LAW LETTER

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MacRobert
Attorneys

Your strategic partner at law

This Springtime edition of Law Letter looks at important new legislation, our precious environment, the law of property, contract and mineral rights, and the law of defamation. 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

■ A Period of Consequences

"The most terrifying words in the English language are: I'm from Government and I am here to help."
– Ronald Reagan (1911 – 2004)

THE BP oil spill in the Gulf of Mexico has underlined the lack of a principled approach in international law regarding accountability for environmental disasters.

If drilling in deeper and deeper waters is the only option left to overcome the failure of existing oil fields to provide for the world's rising energy demands, more catastrophic spills may be expected in future. Governments are aware of the odds for drilling in high risk locations and have to share the blame in the present collision of politics and big business.

BP has offered a large payment as a gesture of goodwill and not as a result of civil and criminal law investigations into the spill. BP faces high potential fines under the U.S. Clean Water Act, but it is questionable whether the domestic laws of individual states can resolve the jurisdictional and practical consequences resulting from the hazards of deep sea drilling in international waters by multinational entities. The problem is that recourse to international law will not be of much help.

Traditionally, international criminal law has only catered for relationships between states. Human rights violations compelled a change. As a result, individuals have been prosecuted for genocide and war crimes in Yugoslavia and Rwanda by international criminal tribunals. The next step to extend the jurisdiction of the International Criminal Court to corporate entities has not yet been reached.

International environmental crimes are seemingly limited to military infractions. Article 8 of the Rome Statute of the International Criminal Court has criminalised long-term and severe damage to the environment if it is clearly excessive of an anticipated direct overall military advantage. This provision is too narrow to cover a BP type disaster or tragedies like the world's worst ever industrial catastrophe at the Bhopal Gas plant of Union Carbide in India on December 3, 1984.

Civil law impediments to environmental lawsuits in the international milieu were evident in the Bhopal gas leak that caused thousands of deaths. It affected half a million people, but U.S. courts refused to hear victims who sought damages and a small *ex gratia* settlement payment is all that the people from Madhya Pradesh received. In spite of more than 25 years of continuing toxic waste contamination, legal actions seeking to force Union Carbide and its successors to finance clean-up operations have failed.

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Up to now vested interests have dwarfed environmental concerns, inhibiting a global signing of the Kyoto accord and causing developed countries to scuttle vital initiatives at the recent Copenhagen World Summit. The calamity in the Gulf has fuelled public outrage against the distinction between personal and business ethics and may yet initiate a watershed in environmental relations.

Uniform civil and criminal law remedies for environmental culpability can only be achieved by international treaties. Amongst others, the Rome Statute will have to be amended before executives, who escaped prosecution because their corporations were not under a domestic country's jurisdiction, can be brought before the International Criminal Court. As a first step this court will have to be recognised by all the large industrialised countries.

NEW LAWS

■ The Companies Act 71 of 2008

"It's far better to buy a wonderful company at a fair price than a fair company at a wonderful price."
– Warren Buffett

THE NEW **Companies Act** that will revamp and modernise our company law is now ready to come into effect, as the stipulated time from the date on which the President assented to the Act has elapsed. A rectification process that was initiated to amend grammatical errors and other flaws in the signed copy has also recently been completed.

Government is adamant that the Act must become law this year. The latest extension of time for its introduction has been set as October 2010. It seems unlikely that all outstanding problems will be sorted out before the end of the year so the Act will probably only become operational during 2011.

Allegations of fraud amongst officials at CIPRO (Companies and Intellectual Property Registration Office) may have contributed to the delay. The new Act will convert CIPRO into a financially independent and quasi legislative commission outside the public service with power to make rules, negotiate agreements and institute investigations.

One of the effects of the new Act will be that close corporations may no longer be registered or existing companies converted into close corporations which will, however, continue to exist. But time is fast running out to still register this more simplified form of enterprise.

■ The Consumer Protection Act 68 of 2008

"The consumer isn't a moron. She is your wife."
– David Ogilvy

THE WORLDWIDE movement towards the entrenchment of consumer rights has lead to the **Consumer Protection Act** being signed by the President. It may also become law during October 2010. There is a better chance that its outstanding issues will be settled by the due date than with the Companies Act.

The Act sets out minimum requirements to protect consumers against injuries or hazards caused from the sale of defective products and inferior goods or by the rendering of deficient services. A far-reaching set of consumer rights is introduced. Duties enforced on suppliers are also catered for. Careful note will have to be taken of provisions relating to marketing practices and labelling.

Legal remedies for damages include the burden of proof being placed on the supplier and not on the consumer as in the past. There are severe sanctions for non-compliance including administrative penalties computed as a percentage of the contravener's annual turnover.

The Act will fundamentally affect the way business is conducted. Standard agreements and operational processes will carefully have to be reviewed to ensure that they comply with the provisions of the Act.

Also affected are the common-law position of voetstoots clauses in commercial transactions. Voetstoots means that goods or properties are sold "as is", without any guarantees and no matter in what condition they are. The buyer only has redress if the seller knew about defects and kept quiet about them. Section 55 of the Act does away with the requirement of proving deceit by the seller, stipulating that every consumer has the right to receive goods that are suitable for their purpose, of good quality, in working order and without defect.

