LAW LETTER

Linking Attorney & Client

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This edition of Law Letter includes recent judgments of the Constitutional Court, the High Court, the Labour Court, a Regional Magistrates Court and the CCMA. We also look at the important issue of drunken driving. 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.

FROM THE COURTS

Municipal Law

■ *Pickup 'n Pay Up*

"There is no debt with so much prejudice put off as that of justice."
– Plutarch (46 - 120 AD)

BEFORE THE adoption of the interim Constitution, rural landowners were not required to pay municipal rates, as rural properties did not fall within the area of jurisdiction of municipalities. This position changed with the transition to democracy and the introduction of 'wall-to-wall' municipalities.

The Bergrivier Municipality levied charges against rural landowners within their municipal area from December 2000. The rural landowners refused to pay certain of the rates and levies imposed, but did not approach a court to adjudicate their dispute.

The Municipality sued the rural landowners for payment and the matter eventually reached the Constitutional Court. The defences raised by the rural landowners were of a technical nature and were dismissed by the Constitutional Court. The court found that municipal rates and levies imposed on rural landowners by the Bergrivier Municipality had been validly charged.

The court took the opportunity to note that municipalities have the power to raise revenue in order to finance the performance of municipal functions – including the provision of sustainable services and meeting the basic needs of a community. Municipalities have a constitutional right and duty to raise revenue (by imposing rates and service charges, amongst other things) in order to provide these services. The members of the community have a reciprocal right to access municipal services and a reciprocal duty to pay rates and service charges.

The Bergrivier Municipality had suffered a significant reduction in income as a result of the unlawful conduct of the rural landowners. This resulted in the municipality being unable to effectively meet its constitutional obligations to the rest of the local community. In fact, there had been no contention by the rural landowners that the Municipality failed to comply with its obligation to provide services – services from which the rural landowners had benefitted.

The court noted that, even in cases where communities have genuine grievances with municipalities, they cannot take the law into their own hands by withholding payment of rates and service charges. This kind of conduct can result in chaos and lawlessness; circumstances in which local government cannot function efficiently and effectively. It is not for disgruntled individuals to decide what the appropriate relief should be and to attempt to 'punish' local government by withholding payments due. That is the prerogative of the courts.

Jacobus Johannes Liebenberg N.O. and 84 Others v. Bergrivier Municipality (Minister for Local Government and Environmental Affairs and Development Planning, Western Cape Intervening), CCT 104/12 {2013} ZACC 16.

Animal Protection Act

■ *Jumping Through Hoops*

"If we stop loving animals, aren't we bound to stop loving humans too?"
– Alexander Solzhenitsyn (1918 - 2008)

CARTE BLANCHE recently aired a piece on the cruel treatment of circus animals. Protesters were seen outside Brian Boswell's circus in Johannesburg after the show. A less public part of the campaign against performing circus animals played out in the North Gauteng High Court.

An old piece of legislation – the **Performing Animals Protection Act** of 1935 – provides that no one may train or exhibit performing animals without a licence issued by a magistrate. The Minister of Agriculture, Forestry and Fisheries is responsible for administering this legislation.

The National Society for Prevention of Cruelty to Animals (NSPCA) brought an application to have the relevant provisions of the Performing Animals Protection Act declared unconstitutional. The NSPCA argued that licences should be issued by the Department of Agriculture and not by a magistrate. The Act, said the NSPCA, blurred the lines between

Book review

CONSUMER CREDIT REGULATION IN SOUTH AFRICA

By Michelle Kelly-Louw
(610 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

SHORTLY AFTER the National Credit Act of 2005 (NCA) came into operation, the world-wide financial crisis reached its peak. Many believe that the NCA cushioned South Africa, to some extent, from this crisis, which economies around the globe are still struggling to overcome.

The NCA is a product of an extensive legal-comparative project by the South African Department of Trade and Industry and represents a major departure from previous credit regulation. Its far-reaching impact also signals a significant shift in emphasis towards the protection of the consumer, and represents a recognition that credit is crucial to the proper functioning of every component of our economy, from public authorities and financial institutions to businesses and households.

This book deals comprehensively with the South African law concerning consumer credit as regulated by the NCA. Also considered is other legislation that governs or influences consumer credit agreements, in particular the Alienation of Land Act of 1981 and the Consumer Protection Act of 2008. Since the introduction of the NCA, a large number of judgments of our courts have been handed down which have clarified many issues and settled various concerns regarding certain provisions of the NCA. These are dealt with in the text and included in the table of cases. Decisions of the National Consumer Tribunal are listed, as well as a table of legislation and a bibliography for further reference, all meticulously indexed. A supplementary CD, comprising relevant legislation and regulations, plus the guidelines of the National Credit Regulator, is included.

