# LAW LETTER

*Courts.Cases.Comment*

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Your strategic partner at law

***2011 promises to be a challenging year, not least for lawyers and their clients. This first edition of Law Letter deals with a variety of recent decisions of our courts which we are confident will enable our readers to keep abreast of legal developments in an entertaining and informative 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.***

# EDITORIAL

## The International Criminal Court

- "Whether a country would get away with a Truth and Reconciliation Commission on the basis that South Africa held it now into the second decade of the 21st century is a matter for doubt, because with the International Criminal Court up and running, I think the attitude of most members of the international community, with some unfortunate notable exceptions, is that people committing heinous crimes, such as genocide and crimes against humanity should not have any amnesty at all. There should be trial and punishment."

  *– former Constitutional Court Judge, Richard Goldstone (October 2010).*

- "It is proper that victims have the right to participate in trials before the International Criminal Court. However, the participation of victims should not infringe upon the fair trial rights of accused persons, especially the right to a transparent and public trial. Justice must not just be done, but must also be seen to be done. The court needs to ensure that victims remain participants and do not attain rights equal to those of the parties – the defence and Office of the Prosecutor. To do otherwise could jeopardise the coherence of the ICC system."

  *– Xavier-Jean Keïta, Principal Counsel for the Defence of the International Criminal Court.*

- "It's also important to remember that the ICC, as a court of last resort, acts only when national justice systems are unwilling or unable to do so. There will be less need for it to protect African victims only when African governments themselves improve their record of bringing to justice those responsible for mass atrocities."

  *– former Secretary General of the United Nations, Kofi Annan*
  (New York Times, *29 June 2009).*

THE INTERNATIONAL CRIMINAL COURT (ICC) is founded on the Rome Statute adopted by the United Nations. It came into force on 01 July 2002. It is the world's first permanent international criminal tribunal.

The ICC has been accused by certain African Heads of State, the African Union and others of being an imperialist or Western institution which disproportionately targets Africa. However, African states played a crucial role in the process leading to the creation of the court. 47 African states were present at the Rome conference in July 1998 and the vast majority voted in favour of the adoption of the final statutes. Nearly a third of the 108 states that have ratified the Rome Statute are African. More than 800 African civil society organisations are members of the coalition for the ICC, representing approximately one third of the membership. In June 2009 five of the court judges were African. One former judge, Navanethem Pillay of South Africa, is now the UN High Commissioner for Human Rights. In the ICC's March 2009 judicial elections 12 of the 19 judicial candidates were African citizens nominated by African governments. Three of the current cases being investigated by the ICC relating to Africa were in fact referred to it by the African countries themselves.

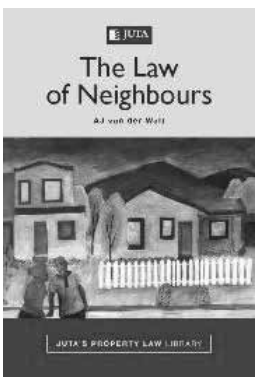
The ICC is also currently analysing situations outside of Africa, for instance in Colombia, Afghanistan and Georgia. Detractors of the ICC often refer to the fact that the United States of America is not a party to the Rome Statute. However, it is seldom acknowledged that other major powers such as China and Russia are also not party to the Statute. From South Africa's point of view, it is vital that we support the work of the ICC so as to give credence to our constitutional values that none are above the law.

# Book review

## The Law of Neighbours

*By Prof. A. J. van der Walt (Juta & Co Limited – 442 pages)*

THIS SOFT-COVERED volume in Juta's property law library series is a useful and practical handbook not only for lawyers, and students but also property owners and managers. It covers the traditional areas of neighbour law, such as party walls and fences, natural support, encroachment, interference with the natural flow of water, nuisance, and dangers caused by neighbours, as well as neighbour conflicts caused by building operations. There are chapters on the influence of the new constitution and the notion of living together as neighbours in a new democracy.




The book is well-organised and readable with each chapter having a brief introduction, setting out the background, summarising the law and looking at future developments which could be relevant.