Sellers will be obliged to check the goods or property to be sold for latent and obvious faults and inform buyers.

Incidentally, the Act's stipulation that a business name must not be the same or similar to the name of a juristic person or a registered trade mark, is a further reason to register your business name as a trade mark. This provision has been introduced for consumers to know who to litigate against but will also strengthen trade mark rights.

RECENT JUDGMENTS

Defamation

■ Grin and Bare It

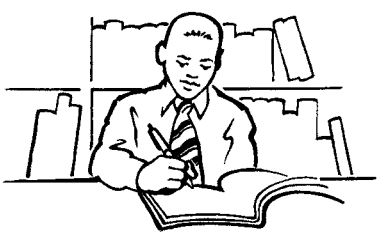
"Never injure a friend, even in jest."
– Marcus Tullius Cicero

THE CLASH of humour and the law resurfaced when three schoolboys tried to make fun of their teachers. They manipulated photographs by superimposing their headmaster and vice-principal's faces on the naked bodies of two obviously gay bodybuilders with their genitals being covered with the school badge.

The pupils were found guilty at a disciplinary hearing at the school and had to perform 56 hours of community service work. The vice-principal then instituted a court action.

The prank eventually ended up in the Supreme Court of Appeal where the boys maintained that their joke was not intended to injure the good name or reputation of the teachers and was not taken seriously. It was obvious that the faces in the photograph did not belong to the bodies and it was accompanied by a word play on the surname of the vice-principal.

Judge Louis Harms did *"not believe that jest excludes the intention to injure*" and found that *"if a joke is degrading the defendant's motive does not matter."* He held that the boys should have known where to draw the line between jest



and ridicule and that they were liable for defamation because their attempt at humour humiliated the vice-principal. He defined defamation as a published affront to a person's dignity.

In a minority judgment, Judge Bennie Griesel considered the natural and ordinary meaning of the picture as understood by its intended audience. The reaction of fellow learners at the school to laugh at the incongruity thereof was considered as significant. He found that the vice-principal failed to prove defamation as his reputation was not affected, but because he perceived the attempt at humour as insulting, his dignity was impaired.

This judgment was called into question in the media. The *Mail & Guardian* saw it as an obvious school prank that should have remained a disciplinary matter. The court should not have "created further uncertainty in an important area of the law relating to defamation."

The Appeal Court's understanding of the nature of humour prevailing in society had previously been questioned in the *Laugh It Off* case when the Constitutional Court overruled its decision to interdict the use of a trade mark for beer as a parody on T-shirts. It induced Judge Albie Sachs to comment: *"The Constitution cannot oblige the dour to laugh. It can, however, prevent the cheerless from snuffing out the laughter of the blithe spirits among us."*

Before the ridicule of the vice-principal could be regarded as defamatory or insulting, it has to be viewed in the context of robust, sometimes immature, sometimes corny schoolboy humour and the measure of respect that teachers, who are often the butt of jokes, can reasonably expect from that quarter. The constitutional rights of free speech and of children, who had already received punishment for their actions, has to be balanced with the right to dignity.

The matter is on appeal to the Constitutional Court. It will come down to a consideration of whether or not the appeal court prescribed conduct that is out of touch with a reasonable understanding of the social norms of adolescent society.

Le Roux v. Dey 2010 (4) SA 210 (SCA).

■ Blotting Out History

ANOTHER APPEAL Court judgment on defamation that has received bad press for being too legalistic and is being appealed to the Constitutional Court, was discussed in the June issue of *Law Letter*. *The Citizen* newspaper was held liable for falsely branding Robert McBride as a criminal and murderer because it failed to mention that he had received amnesty for his crimes. The media supported the minority judgment of Judge Mthiyane that a true reference to a past event cannot become false for the victim because amnesty has expunged its consequences for the perpetrator. He drew an interesting parallel: *"The biblical descriptions of Cain, Moses and King David as murderers have never so far as I am aware been challenged as false because they have not been convicted in a court of law of that crime."*

The Constitutional Court will have to decide how far the legal consequences of amnesty can inhibit the right to freedom of expression.

The Citizen 1978 v. McBride 2010 (4) SA 148 (SCA).

Contract Law

■ Anchoring Tenants

"Things aren't right. If a burglar breaks into your home and you shoot him, he can sue you. For what, restraint of trade?"
– Bill Maher

BEDFORD SQUARE Properties entered into a restraint of trade agreement with the owners of the adjacent Eastgate and Village View shopping centres, undertaking that it would not lease out rental space to Woolworths or Mica Hardware for a period of 11 years.

During this period Bedford Square wished to conclude a lease agreement with Woolworths. It applied to the court for a declaratory order that the enforcement of the restraint was contrary to public policy and unenforceable. Village View opposed the application.

To be successful, Bedford Square had to prove that

- Village View did not have an interest deserving of protection;
- a weighing of the respective interests of the parties justified it;
- the agreement was inherently unreasonable;
- there was oppression by Village View as a result of an imbalance in the bargaining position of the parties.

