



LAW LETTER

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vennnemeth&hart
ATTORNEYS

In this edition of Law Letter we focus on the rights of children and how the courts seek to protect and uphold their vital interests. We also examine the way in which judges are appointed, and how property disputes are determined by our courts. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

EDITORIAL

The Quest for Truth

"Yes, I could have been a judge but I never had the Latin, never had the Latin for the judging."

– Peter Cook

BY RECALLING the past we may get a better perspective of the controversies that have surrounded the Judicial Services Commission recently.

Previously judges were appointed by the Prime Minister (later Executive President) in consultation with his cabinet without any transparency. The executive naturally gave preference to "safe judges" who would not rock the boat. Judges invariably came from an inner circle of senior male advocates at the bar.

Because most of them had similar backgrounds and had trodden the same legal paths, it is no surprise that there was a large degree of uniformity in their decisions.

The problem with a cloistered existence with not enough fresh air coming in from the outside, is that it may start decaying from the inside. Legal certainty is an ideal worth striving for, but not at the expense of vital human rights and constitutional values like equality and dignity.

Those who profess to know the truth, may reflect that several certainties of the past have proved to be illusions. One person's truth became another's lie and many so-called truths were not static – they were in perpetual motion.

The fresh legal breezes that blew in from the Constitutional Court invigorated the legal scene. Disagreements between that court and the Supreme Court of Appeal, which to an extent represented the old legal order, were to be expected. Especially when legal principles started to be evaluated on a more relative rather than an absolute basis.

Inadequacies in the legal system of an open society are more visible and liable to be criticised than of a closed community. The way judges are now appointed by a transparent and representative body like the JSC from all walks of legal life is an example.

The JSC is established and has the powers assigned to it in terms of Chapter 8 of the Constitution and the Judicial Service Commission Act. Its functions are to appoint and discipline judges and advise the government on matters relating to the judiciary and the administration of justice.

The composition of the JSC consists of the Chief Justice, the President of the Supreme Court of Appeal, one Judge President, two practising advocates, two practising attorneys, one teacher of law, six members of Parliament (split between the opposition and ruling party), the Minister of Justice and Constitutional Development, four delegates of the National Council of Provinces and four persons chosen by the President. When matters of a specific High Court are considered, its Judge President and the Premier of the province concerned also form part of the JSC.

The President exerts a strong influence on the composition of the JSC. 11 of its 23 members represent the judiciary, the legal profession and the opposition parties in the National Assembly. Mathematically speaking the ruling party has direct influence over the remaining 12 places on the Commission. The President is also empowered to make appointments to the bench of the Constitutional Court. The JSC provides the President with three names more than the number of vacancies to be filled and he makes his choice after consulting the Chief Justice and leaders of the opposition.

The Chief Justice or his alternate presides at meetings of the JSC and decisions must be supported by a majority of members. The media reports widely on the deliberations of this body.

A large part of the JSC's time is taken up with filling judicial vacancies and consequently the interviewing of candidates. Disciplinary proceedings are part of its duties, but the JSC can only dismiss a judge suffering from incapacity, being grossly incompetent or guilty of gross misconduct, and with a two-thirds majority in the National Assembly agreeing that the judge must be removed.

The conduct of judges cannot, however, be evaluated on the measure applied to an ordinary accused in court. They have to observe a deeper discipline inherent in ethical virtues and not mere written codes. To paraphrase, there is the letter of the law and then there is the spirit of the law. Judges must observe both and should be beyond reproach.

Judges carry the primary responsibility to foster respect for our courts. At a recent legal conference, Chief Justice Pius Langa admonished judges of the Supreme Court of Appeal for making inconsiderate and undignified remarks when they overruled a controversial judgment. He said: *"Judges should bear in mind that courtesy and collegiality towards colleagues are not merely good manners but indispensable attributes of a judge"*.



