

LAW LETTER

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Your strategic partner at law



In this edition our roving spotlight falls on some hot topics dealt with by our courts – tenders, tax and urban housing. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney. We welcome your comments and suggestions.

INTERNATIONAL TREATIES

Tax Law

■ **Double Trouble**

*“Let’s find out what everyone is doing,
And then stop everyone from doing it.”*

– A.P. Herbert (1890 - 1971)

IN RECENT times, numbers of South African companies have migrated to neighbouring countries such as the Kingdom of Lesotho, partly in order to avoid paying taxes which might become due in South Africa. For this reason, the South African authorities have entered into agreements with a number of other countries, so as to ensure that no matter where a company or individual goes, taxes which become due can still be recovered. In 1995, South Africa and Lesotho entered into an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, more commonly known as a Double Taxation Agreement.

There is generally no duty or obligation which exists between countries to share tax information relating to its domestic citizens or companies. However, Article 25 of the Double Taxation Agreement between Lesotho and South Africa provides that “... competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement.” This sharing of information takes place within the ambit of the domestic laws of each country, including our **Income Tax Act**. Such information may only be disclosed to persons or authorities, including courts and administrative bodies, involved in the assessment or collection, or enforcement or prosecution in respect of and appeals relating to the tax matters under investigation. The competent authorities shall, through consultation, develop conditions, methods and techniques concerning how this exchange of information will take place.

The recovery of tax from a resident or company of the other country will usually be done by means of lodging an assessment in the name of the taxpayer concerned, who will then have to pay it over to the country to which tax is owed. Alternatively, if the circumstances permit, the tax authority in whose jurisdiction the taxpayer resides may withhold the tax owed from the taxpayer owing such tax and pay it over to the tax authority owed. Article 27 of the Double Taxation Agreement between South Africa and Lesotho relates to

assistance in recovery of taxes between the Contracting States subject to the domestic laws.

Section 74 of our Income Tax Act deals with the obtaining of information by the competent authority namely South African Revenue Service. A request for information with due notice to the taxpayer can be requested by the Commissioner of SARS with reasonable prior notice. These measures have been put in place, in line with international tax norms, to hamper criminal syndicates, promote tax policy efficiency and have clear policies that promote international trade.



RECENT JUDGMENTS

Administrative Law

■ **Cleared for Take Off**

*“Success is relative: it is what we can make
of the mess we have made of things.”*

– T.S. Eliot (1888 - 1965)

THE AWARD of Government tenders is governed by Section 217(1) of the Constitution. This section requires that the tender process, preceding the conclusion of contracts for the supply of goods and services must be fair, equitable, transparent, competitive and cost-effective. However, a procurement system may provide for categories of preference and for the advancement of categories of persons.

The **Preferential Procurement Policy Framework Act** of 2000 aims to achieve that goal. The Act provides that organs of State must determine their preferential procurement policy based upon a point system. The importance of the point system is that contracts must be awarded to the tenderer who scores the highest points unless objective criteria justify the award to another tenderer.

Indiza Airport Management (Pty) Ltd brought review proceedings in the Pietermaritzburg High Court against

BOOK REVIEW

PRODUCT LIABILITY IN SOUTH AFRICA

By Max Loubser & Elspeth Reid
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PRODUCT LIABILITY claims involve the recovery of damages for harm, whether to property or for personal injury, caused by a defective product.

The **Consumer Protection Act** of 2008 introduced strict liability on producers, importers, distributors and retailers for damage caused by defective goods. This was part of a series of measures in the Act to protect the interests of all consumers, and to ensure “accessible, transparent and efficient redress” to compensate them for grievances.

Strict liability means a consumer who has suffered harm from a defective product may bring a claim against the producer or supplier without having to prove any kind of fault on its part.

This well-researched book explains the issues surrounding strict liability for products. The authors draw on sources

in other jurisdictions with similar regimes and provide practical guidance on the application of the Act. Specific categories include design defects, manufacturing defects, instruction and warning defects, services involving goods and reconditioned products. Individual sections deal with particular goods such as pharmaceutical products, component parts, blood, gas and electricity, water and commercial products.