According to Judge Nigel Willis these considerations did not apply. Restrictions on tenants of particular shopping centres are a well-known feature of the commercial landscape and a legitimate protectable concern for landlords.

The principle of freedom of contract had to be observed in this matter and could not be set aside on grounds of public policy. Bedford Square remained bound to its undertaking.

Bedford Square Properties v. Liberty Group 2010 (4) SA 99 (GSJ).

■ Time Out

"Probable impossibilities are to be preferred to improbable possibilities."

– Aristotle

THE EXECUTOR in the estate of the late Marjorie Dent sold mineral rights to Southern Era Resources. The purchase price was payable against registration of a cession of mineral rights and the purchaser provided the required security for payment with a bank guarantee. There was a delay in obtaining the necessary consent to the sale from the Master of the High Court due to uncertainty about heirs in the estate. The guarantee was returned to the purchaser on the understanding that it would be furnished once the identity of the heirs was confirmed.

On 21 April 2004 the Master issued his certificate and a letter was immediately sent to the purchaser to furnish the bank guarantee by 6 May 2004. Before this could occur a section of the **Deeds Registries Act** was repealed on 1 May 2004 with the result that the registration of cessions of mineral rights was no longer possible.

Who bore the risk of loss or destruction of the mineral rights depended on whether the sale had become complete before the date on which it became impossible for the executor to give transfer.

It was common cause that the sale remained incomplete until such time as the Master gave his consent. For the sale to remain incomplete, the purchaser's furnishing of a guarantee had to be a true suspensive condition and not a mere contractual term.

Judge Mpati decided that the discretion for a rejection of the guarantee lay with the seller. For the purchaser it was an enforceable contractual obligation and the condition in question was merely to ensure that the executor did not part with his rights without an assurance that the purchase price would be paid.

He accordingly concluded that when the purchaser was informed on 22 April 2004 that the Master had issued his certificate, the agreement between the parties became unconditional and the sale was complete. The risk of impossibility of delivery of the mineral rights had therefore passed to the purchaser and he was still obliged to pay the purchase price.

Southern Era Resources v. Farndell 2010 (4) SA 200 (SCA).

Property Law

■ Out of Order

"The truly proud man knows neither superiors nor inferiors. The first he does not admit of; the last he does not concern himself about."

– William Hazlitt (1778 – 1830)

JUDGE NIGEL WILLIS in the Johannesburg High Court dismissed an application to set aside a transfer of property on which an eviction order was based. He proceeded to grant the Emfuleni Local Municipality an order for the eviction of a large number of poor tenants in terms of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act** (PIE). He did not stay the execution of the eviction order when granting the tenants leave to appeal to the Supreme Court of Appeal.

The tenants approached the Constitutional Court on an urgent basis. It suspended the execution of the order and duly criticised Judge Willis for granting it while the appeal was pending, for not having regard to the Constitution and found it "inexcusable" that the eviction was authorised without regard to the provisions of PIE.

Thereafter the matter was heard by the Supreme Court of Appeal, which referred it back to the High Court after it had set aside the sale and transfer of the property.

Judge Willis consequently expressed the view that clarity was required as to eviction orders and the requirements of PIE. In order to achieve this, he requested the Deputy Judge President to appoint a full court of three judges to hear the application for eviction.

He went further and in turn criticised the Constitutional Court with intemperate language stating: *"Quite how the Constitutional Court could have come to this conclusion is one of*

the great unfathomable mysteries of my life." He proceeded to set out his own personal views and theories on economic liberty and the right to property, doubting the higher courts' emphasis on socio-economic rights and citing economic "success stories" in developed countries including praise for Tony Blair in a politicised statement outside the domain of the bench or the pleadings of the matter.

The judge was criticised in the media for vilifying the highest court of the country, for ignoring the Constitution as well as legislation enhancing constitutional protections and for subverting judicial power to assert his own economic values.

Emfuleni Local Municipality v. Builders Advancement Services 2010 (4) SA 133 (GSJ).

■ You sleep, you weep

"Our favourite holding period is forever."
– Warren Buffett

IN TERMS of the **Sectional Titles Act** a developer may, at the time of registering a development, reserve the right to extend the scheme. The developer has to stipulate the time span required to complete the future extensions and has sole discretion to fix the period. Detailed plans of the envisioned units on the specified portion of the common property must be provided as well as how it will affect all sections of the scheme. This right lapses after the period for which it had been reserved.

This right must be registered against the development at the relevant deeds office.

A developer wished to extend the elected period of 10 years in respect of the Waterfront Mews sectional title scheme in Gauteng. On appeal it was confirmed that this was a registered servitude and that the courts have no inherent or statutory power to extend the period or assist the embarrassed developer when opposed by an aggrieved unit owner.

The following passage from the judgment of Judge Botha of the High Court was quoted with approval: *"I simply cannot see how a court can, without express statutory authorization, make an order that will have the effect of adding to someone's real right and at the same time subtracting from someone else's real right."*

S P & C Catering v. Body Corporate of Waterfront Mews 2010 (4) SA 104 (SCA).

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