There are chapters on surface support in mining law, trespass, and the exercise of servitude rights such as rights of way. The chapter on nuisance refers to cases dealing with dust, water pollution, flies, leaves, vibrations, continuous religious services, smoke, chicken farming, pig farming, dog kennels, an outside toilet and many other un-neighbourly disputes that have arisen.

There is a good subject index and separate indexes on applicable case law and legislation both in South Africa and abroad, as well as a bibliography for further reading and reference. Here you will find what the law says on interference with views, sunlight, natural light, the free flow of air, privacy and illegal building operations.

With increasing urban densification, the need for safety and security, the huge investment in property in South Africa and the protection and advancement of human rights, this is a welcome and accessible reference work.

# Recent cases

## Gambling Law

### ■ *Cross-border Raid*

*"It's a silly game where nobody wins."*
– Thomas Fuller (1654 - 1734)

CASINO ENTERPRISES owns and operates a land-based casino in Swaziland. It also operates an online casino from that country. It is licensed under Swazi law to do so. It advertised its online casino through radio station broadcasts in Gauteng province. The Gauteng Gambling Board objected and asserted that Casino Enterprises was not licensed to conduct a casino in Gauteng and that its internet online casino operation was in contravention of the **Gauteng Gambling Act** of 1995 as well as the **National Gambling Act** of 2004.

The stakes were high when the matter came before Judge Tuchten in the Pretoria High Court. Casino Enterprises engaged no less than three senior counsel and the Gauteng Gambling Board two senior counsel and one junior counsel. The Minister wisely decided to abide the decision of the court.

After considering the legislation, the judge decided that what takes place at an online gambler's computer terminal in Gauteng constitutes "gambling" as defined in the national and provincial legislation. The casino operator who runs his online gambling operation from servers in a foreign country will therefore contravene South African national and provincial gambling statutes to the extent that he allows persons in South Africa or Gauteng to gamble online without doing so from "licensed premises". The reason is that the gambler is then not gambling with the person who is the holder of a local license. The judge set out his views:

> *"The legislatures also recognised certain negative aspects attendant upon the establishment of a gambling industry. One of these was manifestly the undesirability of allowing unlicensed, and thus unregulated, industry operators to compete, probably at a cost advantage in regard to infrastructure and taxation, with industry operators which had spent large sums of money to get the necessary licenses to enter the market. … The South African gambling market is finite. It would be subversive of their own declared purposes for the legislatures to allow a foreign organisation to benefit from the local gambling market without fiscal compensation, whether in the form of licenses, infrastructure, job creation or otherwise."*

> *"The vulnerabilities of individuals and the risk of harm to their*

*families are, if anything, greater where the gambling takes place in a private home, rather than in a public place, where limitations on reckless gambling and access e.g. by children and other vulnerable persons, can be prevented or regulated. The provincial legislature has exercised a clear policy choice against the enjoyment of the casino experience from, to use the language on the plaintiff's web pages, the gambler's personal cosy abode where the gambler can just relax and be at home."*

*Casino Enterprises (Pty) Ltd (Swaziland) v. Gauteng Gambling Board & Others 2010 (6) SA 38 (GNP).*

# Competition Law

## ■ *Sour Cream*

*"Human beings are perhaps never more frightening than when they are convinced beyond doubt that they are right."*
– Laurens van der Post (1906 - 1996)

DEPUTY PRESIDENT of the Supreme Court of Appeal in Bloemfontein, Judge Louis Harms, and four other judges heard this appeal from the Competition Appeal Court. The appellants were Woodlands Dairy and Milkwood Dairy. They purchased raw milk from dairy farmers for resale after processing and packaging. They and a number of other major players in the industry were accused before the Competition Tribunal of "cartel activities", more particularly contraventions of certain provisions of the **Competition Act** of 1998. The dairies objected to the procedures which had been followed.

