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# LAW LETTER

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*A vital function of our courts is to hear appeals from lower courts, and an important component of the judicial process is the right of an unhappy litigant to appeal an unfavourable judgment. In this edition of Law Letter we look at some recent decisions of courts of appeal which illustrate why difficult decisions of law often can and do go either way. 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 CASES

### Damages

#### ■ Puncture Juncture

*"And without fear the lawless roads  
Ran wrong through all the land."*

– Edwin Muir (1887 - 1959)

IN AUGUST 2004 Pietermaritzburg advocate, Allistair McIntosh, was out cycling with friends. While negotiating a steep bend in the Kamberg valley of the KwaZulu-Natal Drakensberg, McIntosh suddenly became aware of an enormous pothole in his path. In an attempt to avoid the pothole, he lost control of his bicycle, fell and suffered serious injuries.

McIntosh claimed damages in the Pietermaritzburg High Court on the grounds that the MEC for the KwaZulu-Natal Department of Transport, amongst others, was negligent and consequently responsible for his injuries. He alleged that the MEC had a duty to ensure that potholes were timeously repaired and that adequate measures were taken to ensure that road users are made aware of the potential danger arising from such hazards.

The High Court dismissed his claim. Its view was that McIntosh was solely to blame as he was travelling at 55 km an hour when the accident occurred. Dissatisfied with this decision, he appealed to the Supreme Court of Appeal.

McIntosh argued on appeal that the MEC's negligence arose from his failure to ensure that the pothole was repaired before the date of the accident and certainly long before it had grown to such a significant size. The provincial government, on the other hand, denied any negligence on its part and attributed the serious deterioration of the KwaZulu-Natal road network to under-funding and a lack of resources.

Judge Doug Scott considered the provincial government's legal duties and weighed up the reasonableness of its conduct. Ultimately, McIntosh's appeal was upheld

primarily because the provincial government could not provide reasons as to why the pothole was left unrepaired for such an unreasonably long period of time. The provincial government had not produced evidence of a policy that prioritised certain potholes over others due to financial restraints. It merely alleged, without evidence, that under-funding was the reason that the pothole had not been attended to.

Having found the provincial government to have been negligent, the court had to decide whether McIntosh had also been negligent and had contributed to his own damages. The court found that McIntosh had been partly negligent in that he was cycling at high speed when the accident occurred. The court accordingly apportioned damages in the ratio of 60:40 in favour of McIntosh.

The provincial government applied to the Constitutional Court for leave to appeal against the Supreme Court of Appeal's judgment. The Constitutional Court has, however, dismissed the application on the basis that there is no constitutional issue in dispute.

*McIntosh v. Premier, KZN (632/07) [2008] ZASCA 62.*



#### ■ Candle in the Wind

*"To be, or not to be: that is the question."*

– William Shakespeare, *Hamlet*

THE SUPREME COURT OF APPEAL was recently faced with a question of profound complexity.

Mrs Stewart consulted a general practitioner and obstetrician during the course of her pregnancy. Neither doctor picked up the fact that her baby had severe congenital defects and the baby was born with abnormalities of the brain and lower spine.

## ■ Mix 'n Match

*"The more things change, the more the stay the same."*  
– Alphonse Karr (1808 - 1890)

WHEN the Gauteng Department of Health negotiated with the Gauteng Anti-Tuberculosis Association to take over the Association's hospitals, an agreement was reached that the Association's staff would not automatically be transferred to the Department. In addition, the salaries of those staff who were transferred would be matched to the nearest applicable State salary. At the same time fears were allayed by assurances that conditions of employment would remain the same until all transfer-related issues had been considered and resolved.

Three managers, who had represented the Association in its negotiations with the Department, were surprised to find themselves facing offers of three months' fixed term employment at much reduced salaries. The managers complained to the Department and were told either to accept the offer or cease work. The managers chose the latter and referred a complaint for unfair dismissal to the Public Health and Welfare Sectoral Bargaining Council. They subsequently took the matter to the Labour Court.

The default position, under Section 197(2) of the **Labour Relations Act**, is that, if a business or business unit is transferred as a going concern, the staff is automatically transferred to the new employer on the same terms and conditions of employment. This position may be varied in terms of Section 197(6), but only by an agreement reached between the old and new employers and the employees.



Nobody disputed the fact that the hospitals had been transferred to the Department as a going concern. The only question was: were the managers entitled to automatic transfer to the Department on the same terms and conditions, or had the agreement successfully altered their statutory rights?

Judge Van Niekerk pointed out that one of the requirements

Mrs Stewart approached the Cape Town High Court, claiming damages from the doctors in her own name and on behalf of her son. She did not allege that the baby's problems had arisen because of the doctors' negligence, but that the doctors had been negligent in not detecting the presence of abnormalities. Had she known of the baby's problems, she would have undergone an abortion.



The doctors argued that there was no duty on them to ensure that the baby was not born. This would be contrary to public morals and public policy. The High Court ruled that Mrs Stewart's claim had prescribed, but indicated that she might otherwise have succeeded as she had the right to terminate her pregnancy and would have done so had she been informed of her foetus' congenital defects. The court went on to dismiss the baby's claim, but granted leave to appeal.