Not only lawyers but everyone in business responsible for quality control, research and development, production, distribution and marketing, as well as insurance cover will welcome this extremely useful handbook. Well-indexed, it contains full details of relevant South African and foreign legislation, case law, a bibliography for further

reference, and pertinent extracts from the Consumer Protection Act.



the Msunduzi Municipality in which it sought an order that the municipality's decision not to award a contract for the provision of management services for Maritzburg Airport to Indiza, to abandon the tender and to proceed with a new tender process, be reviewed and set aside, and directing that the original tender be re-instated and awarded to Indiza.

Judge Seegobin examined the facts and remarked:

"I make the observation that government procurement has become big business for many in this country. While the aim is to obtain goods and services in a transparent, efficient and cost-effective manner, in view of the large amounts of money involved, these awards often give rise to public concern. Additionally... these awards have become a 'fruitful source of litigation.'"

The judge's conclusion was that the reasons advanced by the municipality for cancelling the previous tender and its decision to re-advertise it, "cannot be justified in light of all the information that was before it at the time." The reasons advanced on behalf of the municipality were: "...without any substance whatsoever and are not rationally connected to all the information..." It seemed that both the Municipal Manager and

the Administrator merely appended their signatures to a report "without themselves applying their minds fully to everything that had transpired during the tender process."

The decision to cancel the tender and to re-advertise it in the face of compelling evidence that it should have been awarded to Indiza, offended the doctrine of legality and accordingly fell to be set aside. The judge said that an organ of State charged with a public function and utilising public funds, is required to act in a responsible, fair and transparent manner at all times. The municipality had clearly failed to do so in this instance. He said that the decision to cancel the tender and re-advertise it "...was procedurally unfair, arbitrary and materially influenced by an error of fact. The decision was irrational and not remotely connected to all the information that existed at the time."

Instead of remitting the matter back to the municipality, the judge said that because Indiza was the most compliant tenderer, that its tender was the only one that could truly be regarded as an acceptable tender within the provisions of the Act and its regulations, and because it had scored the highest total number of points, there could not be any prejudice to any other tenderer or to the public if the tender were reinstated and awarded to Indiza. It would be in the public's interest to bring

finality to the issue for the sake of effective service delivery and to avoid wasteful and fruitless expenditure.

The judge accordingly awarded the tender to Indiza and ordered the municipality to pay its costs.

Indiza Airport Management (Pty) Ltd v Msunduzi Municipality [2013] 1 All SA 340 (KZN).



Municipal Law

■ Shacks and the City

"Clearly, then, the city is not a concrete jungle, it is a human zoo."
– Desmond Morris (born 1928)

A GREAT DEAL of service delivery directly affecting members of the public takes place at local authority level. Failure to achieve acceptable standards of service delivery means not only that legal and regulatory requirements are not complied with, but also fails to achieve the socio-economic and constitutional rights to which all citizens are entitled. Apart from protests at street level within communities, many of these shortcomings are brought before our courts. In a number of cases recently, it is instructive to note what our judges have said and how they have approached these important challenges.

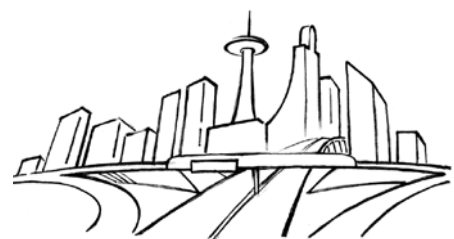
1. Rate Relations

- The South African Property Owners Association (SAPOA) brought an application to review a decision by the City of Johannesburg Metropolitan Municipality to increase the property rates on business properties by an additional 18%. This dispute eventually reached the Supreme Court of Appeal in Bloemfontein. Acting Judge of Appeal, Brian Southwood, dealt with the obligation to consult and stated:

- *"...the short period allowed for business organisations to comment on the amended rates for business properties was completely inadequate for any person or body to properly consider the matter, do the necessary research and prepare a meaningful representation. It is clear from the responses received from the business forums that they were not able to consider the matter properly and make substantial representations in the time allowed."*
- *"The City officials obviously considered that it was more important for them to meet their deadlines than to get*

the business community's comments. It is also noteworthy that the City did not ensure that SAPOA was involved from the outset. It was the most important organisation to consult as it represents 90% of all business property owners."