FROM THE COURTS

Children's Rights

■ Young Criminals

"O remember not the sins and offences of my youth."
– Common Prayer Book

ALTHOUGH THE Constitution permits the imposition of long sentences to child offenders, the Constitutional Court has found that minimum sentencing legislation infringes the protection the Bill of Rights affords to children under the age of 18.

The **Criminal Law (Sentencing) Amendment Act 38** of 2007 made minimum sentencing of 16 and 17 year old children possible for certain serious crimes. The Centre for Child Law at the University of Pretoria decided to challenge this statute after investigating cases of children sentenced to life imprisonment. The matter was eventually referred to the Constitutional Court.

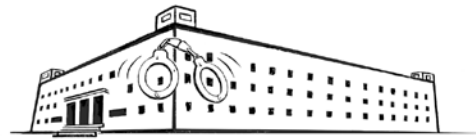
Judge Edwin Cameron emphasised that the Constitution itself recognises children's greater physical and psychological vulnerability. The Constitution requires sentencing for children that focuses on the particular child involved. He mentioned that *"Children are less mature and more susceptible to influence, whim and frailty"* and that it is not fair to apply the same sentencing regime for adults to children.

The court also found that minimum sentencing discouraged judges from options other than imprisonment for children and encouraged longer and heavier sentences. It is still possible for children to receive harsh sentences but this judgment now allows judges to make more individualised

sentences without limitations being imposed on their discretion.

The court declined to order the reconsideration of sentences of children already sentenced under the Amendment Act. Instead, it required government to identify all child offenders sentenced under its provisions, so that appeals or reviews could be considered by the Centre of Child Care on their behalf.

Centre for Child Law v. Minister of Justice and Constitutional Development and Others, Case No CCT 98/08 (2009) (ZACC) 18 (Delivered on 15 July 2009).



■ Upper Guardian

"If you bungle raising your children, I don't think whatever else you do well matters very much."
– Jacqueline Kennedy

SERIOUS PROBLEMS in the implementation of the protective measures of the **Criminal Procedure Act** when child complainants have to testify in court in sexual offence cases, were raised when two convictions of child rapists in the regional court came before Judge Eberhard Bertelsmann in the High Court for sentence.

The judge did not only concern himself with the sentences, but also raised as issues his concerns about the treatment of children in our courts. He called upon the accused, the State and various non-governmental organisations involved in the interests of children, to submit written argument on the constitutionality of certain provisions of the Criminal Procedure Act.

The judge then held that these provisions fell short of the protection afforded to children in Section 28 of the Constitution. He declared them invalid and issued declaratory and supervisory orders concerning the rights of child complainants and child witnesses. They dealt with the priority, aid and assistance required in cases involving children.

The matter was referred to the Constitutional Court for confirmation. The Minister of Justice and Constitutional Development successfully appealed against the judgment. The court could not confirm the orders relating to constitutional issues because they had been improperly raised by the judge of his own accord. In consideration of the court's role as upper guardian of children however, it ruled that the concerns raised by the High Court could not be deferred.

The court therefore gave the State a deadline to submit a report setting out amongst others the needs of every regional court regarding intermediaries assisting children, separate rooms from which children can testify, closed circuit television, one way mirrors and steps taken to provide these needs and facilities. The friends of the court and National Director of Public Prosecutions who joined the proceedings were also given opportunities to comment on the report. These are important and welcome developments to give real effect to the fundamental human rights entrenched in our Constitution.

Director of Public Prosecutions, Transvaal v. Minister of Justice and Constitutional Development, and Others, 2009 (4) SA 222 (CC).



■ Out of Bounds

*"They can't censor the gleam in my eye."
– Charles Laughton (1899 - 1962)*

A HIGH COURT provisionally restrained the *Sunday Times* from publishing a story of a man who claimed a large sum from his divorced wife on the assertion that she deceived him into believing that their son was his biological son. In the divorce order he had been awarded custody of the son and had to pay his former wife certain benefits. He claimed damages for the alleged misrepresentation.

