
LAW LETTER

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Transnet, Checkers Supermarket, the National Lotteries Board, FirstRand Bank, ABSA and the Minister of Finance all feature in this early Summer edition of Law Letter as we examine recent decisions of the Constitutional Court, the Supreme Court of Appeal, and various divisions of our High Court. 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

Law of Contract

■ Dock Up and Go

*“Like two doomed ships that pass in a storm
We had crossed each other’s way;
But we made no sign, we said no word,
We had no word to say.”*

– Oscar Wilde (1854 - 1900)

NEEDING to dry-dock its vessel for a period of two weeks, the owner of the MV *Snow Crystal* made arrangements with the dock master, Cape Town, in March 2002 to utilise the Sturrock dry dock from 1 December to 14 December, 2002. The arrangement was confirmed in writing in June 2002 when the dock master required the owner to furnish an “official booking” for the vessel. This was by way of a printed form prepared by Portnet that had to be completed with information regarding the date of the dry-docking and particulars regarding the size of the ship. It was signed by the owner’s agent. The reverse side of the form contained a “declaration” which made Regulation 61(1) of the Harbour Regulations applicable to the intended dry-docking. The regulation itself obliged the owner of the vessel or its agent to sign an agreement acknowledging that it was bound to the terms of regulation 61 and undertaking to pay the applicable charges. The printed application form was, essentially, the agreement envisaged in the regulation.

The *Snow Crystal* was ready to enter the dry-dock on 1 December 2002, as arranged, but the dock was, on that date still occupied by another vessel, the *Gulf Fleet 29*, on which work was still being performed. Although the *Gulf Fleet* had been booked in the dock for a period ending on 30 November, its owners declined to move their ship which could have been accommodated in a smaller dry-dock that was not large enough for the *Snow Crystal*. The dock master adopted the attitude that the continued occupation

of the dry-dock was not his fault and failed to exercise the powers available under regulation 61(10) which would have entitled him to force the *Gulf Fleet 29* to be moved to make way for the *Snow Crystal*.

On being advised that it could not dock until 10 December, the *Snow Crystal* carried out certain temporary work before sailing without using the facilities of the dry-dock. It was subsequently dry-docked a year later in Bulgaria where the work that should have been done in Cape Town was carried out.

The owners of the *Snow Crystal* sued Transnet for damages. These included the cost of the temporary work that had been carried out to enable the vessel to sail efficiently, namely scraping of the hull, polishing the propeller and repainting of the top-side and boot top of the vessel. The cost of further repainting which, if it had been done while the vessel was in dry-dock would not have been required until the vessel had again been dry-docked three years later, and the loss of charter hire while the vessel was in dry-dock in Bulgaria were also successfully claimed in the Cape High Court.



Transnet appealed. It contended in the Supreme Court of Appeal that there was no contract between the parties, arguing that the relationship between the parties was governed

by the Harbour Regulations and that the booking of the dry-dock was not made with any intention of contracting. The owners had merely arranged to use the facilities available against payment of the charges set out in the Official Harbour Tariff Book.

This argument was rejected by the Appeal Court. It said that there had been an ordinary commercial undertaking. For instance, had the vessel been dry-docked in Cape Town the owners would have been liable to Transnet for the charges relating to the use of the dock on the basis of a contract. Transnet’s further argument that it was excused performance by reason of impossibility arising out of the presence of the *Gulf Fleet 29* in the dock also failed because the dock master could have exercised his powers to cause that vessel to move.

Transnet Ltd t/a National Ports Authority v. Owner of mv Snow Crystal 2008 (4) SA 111 (SCA).

■ Two-time Loser

A SIMILAR problem, namely whether the action in issue was purely administrative or was contractual in nature was considered by the Constitutional Court in this case. The plaintiff, Ms Chirwa, had been an employee of Transnet. After being subjected to disciplinary procedures she was dismissed but she did not pursue her claim alleging unlawful dismissal through the structures available under the **Labour Relations Act**. Instead, she approached the Constitutional Court and argued that her dismissal constituted an administrative decision that should be dealt with under the provisions of the **Promotion of Administrative Justice Act**. Not so, said the Constitutional Court. Ms Chirwa was not in a preferential position because of her status as a public sector employee and her remedies, if any, lay in terms of the labour legislation. The decision to dismiss her was not an administrative action.

