 1950)

THERE IS no appeal to the courts from the decision of an arbitrator under the **Arbitration Act**, 1965. A person aggrieved by the award of an arbitrator may review that

■ You Take the High Road

*"Your old road is
Rapidly agin'
Please get out of the new one
If you can't lend a hand
For the times they are a-changin'!"*

– Bob Dylan

SECTION 67 of the Local Government Ordinance, 17 of 1939 (T) deals with the closure or diversion of streets. A municipality may, with the approval of the relevant provincial Minister, permanently close or divert any street or portion of street provided that certain procedural requirements are met. These include giving due notice within the municipality's own decision-making processes and to the public which is given an opportunity to object. Any person who considers that his or her interests will be adversely affected by the proposed closing or diversion may lodge a claim with the municipality for any loss or damage which will be sustained by him or her if the closing or diversion is carried out.

From 1992 to 1994 the then City Council of Sandton (the council) effected substantial changes to Grayston Drive at its intersection with Katherine Street. Both these roads are major thoroughfares. The effect of the construction work was to elevate four lanes of Grayston Drive (two in each direction) above Katherine Street in such a way as to create



a flyover. One lane on the southern side and two on the northern side of the flyover remained on the same level as previously. Sandton Gate Service Station CC owns a petrol filling station on the southwest side of Grayston Drive at its intersection with Katherine Street where it is supplied with petrol and other products by Engen. Both alleged that the closure or diversion of Grayston Drive by the construction of the flyover impeded access to the filling station and resulted in a decrease in sales of Engen products, causing loss to both the service station and to Engen. They also alleged that the council had failed to comply with the conditions prescribed by Section 67 and that its successor in law, the City of Johannesburg, was liable to compensate them.

In its defence the City Council contended that the road reconstruction did not effect a permanent closure or

award but only in three strictly limited circumstances, namely: if the arbitrator has misconducted himself in relation to his duties as an arbitrator; if he has committed a gross irregularity in the conduct of the arbitration proceedings; or if the award had been improperly obtained. In an application to appeal to the Constitutional Court the question in issue was whether Section 34 of the Constitution increases the power of the courts to set aside arbitration awards where it can be shown that an aggrieved party was denied a fair hearing. Section 34 provides that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."



The members of the Constitutional Court held differing views. Five of the justices comprising the majority, agreed that the appellant's application for leave to appeal should succeed but that the appeal itself be dismissed; three of the justices agreed that leave to appeal should be granted but would have allowed the appeal; and Justice Ngcobo was of the view that leave to appeal should not be granted.

The three justices who dissented from the majority were strongly of the view that the fairness requirements of Section 34 of the Constitution did apply to consensual or private arbitrations and that a submission to arbitration does not imply a waiver of that requirement. In a lengthy judgment with which the majority of the justices concurred, Acting Deputy Chief Justice Kate O'Regan, held that the values of the Constitution will not necessarily best be served by interpreting Section 33(1) of the **Arbitration Act** in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, said the court, the contrary seems to be the case:

"The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently."

Justice O'Regan then referred to the three grounds for reviewing an arbitration award that are set out in the **Arbitration Act** and said that the Constitution requires a court to construe these grounds reasonably strictly in relation to private arbitration.

Lufuno Mphaph & Associates (Pty) Ltd v. Andrews and Another 2009 (4) SA 529 (CC).

diversion in terms of Section 67. The Johannesburg High Court agreed that there had been no permanent closure but decided that there was a permanent diversion.

On appeal to the Supreme Court of Appeal the City Council argued that the elevation of the road did not amount to a diversion because that required a lateral change on a horizontal plane. The Supreme Court of Appeal approved the decision of the High Court that prior to the construction of the flyover there had been three lanes of Grayston Drive running from west to east on a level plane; after the construction two lanes were on a different plane. There had thus been a vertical diversion. As Judge Lewis said in her judgment:

“Counsel for the City Council were driven to contend that if the four lanes of Grayston Drive had been built underground, in a tunnel rather than on a flyover, that too would not amount to a diversion, since there would not be any deviation away from the original path of the road. The fallacy in this approach is self-evident.”