The divorce had occurred six years before the damages action and the wife and son obtained the provisional interdict the night before publication of the story. They based their case on Section 12 of the **Divorce Act** prohibiting publication of any information that comes to light during divorce proceedings that affect the parties and their children's rights to privacy and dignity.

The owner of the newspaper claimed that the story would be of interest to its three million readers and an interdict would limit the media's right to impart information. On the return day of the provisional order, Section 12 was declared invalid as being inconsistent with the right to freedom of expression entrenched in the Bill of Rights. This gave newspapers *carte blanche* to report all the intimate details of divorce actions.

Any rendering of a statute as being void, must be confirmed by the Constitutional Court. It had to balance the limitation set out in Section 12 with the competing rights of freedom of expression. Even though Section 12 did not differentiate

enough to be justified in terms of the Constitution, Judge Chris Jafta found that its purpose, being *"to protect the privacy and dignity of people involved in divorce proceedings, in particular children"*, should be achieved with less restrictive means than a prohibition on all evidence presented at a divorce trial. The way to do this would be by not disclosing the identities of children and vulnerable parties in appropriate cases.

The conditional invalidation of Section 12 will effectively stop the media from sensationalising divorce actions. Bedroom secrets are only newsworthy if the public knows who are involved, especially if they are celebrities. Incidentally, when the civil case on which the story was based went to trial, the father could not prove that his son was not his biological son.

Johncom Media Investments Ltd v. M and Others 2009 (4) SA 7 (CC).



■ Babies are not Tennis Balls

*"There are no illegitimate children – only illegitimate parents."
– Leon R Yankwich*

IN MAY 2003 a mother gave birth out of wedlock to a daughter. She was in emotional turmoil having been involved in more than one affair during her pregnancy and booked into a home for unmarried mothers where she made arrangements for adoption. Her baby was taken away at birth by social workers but reunited with her five days later when she decided against adoption. A month later she placed the child with a so-called kangaroo mother and signed an adoption form with social workers while seeking a new job. When she appeared before the Children's Court in July, she consented to the adoption proceeding and was informed that she could withdraw her consent within a period of 60 days.

In August she changed her mind and her daughter was returned to her. During November she contacted the social workers again stating that she wanted to resume the adoption proceedings. The baby was placed with the same kangaroo mother and in December she attended a second Children's Court hearing. She confirmed that the adoption would be in her daughter's best interests and accepted that the grace period in which to withdraw her consent had expired. Her daughter was placed in the custody of her adopting parents the same day.

Two days later she contacted the social workers stating that she wanted her child back. When her request was

refused she formally approached the Children's Court for an order to restore custody to her. Despite these efforts, the Children's Court finalised the adoption of the child in February 2004.

She applied for the rescission of the adoption order to the High Court during June 2004 but did not show any sense of urgency to finalise the process.

Four years later Judge Jeremy Pickering found that the adoption order had been wrongly granted. When the mother withdrew her consent within the initial 60-day period and had her daughter restored to her, the adoption process was over. When she again put the child up for adoption, the statutory procedures started anew and during the further 60-day period she again withdrew her consent.

Even though the adoption order was obtained irregularly, the matter did not end there as the interests of the child were the deciding factor. The mother's frequent changes of mind, her emotional immaturity, the happy and stable relationship the child enjoyed with her adoptive parents during the long delay from the time of the adoption order to the hearing of the application, persuaded the court to find that it would not be in the best interests of the child to set the adoption order aside.

AS v. Vorster NO and Others 2009 (4) SA 108 (SECLD).



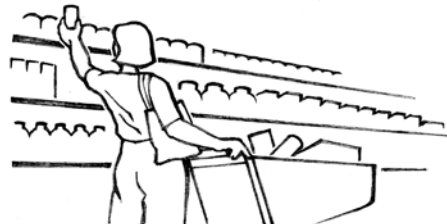
Section 7 of the **National Building Regulations and Building Standards Act** of 1977 was the bone of contention.