Chirwa v. Transnet and Others 2008 (4) SA 367 (CC).



Banking

■ Banker Rolling the Dice

"The tempter or the tempted, who sins most?"
– William Shakespeare (1564 - 1616)

"ACROSS THE country there are people who keep their spare money under mattresses, or under the floorboards, or in glass jars." These were the opening words of Judge Bob Nugent in the Supreme Court of Appeal when deciding whether Firststrand Bank was running an illegal lottery. In an attempt to persuade some of the 17 million people said to hoard their spare money in the manner described to deposit it with the bank, Firststrand produced a scheme which it entitled the "Million-a-Month Account". This was essentially a savings account that operated at no cost to the customer. Withdrawals were possible only on 32 days' notice and a nominal interest rate of 0.25% was paid on the deposit. The real attraction of the account was that for each R100 credited to the account on a selected day each month, the depositor had a chance of winning a prize. One of these was the bonanza of R1 million.

But the National Lottery has a monopoly on collecting money from the general public in this way and the National Lotteries Board applied to the High Court for an interdict to stop the scheme. The application was successful but

Firststrand appealed. It argued that for a lottery to be unlawful there had to be a "subscription" by the participants and the definition of a subscription requires there to be a payment of money. Because the depositors in the Million-a-Month Account were entitled after 32 days to receive back in full the amount deposited, it was contended that nothing was given to Firststrand in consideration for the chance to win a prize and so there was no subscription. Reference was made to the Defence Bonus Bonds which the government had issued from 1980 for some years. These were loans to the government for a year, carrying tax-free interest and also the opportunity to win large cash prizes which were awarded each month. That scheme also had been challenged as amounting to a lottery but the challenge had been defeated because bond-holder's chance to win a bonus did not involve the holder in any risk or loss of his or her deposit or interest.

The Appeal Court did not agree with that reasoning. It decided that what passed to the bank – irretrievably for the period concerned – was possession of the depositor's money with its potential to be used for the benefit of the bank. The very purpose of the transaction was to bring about the transfer of possession of the money which is the bread and butter of banking and was therefore capable of constituting a "stake". The Million-a-Month Account was indeed a lottery.

Firststrand Bank v. National Lotteries Board [2008] 3 ALL SA 121 (SCA).



■ Cash Converters

THE APPELLANT, a company incorporated in Kazakhstan, was involved with the establishment of a gold and copper mine and processing facilities at a site known as the Varvarinskoye Project (the VP) in Northern Kazakhstan. Needing a project engineer and lead contractor for the VP, the appellant appointed MDM Ferroman (Pty) Ltd (MDM), a South African company to supply, on a design, build and turnkey basis, a complete and functional mineral plant for the production of gold ore and copper concentrate. The contract price was in excess of US\$55 million.

MDM was to be the lead contractor with the right to appoint sub-contractors. This arrangement involved the use of a special bank account with ABSA (Account 1313) which was dedicated to the payment of the sub-contractors. MDM and various other companies associated with it held other banking accounts with ABSA.

The relationship between the appellant and MDM became strained, the contract between them was cancelled by the appellant and MDM was subsequently placed in provisional liquidation. ABSA purported to apply set-off to the money held in account 1313 against other overdrawn accounts of MDM held at the Bank's Sandton Business Centre Branch and appropriated the money in Account 1313. In response, the appellant claimed that the money in that account belonged to it and was not subject to any set-off as between MDM and ABSA. It was the appellant's case that account 1313 was used to warehouse money destined for MDM and its sub-contractors until the contractual formalities were complied with which would entitle either or both to withdrawals of money. At the time of the appropriation by ABSA nothing was owing to MDM and only the sub-contractors had any claim to what was in the account. This argument did not find favour with the Johannesburg High Court but on appeal to the Supreme Court of Appeal the appellant succeeded.