The Supreme Court of Appeal had a tough question to answer: was it preferable from the baby's perspective not to have been born at all? If the baby's claim were to succeed, the court would be required to evaluate his existence against his non-existence and to find that the latter was preferable. The court concluded that, along with most courts around the world, it could not recognize his claim.

Had the doctors properly informed Mrs Stewart, her child would not have been born, but once born, he has a constitutional right to life. To allow a claim of this nature would open the door to a child's claim against its mother in circumstances where the mother was informed of the congenital defects but chose not to terminate her pregnancy. It would also cause medical practitioners to be overly cautious and to advise termination of pregnancy in order to avoid the possibility of liability.

The Supreme Court of Appeal determined that, on grounds of public policy, the child's right to life should be recognised and that his interests would be best served by being permitted to be born and having access to the best possible medical care. The anguish of the judges of appeal can perhaps be heard in their concluding words:

*"Whether a particular child should have been born at all . . . that is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law."*

*Stewart & Another v. Botha & Another [2007] 3 ALL SA 440 (C).*

of Section 197(6) is that the agreement be concluded between the correct parties – between the old and new employers and the employees. The Department argued that the three managers had been part of the negotiations and, as such, were aware of the contents of the agreement and its consequences for their employment. These managers could not, the Department said, now evade the agreement. The court was not convinced. Participation by the managers in negotiations as representatives of the Association was not the same as the conclusion of an agreement with these managers as individual employees. As a result, the agreement was not compliant with Section 197(6) and the managers were entitled to rely on their statutory rights to automatic transfer on equivalent terms and conditions. The Department's instruction to the managers to either accept the offer or cease work therefore constituted a dismissal.

The court was then asked to consider whether the dismissal was automatically unfair, entitling the managers to increased compensation. Under the Labour Relations Act, a dismissal is automatically unfair if the reason for the dismissal, amongst other things, arises out of the transfer of a business as a going concern. The employees had to demonstrate a clear causal link between the transfer of the hospitals to the Department and their refusal to accede to the Department's ultimatum to establish that an automatic unfair dismissal occurred. The court was satisfied that the managers were automatically unfairly dismissed and they were awarded 24 months' remuneration in compensation, together with costs.

*Douglas and Others v. Gauteng MEC for Health [2008] 5 BLLR 401 (LC).*



## Banking

### ■ Dropped Catch

*"Money talks, they say. All it ever said to me was 'goodbye'."*  
– from the movie, *None but the Lonely Heart*.

THE South African Revenue Services has some handy powers under the **Income Tax Act**. One of these is the power to issue a garnishment instruction requiring a taxpayer's bank to pay over monies standing to the credit of the taxpayer.

Nedbank's head office received an instruction to debit a client's account and pay monies over to the South African

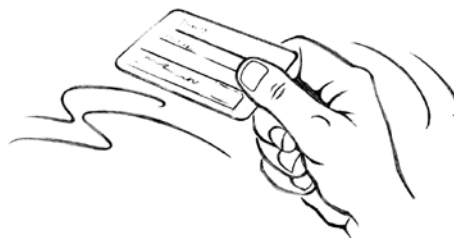
Revenue Services. Before the relevant branch received the instruction, it received and complied with instructions from its client to transfer money to Pestana, who held an account at the same branch. The credit to Pestana was quickly reversed when the bank realised its mistake.

Pestana was unhappy with this reversal of fortunes and approached the court for an order requiring Nedbank to credit his account with the amount originally transferred. Pestana's claim was dismissed, but he took the matter on appeal.

The Appeal Court found that the garnishment instruction did not have the effect of freezing the client's account or of effecting the cession or transfer of the entire contents of the account to the South African Revenue Services. Having said that, the crediting of Pestana's account had been unconditional and, as such, could not be reversed. The only exception might be if the monies were acquired by theft or fraud, but this had not been the case. Once the debit and credit had been made, they represented a binding legal act that was independent of its underlying cause. The fact that Nedbank had mistakenly made the transfer was not relevant.

The court ordered Nedbank to pay Pestana's legal costs and to credit his account with the amount originally transferred.

*Pestana v. Nedbank Ltd 2008 (3) SA 466 (WLD).*



## Law of Contract

### ■ Twists and Terms

*"That was a way of putting it – not very satisfactory leaving one still with the intolerable wrestle with words and meanings."*

– T.S. Elliot (1888 - 1965)

FOR AS long as people have been entering into contracts, there have been disputes about their interpretation. To add to the confusion, contracts may contain, amongst others, express and implied terms. Express terms are those terms that are actually stated, whether in writing or verbally in an oral contract. Implied terms, as the name suggests, are terms the parties have not spelled out, but which can be inferred or implied from the express terms. The Supreme

Court of Appeal recently had to unravel these types of terms.