The Supreme Court of Appeal confirmed that this statute requires the local authority to only refuse approval of plans if it is positively satisfied that the proposed building will cause the type of results foreseen by the objecting neighbour. Should the local authority be uncertain of these outcomes, it must approve plans that otherwise comply with the statute.

A review application against a local authority's decision can only be based on the material before the local authority at the time of its decision and not on the objecting neighbour later proving objectively that the negative results came to pass. Notwithstanding the vulnerable owner not being entitled to inspect plans lodged for approval or to be involved in the process, the practical effect of this approach would be to free building approvals from many potential statutory challenges. According to the court, many of the proscribed outcomes would in any event be evaluated subjectively, such as unsightliness.

The result of this case is that a local authority cannot be required to be satisfied that there would be no harmful consequences before granting an approval. The property owner therefore remained saddled with his neighbour's invasive extensions.

True Motives 84 (Pty) Ltd v. Mahdi and Another 2009 (4) SA 153 (SCA).



Property

■ A Room with a View

*"Living a life is like constructing a building:
if you start wrong, you'll end wrong."*

– Maya Angelou

THE APPROVAL of building plans that affects the value of adjoining properties has surfaced again in the Supreme Court of Appeal.

When a property owner became aware of extensive alterations being made to his neighbour's house that had the potential to violate his privacy, block out his direct sunlight, be unsightly and depreciate the value of his property, he applied to court for an order to set aside the approval of the building plans by the local authority.

■ Empty Vessels

*"My true love hath my heart and I have his,
By just exchange one for the other giv'n;
I hold his dear, and mine he cannot miss,
There never was a better bargain driv'n."*

– Algernon Sidney (1622 - 1683)

LPG (Liquefied Petroleum Gas) being a mixture of propane and butane, is highly flammable and used for cooking and heating. It can only be economically stored in liquid form. It is transported to and stored in bulk pressure vessels at depots from where smaller cylinders are filled and distributed. These cylinders have to withstand the vapour pressure and their filling and maintenance is a critical safety matter regulated by the SABS (South African Bureau of Standards).

Tolgaz together with major wholesalers enjoys a significant share of the cylinder market using a network throughout the country with numerous contracts for the supply and distribution of LPG. It did not have such an agreement with Solgas.

When a customer purchases LPG from a distributor for the first time, a refundable deposit is paid for the cylinder. It is marked with the supplier's name and remains the property of the supplier. The customer only purchases the contents of the gas cylinder and when empty gas cylinders are replaced with full ones, the customer is only charged for the LPG.

The usual practice is to provide the customer with pre-filled cylinders rather than refilling empty cylinders. A supplier receiving an exchange cylinder belonging to another supplier will then return it to that supplier and *vice versa*. The recipient of the greater number of cylinders will pay in the current deposit price on the excess delivered.

The code of practice of the SABS provides that permission to fill a container must be granted by its owner. Tolgaz applied to the court for an interdict to prohibit Solgas from filling and distributing Tolgaz cylinders without its authorisation.

Solgas claimed that the trade usage and custom in the industry permitted it to fill cylinders belonging to Tolgaz on the basis that it tacitly agreed that its empty cylinders could be filled by Solgas on the spot and returned to the end-user.

On appeal to a full bench of three judges in the Johannesburg High Court the court found that the express permission of owners to fill their LPG cylinders required in the SABS code to monitor the trade for safety considerations, could not be excluded by a term implied from trade usage. Solgas also did not establish that a uniform custom was observed in terms of which unauthorised distributors of LPG could fill the cylinders. Solgas was ordered to pay the costs.

Tolgaz Southern Africa v. Solgas (Pty) Ltd and Another 2009 (4) SA 37 (WLD).

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