- *"The documents relied on ... clearly demonstrate that there is no rational connection between the facts and the decision to impose the additional 18% rate on business properties and that there is no legal basis for the justification of the additional increase."*
- Judge of Appeal Mohamed Navsa also pulled no punches:
 - *"...at the time that the rate in question was imposed, the valuation roll was in a chaotic state, not only because the objection process was still under way, but also because in relation to some commercial properties there had been a significant degree of undervaluation... Importantly, because of the unknowns, the variables and the imponderables one is unable to say with exactitude, if at all, what the rate on any category of property would have been had the valuation roll been rectified in time and had the statutory public participation process been followed. Put differently, a rate to deal with the revenue shortfall had not been lawfully adopted."*
 - *"The cavalier attitude of the Council might well have caused many businesses to founder and fail. To say to ailing businesses that may be entitled to recover monies that they have to wait a further three years would be to add insult to injury."*



- *"Does this mean the Council can continue flagrantly flouting the law with impunity? The short answer based on the principle of legality is no. If it becomes clear that the Council has not rectified or is not willing to deal with the shortcomings in the valuation roll, an application to court for a mandatory interdict would be warranted in advance of the budgetary process. If it becomes clear that the Council intends to continue denying its constituent ratepayers meaningful participation in the budgetary process and that it is resorting to irrational means in the process of determining rates a timeous application to court might well result in a proposed budget or even an adopted one being set aside. It is not inconceivable given the history that offending officials could be ordered to pay litigation costs personally."*

South African Property Owners Association v. Council of the City of Johannesburg Metropolitan Municipality & Others [2013] 1 All SA 151 (SCA).

2. Flop House

- The Supreme Court of Appeal has also been called upon to deliberate upon circumstances where a company was the owner of Tikwelo House in the inner city of Johannesburg. The City gave the owner notice to comply with the Public Health and Emergency Service By-laws as well as the provisions of the **National Building Regulations and Buildings Standards Act** of 1977. The owner in turn commenced eviction proceedings to regain possession of the building, citing 97 known occupiers of the building. The court considered the requirements of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act** of 1998 (known as PIE). Acting Judge of Appeal Malcolm Wallis set out the factual position.

- *“The building was formerly a factory or warehouse. The interior was divided into flats using rudimentary partitioning. Whether the original owners were party to this or whether its occupation occurred through people desperate for a roof over their heads simply taking possession of the building is not known. Whilst the building was in the hands of its previous owners, third parties took control of access to it and let rooms and collected rentals from the occupiers.*



South Gauteng High Court, Johannesburg

They now maintain that control ...by force or the threat of force. This phenomenon is appropriately described as the hijacking of the building. Tikwelo House is unsuited to human habitation and in a state of disrepair with no toilet or ablution facilities, no water supply or sewerage disposal, illegal electricity connections, inadequate ventilation and refuse, including human waste, strewn in open spaces. Counsel who appeared for the occupiers said that they accept that it is a death trap and it is in no-one's interests that they continue to live there. It is a health and fire hazard and the local police claim that it is a focus for illegal activity.”