It is not correct, said Judge Navsa, that it is a universal and inflexible rule that only an account holder may assert a claim to money held in its account with a bank. Nor does the proposition that money deposited in an account becomes the property of the bank necessarily militate against a legitimate claim by another party. The funds in an account may "belong" to someone other than the account holder or, for that matter, the bank holding the money. In this case ABSA was aware, from the outset, of the purpose behind account 1313. It knew of the source and the very specific purpose of the funds. The bank had merely acted as the appellant's agent to warehouse the money in account 1313 for that specified purpose and accordingly there could be no set-off against money in that account.

In a separate concurring judgment, Judge Cachalia took the view that the agreement between the appellant and MDM required that the money paid into account 1313 would be held in trust and only dealt with in accordance with the instructions regarding payment under the contract. For that reason he suggested that ABSA's knowledge of the arrangement was irrelevant.

ABSA was ordered to repay to the appellant the amount of R28 244 780.59 which it had appropriated.

Joint Stock Co Varvarinskoye v. ABSA Bank Ltd and Others 2008 (4) SA 287 (SCA).

Company Law

■ Board Games

THERE is disagreement among the various High Courts on the question of whether, in the case of an application by a company for its own winding-up in terms of Section 346(1)(a) of the **Companies Act**, the proceedings may

be launched by the board of directors on behalf of the company or whether the company itself must resolve in general meeting to do so. Faced with an application brought by the directors of a company, Judge Horowitz in the Johannesburg High Court considered four of the more recent decisions on the point. He avoided any reference to older South African decisions or to United Kingdom cases dealing with similar legislation. Of the four cases, two were supportive of the application, two were against.

After careful consideration the judge added his vote to the opposition and held that a board of directors does not have power to make the application to wind up the company without a resolution of the company to do so. This continuing uncertainty will be resolved when the new Companies Bill, which is before Parliament, becomes law. Whereas Section 346(1)(a) of the current Act merely provides that an application to court for the winding-up of a company may be made "by the company", clause 81(1) of the Bill states that the court may wind up a solvent company if it has "resolved, by special resolution, that it be wound up".

Ex parte New Seasons Auto Holdings (Pty) Ltd 2008 (4) SA 341 (W).



Damages

■ There's Many a Slip

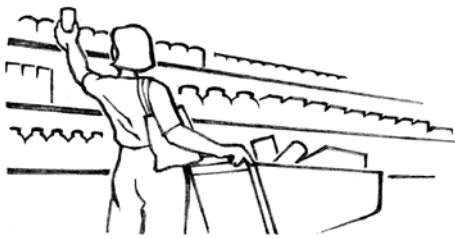
IN ANOTHER of what the presiding judge called "slippery shop floor" cases, the plaintiff slipped and fell on an oily substance on the floor in the fruit and vegetable section of a large supermarket. Judge Van der Reyden in the Pietermaritzburg High Court quoted from an earlier case (*Probst v. Pick 'n Pay (Pty) Ltd*) in which it had been held that:

"The duty on the keeper of a supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleared up as soon as it occurs. Nevertheless it does require a system which will ensue that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude."

Counsel for the supermarket argued that it had in place an adequate system to ensure that hazards were cleared

up reasonably quickly and that in the absence of any evidence from the plaintiff (on whom lay the onus to prove negligence) to prove for what period the oil patch had remained undetected, the supermarket could not be held liable.

The judge however observed that the length of time that the hazard remained undetected should not be emphasised without considering the adequacy of the cleaning system. The test was whether the supermarket had taken reasonable steps to guard against the possibility of spillage causing harm to customers. In this case the floor area of the store was approximately 15000 square metres and there were



about 22 aisles in which products were displayed. From 9h00 until 14h00 two cleaners were on duty to keep the floors cleaned but from 14h00 only one cleaner remained to do so. He was assisted by six staff members who were on the shop floor pricing and packing merchandise. They were required to cordon off spillages and to report them or to call the cleaner themselves to clear up the spillage.