During 2006 the Commissioner of the Competition Commission initiated several complaints against the dairies, based on evidence gathered arising from previous summonses issued in 2005 and interrogations held in terms of a complaint initiation and investigation of the milk producing industry at all levels. In effect, the Commissioner had exercised his procedural powers against the dairies without first having initiated the complaint against them. He had acted in terms of the earlier 2005 industry-wide investigation, and then, using the evidence so collected, initiated the complaint against them in 2006.

Judge Harms concluded that the Commissioner was not empowered to investigate "generally" anti-competitive conduct. The "alleged prohibited practice" must have related to an alleged contravention of the Act, as specifically contemplated by one of its provisions.

At the very least, the law requires for the initiation of a complaint by the Commissioner, the possession of information concerning an alleged prohibited practice which could objectively have given rise to a reasonable suspicion that a prohibited practice existed. It is only once a valid complaint, based on reasonable suspicion, has been initiated, that the Commissioner can summons people for purposes of interrogation and production of documents. But there were no facts mentioned in the 2005 investigation which could have given rise to any suspicion that the dairies in question were involved. The scope of the summons cannot be wider than the terms of the complaint initiation, and the suspicion against some could not be used as a springboard to investigate all.

Because the 2006 complaint initiations all related back to the early investigation under the 2005 complaint, and were drawn as a consequence of that investigation, the 2006 complaints fell to be set aside because they were the direct consequence of an invalid complaints procedure. The appeal of the dairies succeeded, and the Competition Commission was ordered to pay their costs.

*Woodlands Dairy (Pty) Ltd & Another v. Competition Commission 2010 (6) SA 108 (SCA).*

# Personal Injury Law

## ■ *Home Zone*

*"It is a fine broad stairway at the beginning, but after a bit the carpet ends. A little further on there are only flagstones, and a little further on still these break beneath your feet."*
– Winston Churchill (1874 - 1965)

MR SWINBURNE was the tenant of a flat on the Bluff in Durban. On 16 April 2006 in the evening he fell and injured himself while climbing a short flight of stairs from the garage area of the block of flats to a path giving access to the flats themselves. He attributed his fall to negligence on the part of his landlord, mainly in failing to erect a handrail on the stairs which would have prevented his fall.

Judge Malcolm Wallis considered the case in the Durban High Court. In order to determine whether the landlord was liable to compensate Swinburne for his damages on the basis that it had been negligent in not providing a handrail, it had to be considered whether the landlord owed Swinburne a legal duty to take steps to protect him and other users of the stairs against harm arising from their use of the stairs. The issue related to legal liability arising from omissions.

In general, the legal position is that people are not under a legal duty to prevent physical harm to others, whatever moral duty they may be thought to have. However, in certain circumstances the legal duty to prevent harm or to protect another against harm may arise. The test is as follows: an omission would be wrongful if the landlord was under a legal duty to act positively to prevent the harm suffered by Swinburne. The test is one of reasonableness. The landlord would be under the legal duty to act positively to prevent harm to Swinburne if it would be reasonable to expect of him to have taken positive measures to prevent the harm.

Judge Wallis pointed out that the owner of a property is ordinarily liable to ensure that the property does not present undue hazards to persons who may enter upon and use the property. It is the owner's legal duty to ensure that the premises are safe for those who use them. This is so whether one is dealing with trespassers, visitors or anyone else who may have the right to enter upon the property such as tenants. There are a number of previous cases where the courts have imposed upon an owner of property the legal duty to ensure that the property, such as the condition of stairs and staircases are not a source of danger to members of the public using those approaches.

The judge concluded that the landlord had been negligent in failing to provide a handrail for users of the stairs leading to the flat. That failure meant that when the stairs were wet or covered with sand, wet soil or other debris rendering them slippery, users had no means of steadying themselves while climbing the stairs or if they happen to slip.

The court found in favour of Mr Swinburne and the landlord was ordered to pay the costs.