- *“Very often it seems that once an eviction is ordered the Sheriff effects it, making use of assistance from security firms and the police. However, in many instances all that happens is that the Sheriff and his staff remove people and their belongings and dump them unceremoniously on pavements outside the building they have been occupying in scenes reminiscent of forced removals in the days of apartheid.”*

- *“The Constitutional Court has rightly said that the loss of a home, even one as exiguous as these appear to be, is a painful and often degrading experience. It has charged courts with responsibility for infusing ‘grace and compassion’ into the situation. One way in which that could be done would be if the property owner indicated a willingness to assist those displaced to move themselves and their meagre belongings to whatever new location they may have found or whatever emergency accommodation may be provided. That would ameliorate the situation of the evictees to some degree at some additional cost to the property owner. A tender to provide such assistance would help the court in determining whether the eviction and the date and conditions on which it is to be effected are just and equitable.”*

- *“Infusing grace and compassion into the process of eviction does not mean that an eviction should be postponed for as long as possible, but may mean that it should take place expeditiously. If delayed, the property owner bears the burden of not having access to its property, whilst*

the authority responsible for attending to the housing needs of the persons in unlawful occupation of the premises postpones the discharge of its obligation. Where, as here, the occupiers are living in conditions of the utmost squalor at the risk of their lives and health, the court should be concerned that the process is expedited so that they are moved away from that situation as soon as possible. It is noteworthy that local authorities are vested with statutory powers under other legislation to address situations such as these.”

City of Johannesburg v. Changing Tides 74 (Pty) Ltd & Others [2013] 1 All SA 8 (SCA).

3. Ground Zero

- In a further eviction case in Johannesburg, Judge Nigel Willis has given an extensive judgment where the owner of property making up a housing complex consisting of 340 dwellings units known as the Newtown Urban Village sought the eviction of occupants from its property. Here are some of the judge's observations:

- *“It is common cause that in an all-too-depressingly familiar scenario, the entire housing scheme collapsed as a result of mismanagement, fraud and corruption. ... There appears to be no real dispute that the property is controlled by one Zachariah Matsela who, in another all-too-familiar scenario with which the judges in the South Gauteng High Court are familiar, ... has hijacked the property. Mr Matsela appears to exercise control over the property through his security guards. These guards have used physical violence*

to deny the (owner) access to the property. It has not been denied by Mr Matsela that he collects "rent" from the occupiers. This is a criminal offence..."

- "One of the files in the case before me is a "duplicate file", created after the original file went missing. The disappearance of files from the Registrar's office occurs not infrequently in this court, especially in matters relating to evictions."
- "I see no point in involving the City in this matter further than has already been the case. The City is subject to severe financial constraints. This is a matter which is quite regularly discussed freely in open court. It is also common knowledge that the City leaves potholes unattended for lengthy periods of time, the traffic lights are frequently out of order, that our park and municipal gardens are in a state of neglect."
- "A matter which also frequently arises in the South Gauteng High Court is the "billing crises". This refers to problems which occur with statements of account for utilities which should be sorted out within a few days that take months, if not years, to resolve. In some instances, these issues have remained unresolved for homeowners, even after many years, despite the efforts of ratepayers and the courts to do so. Schools and hospitals in Gauteng (which are matters falling within the authority of the provinces) bear the signs of dilapidation and neglect."

- "The High Courts are duty bound to have regard to the provisions of PIE and the injunction of the Constitutional Court to apply their mind to the contribution which municipalities can make to the resolution of the problems of housing. In doing so, it would be intellectually dishonest for a court not to take into account the real problem that exists at the municipal level with its capacity in terms both of finance and its administrative personnel, to solve problems. If a city cannot even mend potholes promptly and resolve billing crises expeditiously, what hope does it have of addressing adequately the needs of housing? The courts cannot blink, Bambi-like at the real dangers that are posed through a lack of capacity at a municipal level. The judges on duty in the Motion Court in the South Gauteng High Court stare real evil in the face every week. Among these evils is the hijacking of buildings in the city. This hijacking is not only criminal but brings with it attendant evils of exploitation, squalor and degradation."

Johannesburg Housing Corporation (Pty) Ltd v. Unlawful Occupiers of the Newtown Urban Village [2013] 1 All SA 192 (GSJ).

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