This was not enough said the judge. Having regard to the vast floor area and the number of shopping aisles, the system relied upon was inadequate. One cleaner and six staff members who had other duties with which they were otherwise engaged at the time, could not deal timeously with hazardous spillages.

The supermarket was held to be liable.

Lindsay v. Checkers Supermarket 2008 (4) SA 634 (N).

and she, a few months after him. Only then was the error discovered. The executor of the two estates (a director of PKF (CPT) Inc) made application to the Cape High Court for an order rectifying the respective wills to reflect the true intent of the signatories at the time. A fairly complicated family structure involving grandchildren who included a half-brother to the others raised conflicting interests and the application was opposed.

Judge Goliath held that rectification was the appropriate remedy whereby the court could order the documents to be amended so as to conform to the true intention of the parties at the time which had, in error, not been recorded at the time of signature.

Section 2(3) of the **Wills Act** permits the court in the circumstances laid down in that section, to accept as valid a will which does not comply with the formalities of execution. On the facts of this case, however, the section could not be applied.

Rectification of a will has been permitted by our courts but the judge also sought assistance further afield and was able to refer to foreign judgments, mainly in New Zealand and Canada, in which, on facts similar to or exactly the same as in this case, rectification had been allowed. He ordered likewise.

Giles NO and Another v. Henriques and Others 2008 (4) SA 558 (C).



Estates

■ Mix-up Fix-up

*“One can only wonder
At so grotesque a blunder.”*
– Edmund Bentley (1875 - 1956)

MR AND MRS CAMMISA went together to the offices of PKF (CPT) Inc to sign the wills which PKF had been instructed to draft for them. During the signing process and unrealised either by Mr and Mrs Cammisa or the witnesses who were present, Mr Cammisa signed his wife’s will and she signed his. He died five years later

LEGISLATION

Tax Reform

■ Penalties for Tax Non-Compliance

THE MINISTER of Finance has released draft regulations to prescribe administrative penalties to be imposed by the South African Revenue Service (SARS) for non-compliance by taxpayers with their obligations under the **Income Tax Act**. The stated purpose of the draft regulations is to ensure the widest possible compliance with the provisions of the Act and to ensure that penalties are imposed consistently

and appropriately. A document comparing the systems for administrative penalties in various jurisdictions has also been released.

The draft regulations specify the penalties that SARS may impose and the procedures that it must follow when doing so. The "non-compliance" in respect of which penalties may be imposed, is widely defined. It ranges from failure to properly register as a taxpayer or to submit returns, to failure to provide information or documents to SARS when required to do so.

There is a scale of financial penalties, which increases in line with a taxpayer's taxable income for the year of assessment preceding that in which non-compliance occurs or a penalty is assessed. Companies that are listed or have annual turnovers exceeding R500 million (and, in both cases, their associated companies) occupy a minimum position on the penalty scale. Penalties increase if the non-compliance continues for an extended period of time or in cases of repeated non-compliance. Procedures are also set out in the regulations, under which taxpayers may apply for remission of penalties and the circumstances under which such remission may be appropriate.

There are special remission provisions for failure to register as a taxpayer and for an initial case of non-compliance. In the former cases, SARS may remit penalties where the taxpayer has come forward voluntarily and has submitted

outstanding returns for the last five years. If an act of non-compliance is the first for a particular taxpayer, SARS may remit the penalties if there are reasonable circumstances for the non-compliance and it has been subsequently remedied. In circumstances other than these, penalties will only be remitted where exceptional circumstances have prevented a taxpayer from complying with its obligations. Exceptional circumstances specifically listed include natural disasters, errors or delays on the part of SARS and severe financial hardship.

SARS' decisions in levying penalties or rejecting remittance requests are subject to objection and appeal.



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