Finding also that the elevation of the lanes of Grayston Drive had had a material impact on the ability of drivers to gain access to the filling station, Sandton Gate Service Station and Engen had a right to sue for their losses.

City of Johannesburg v. Engen Petroleum Ltd and Another 209 (4) SA 412 (SCA).



Judges

■ Running outside his lane

“The cobbler should not judge beyond his last.”
– Pliny the Elder (AD 23 - 79)

“IN EXERCISING the judicial function, judges are themselves constrained by the law”. This is what the Deputy President of the Supreme Court of Appeal said in his judgment on the appeal against the findings of Judge Nicholson in the Zuma case last September. This principle was applied by Judge Hurt in the same court in respect of a decision by Acting Judge Cassim in the Johannesburg High Court.

An application had been brought in that court by the trustees of the Islamic Dawah Movement Trust, the owners of a property within the jurisdiction of the Ekurhuleni Metropolitan Municipality. In December 2004, 76 families from an informal settlement on a neighbouring piece of

land moved on to the Trust’s land and in 2006 the Trust brought an application in the Johannesburg High Court for the eviction of the occupiers. They opposed the application, alleging that an official of the municipality had authorised their occupation, and they brought a counter-application against the municipality claiming that under Section 26(2) of the Constitution, the municipality was obliged to realise their right of access to adequate housing.

When the matter came before Acting Judge Cassim he held that the municipality’s lack of activity in dealing with the problem constituted a failure to comply with its constitutional duties. He ordered the municipality to purchase the property from the Trust within 30 days for an amount of R250 000.



The municipality appealed to the Supreme Court of Appeal where counsel for the Trust contended that the Johannesburg court had taken an appropriately robust approach. The Appeal Court, after referring to the principle quoted above, said that it was *“a sanguine reminder to a judiciary which might often, in its efforts to achieve the objects of the Bill of Rights in the Constitution, be tempted to chafe against the concept of ‘progressive’ as opposed to ‘immediate’ realisation of constitutional objectives, especially at the governmental and municipal levels.”*

Judges, as members of civil society are entitled to hold views about the issues of the day but they are not entitled to inject their personal views into judgments. Although the municipality might not have dealt with the problems of the occupiers of the property with the alacrity which could have been expected of it this did not justify the judge in adopting a solution which was well outside the limits of his powers. Acting Judge Cassim was not asked, either in the application papers nor in the evidence which was led at his suggestion to make the order to purchase, nor was it rationally related to the evidence concerning the municipality’s policies and plans. In his enthusiasm *“to get things moving”* he had come to the conclusion that it was time to cut across the principles of *“progressive realisation”* of housing access, and the bureaucratic red tape, but overlooked the fact that he did not have the power to do so in the manner he chose.

His order that the municipality purchase the property was not appropriate and was set aside.

Ekurhuleni Metropolitan Municipality v. Dada NO and Others 2009 (4) SA 463 (SCA).

■ For Better or Worse

*"What men call gallantry, and gods adultery,
Is much more common where the climate's sultry."*
– Lord Byron (1788 - 1824)

ADULTERY MAY be defined as the willing sexual intercourse between a married person and another person who is not his or her spouse. Unlike certain other legal systems around the world, adultery is not a crime in South Africa. The question whether it can form the basis for a claim for damages was however recently considered in the High Court in Pretoria.

Judge Du Plessis pointed out that adultery conflicts directly with the undertaking of spouses towards one another and towards the outside world to have sexual intercourse only within the marriage. As such our law regards it as a violation of a collection of personality rights which each spouse has arising out of the marriage.

The convictions of the community are that the exclusive sexual relations of marriage have to be respected and that

it is unlawful to interfere with them. The court referred to a 2005 Constitutional Court judgment which observed:

"Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases for family life in our society."

The judge pointed out that in terms of legal policy it is necessary to protect the exclusivity of sexual relations to which spouses have bound themselves from interference by third parties. It is therefore incorrect that the view that adultery constitutes an injury is incompatible and *"not in harmony with the modern concept of marriage"*. The action for damages for harm caused for adultery does not clash with the Bill of Rights, is still maintainable in South African law and should not be abolished.

Wiese v. Moolman 2009 (3) SA 122 (TPA).

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