SDR Investments loaned money from Nedcor to buy three Stellenbosch wine estates. It wasn't long before SDR Investments defaulted on its monthly repayments to Nedcor. Rather than liquidate the company and attach



the farms, Nedcor rather generously agreed with SDR Investments that it would auction off the farms and discharge the debt from the proceeds. Further, there would be a 14-day period after the auction when Nedcor, at its discretion, could consider any higher offers.

The farms were sold collectively for R31 million, but SDR Investments produced a buyer who, within the 14-day period, offered a higher price. Nedcor refused the new offer and stuck with the bid placed at the auction.

The management at SDR Investments was not impressed and legal action was promptly instituted against Nedcor. In the High Court SDR Investments argued that, while not breaching any of the express terms of the contract between the parties, Nedcor had failed to comply with implied terms which imposed obligations on Nedcor to secure the highest possible price for SDR Investments, to act in good faith and to exercise the skill and diligence expected from a large banking institution. The High Court accepted SDR Investment's argument but Nedcor took the matter on appeal to the Supreme Court of Appeal in Bloemfontein.

The Supreme Court of Appeal concluded that the agreement expressly gave Nedcor the discretion, but not the obligation, to accept a higher offer in the 14-day period. Given that Nedcor had a discretion, the bank was entitled to accept the bid made at the auction and was not obliged to hold the matter open for the 14-day period. The court could not infer implied terms that were contrary to the valid express terms of an agreement. At the most, the court could infer a duty on Nedcor not to act in bad faith but there was nothing to suggest that the bank had done so. Nedcor's appeal was upheld.

*Nedcor Bank Ltd v. SDR Investment Holdings Co (Pty) Ltd and Others 2008 (3) SA 544 (SCA).*

## ■ Breaking up is hard to do

*"Our farmers round, well pleased with constant gain,  
Like other farmers, flourish and complain."*

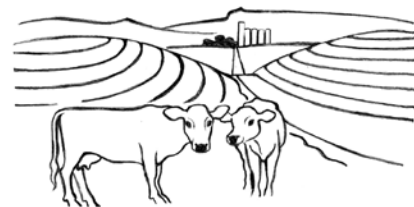
– George Crabbe (1754 - 1832)

THE SUBDIVISION of Agricultural Land Act requires that owners of agricultural land obtain consent from the Minister of Agriculture to subdivide agricultural land. Any sale of a proposed subdivision is invalid if it is entered into before ministerial consent is granted.

Lawyers, farmers and property developers were stirred up in 2007 by a decision of the Supreme Court of Appeal. The effect of the judgment was that land that was classified as agricultural land when the transitional local councils were elected lost its agricultural character when municipal councils replaced these transitional local councils. Did this mean that farmland could be subdivided and developed without reference to the Minister of Agriculture?

Wary Holdings had sold a proposed subdivision of agricultural land to Stalwo but had occasion to regret the agreed purchase price. Seeking to escape the deal, Wary Holdings argued that the sale was technically deficient as ministerial consent for the subdivision had not been obtained.

The Supreme Court of Appeal had to decide whether the land in question was "agricultural land". If the land was not "agricultural land" for the purposes of the **Subdivision of Agricultural Land Act**, then the minister's consent was not necessary and the sale agreement was binding.



The Act defines "agricultural land" as any land falling outside the area of jurisdiction of, amongst others, a "municipal council". This made sense before the establishment of transitional councils in 1995, because municipalities then comprised limited pockets of jurisdiction. Vast areas falling outside local government jurisdiction qualified as "agricultural land".

The Constitution introduced radical changes to South Africa's institutional landscape. Not least of these was that post-1995 municipalities have "wall-to-wall" jurisdiction.

Today, no land falls outside the area of jurisdiction of a municipality.

The definition of "agricultural land" was amended in 1995 in response to the constitutional changes. The definition now states that land which is situated in the area of jurisdiction of a transitional council and which was classified as agricultural when the first members of that transitional council were elected, remains agricultural land.



The Supreme Court of Appeal decided that the amendment was intended only temporarily to preserve the status of agricultural land. Once transitional councils were replaced by municipal councils in 2000, the classified land lost its agricultural character, unless specifically declared by the minister to be "agricultural land".

As a result, the Supreme Court of Appeal found that the land in question was not "agricultural land", the sale agreement was valid and Wary Holdings could be held to its bargain.

This dispute has since reached the Constitutional Court which has reversed the ruling of the Supreme Court of Appeal. The Constitutional Court found that the ordinary meaning of the amended definition of "agricultural land" was that farmland retains its classification and that this classification is not tied to the life of the transitional councils.

The amendment simply pinpointed the stage from which land classified as "agricultural land" would retain that classification and the classification did not fall away with the development of new local government structures.

The result? The consent of the Minister of Agriculture is still required for the subdivision of agricultural land and the agreement between Wary Holdings and Stalwo was accordingly invalid. Wary Holdings could escape its unfavourable deal.

*Wary Holdings (Pty) Ltd v. Stalwo (Pty) and Another [2008] ZACC 12 (25 July 2008).*

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