*Swinburne v. Newbee Investments (Pty) Ltd [2010] 4 ALL SA 96 (KZD).*

# Law of Property

## ■ *Anchor Tenants*

*"Don't clap too hard – it's a very old building."*
– John Osborne, British playwright (1929 - 1994)

MARK STEELE became the owner of a property in Yeoville in Johannesburg consisting of four large flats and three separate rooms which were originally staff quarters. These were leased out in terms of oral leases to a group of people. Steele alleged that the property had become run down, dilapidated and overcrowded leading to his decision to renovate it and terminate all the leases. He gave the occupants notice of termination of their leases and three months to vacate the property. None of them complied with the request to vacate.

As a result, Steele obtained orders of eviction in the High Court but the occupants then applied for the order to be rescinded. They had to show good cause why they had not opposed the order in the first place. They said they had approached a non-governmental organisation which provided assistance to people threatened with eviction. They failed to appear in court because they genuinely believed they were being assisted by this organisation. They had not understood that it could not itself provide them with legal representation and appear in court on their behalf. This explanation for their non-appearance was found to be reasonable and the judgment was rescinded.

In terms of the **Prevention of Illegal Evictions from and Unlawful Occupation of Land Act** of 1998 (the PIE Act), the court can only grant an eviction order once it is satisfied that it is just and equitable to do so. The occupiers contended that the High Court should have been aware of the fact that the occupiers were poor and faced the very real prospect of homelessness if evicted.

Acting Judge of Appeal Theron pointed out that the PIE Act gives effect to the constitutional guarantee of adequate housing. One of the primary objectives of the Act is to ensure that evictions take place in a manner consistent with the values of the constitution. The Act prescribes the requirements which must be satisfied before a court may grant an order of eviction. In keeping with this requirement, the courts have recognised that there is a duty on them, in the eviction notice, to consider all relevant circumstances such as the rights and needs of the elderly, children, disabled persons and households headed by women.

Judge Theron concluded that the High Court ought to have been proactive and should have taken steps to ensure that it had all the relevant information before it in order to enable it to make a just and equitable decision. The court had failed to comply with its constitutional obligations. It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless. A court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available.

In the circumstances the order for rescission was confirmed and the occupiers were granted leave to oppose the application for their eviction.

*Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v. Steele [2010] 4 ALL SA 54 (SCA).*

# Due and Proper Process

## ■ *Discovery Channel*

RULE 35 of the High Court Rules makes provision for the discovery and disclosure of documents which may be relevant to prove or disprove either party's case in litigation. The right of a party in a trial to discovery arises in the ordinary course only after the close of pleadings, by which time the legal issues have been identified. The party who is obliged to make discovery has the right to specify documents which are privileged and in respect of which that party has a valid objection to produce. The documents which must be discovered are documents relevant to an issue which may directly or indirectly enable the party requiring the discovery to advance his or her own case or damage the case of the opponent.

In a case recently heard before Judge Lamont in the South Gauteng High Court in Johannesburg, application was made for discovery of documents claimed to be necessary to obtain evidence to supplement the founding affidavit.

The judge observed that only in very exceptional cases is an order made directing discovery in application proceedings where the parties proceed on affidavit. The judge pointed out:

> *"In trial proceedings the legal issues existing between the parties are apparent once the pleadings are closed. That is the purpose of pleading. The factual issues are, however, not identified. The factual issues can only become identified once the facts in question are produced. This takes place by way of production of documents and by way of evidence given in court. The purpose of discovery is to enable the parties to become aware of documentary evidence that is available and to identify factual issues. In addition, discovery results in the production of documents that can be used in the course of interrogation of witnesses. The essential feature of discovery is that a person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues. Rather, it is the tool used to identify the factual issues once legal issues are established. Discovery is not intended to be used as a weapon in preliminary skirmishes. The right to discovery is an easily abused right and must be properly protected to ensure that it is used in the context in which it was designed for use."*

The judge dismissed the application seeking early production and inspection of documents in the application proceedings and ordered the applicant to pay the costs.

*STT Sales (Pty) Ltd v. Fourie & Others 2010 (6) SA 272 (GSJ).*





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