The author Michelle Kelly-Louw is Professor of Law at the University of South Africa, where she specialises in the law of negotiable instruments, insolvency and banking law. Her valuable contribution to credit and consumer law in this high-quality publication, with the able contributions of Philip Stoop, Senior Lecturer at UNISA, and the expert assistance and support of publisher Juta, will be an indispensable resource for lawyers, judicial officers, legal scholars and credit providers, particularly banks and other financial institutions, as well as all involved in the credit industry and consumer affairs, regulators and insurers.

the judiciary and the executive, and breached the important constitutional principle of the separation of powers.

The High Court agreed, pointing out that the legislature makes laws, the judiciary interprets laws and the executive implements laws. The independence of the judiciary is compromised if magistrates are expected to perform executive functions, such as the granting of licences. In the past, there was a "do it all" approach to magistrates, who were required to exercise a range of powers which more properly belonged with government. The Constitution changed this, bringing about a firm separation of powers.

The High Court ordered that the relevant provisions of the Performing Animals Protection Act were invalid and gave the Department of Agriculture six months to amend the Act to remove this illegality. Legislation may only be finally declared constitutionally invalid by the Constitutional Court, so the order was also made subject to confirmation by the Constitutional Court. Interestingly, it was also ordered that, pending the Constitutional Court's decision, licence applications for performing circus animals should be made to a committee comprising representatives of the NSPCA, the Department of Agriculture and the South African Veterinary Council.

The Constitutional Court has now confirmed the invalidity of the sections of the Act in question, and has given Parliament the opportunity to amend the Act to cure the defect. But in the interim, Magistrates will continue to perform the function of issuing animal training and exhibition licences.

National Society for the Prevention of Cruelty to Animals v. the Minister of Agriculture, Forestry and Fisheries (North Gauteng High Court, Case No. 44001/2012, 15 November 2012).

Environmental Law

■ *Traffic Light Rule: Only Go if it is Green*

ENVIRONMENTAL LAW may be regarded as a relative newcomer to South Africa's legal landscape, but it is rapidly becoming one of the most important aspects of our law. For one thing, we see the effect of development on the environment all around us, from the rapid growth of algal blooms in the Vaal dam to the buildup of acidic mine drainage threatening to sink Johannesburg's East Rand.

Despite the upsurge in interest, there are a number of companies and private individuals who fail to appreciate the importance of 'environmental awareness,' even though they may be obliged to do so in terms of the **National Environmental Management Act** of 1998.

One of the key features of the National Environmental Management Act is the requirement that an Environmental Impact Assessment (EIA) must be conducted before engaging in a listed activity. Examples of listed activities are wide-ranging and include the widening of a road by more than 6 metres, the physical alteration of undeveloped land for residential or commercial purposes where the total area to be transformed is more than 20 hectares and the construction of infrastructure within coastal public property. The applicant is then required to submit the EIA to the relevant environmental authority for a decision on whether the listed activity may be undertaken. Failure to comply attracts a maximum fine of R5 000 000, but we are yet to see a fine of this extent being imposed.

A number of companies have overlooked or ignored the requirement to conduct an EIA. In some instances, this may be as a result of ignorance of the law, but in others developers may be aiming to avoid the time taken to conduct an EIA, coupled with the time it takes for the relevant official to come to a decision. In other cases, developers who wish to develop in an environmentally sensitive area may assume that their application will be denied and proceed without permission, budgeting for the possibility of the fine.

Whatever the reasons for non-compliance may be, it appears that governmental officials are finding ever more creative ways to ensure compliance with the country's environmental laws. In a recent case, the Nelspruit Regional Court heard how a well-known timber company had proceeded to widen one of its forestry roads (which is a listed activity) without first conducting an EIA. This violation was later discovered and the company admitted its guilt by paying the fine prescribed in terms of the National Environmental Management Act. The company's woes were, however, far from over.

Rather unusually, the Directorate of Public Prosecutions brought an application to court using the **Prevention of Organised Crime Act** of 1998 to 'confiscate' what it believed the company had benefitted from its violation. According to the Directorate, the company had benefitted from its crime in two ways: firstly, from the widening of the road, and secondly by saving on the costs of conducting an EIA at the time. The Directorate argued that the Prevention of Organised Crime Act is not limited to any specific crime and, since a violation of the National Environmental Management Act is a crime, the Prevention of Organised Crime Act ought to apply in this case. The court ruled in favour of the Directorate and ordered the confiscation of R450 000 plus interest.

The Directorate's approach may well be a game changer – ignoring the National Environmental Management Act may have wider ranging consequences than initially anticipated.

Director of Public Prosecutions v. York Timbers (Pty) Ltd SH 865/12, Nelspruit Regional Court.

Employment Law

■ *Don't Diss the Boss*

"Humpty Dumpty sat on a wall,
Humpty Dumpty had a great fall . . ."

FACEBOOK IS a social networking site. Members communicate by posting messages on their personal pages (referred to as 'walls'), and by responding to postings on the walls of people they have accepted as 'friends'.

Ms Fredericks posted derogatory comments about her boss on Facebook. When her employer discovered the comments, Ms Fredericks was dismissed. She then referred a claim for unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). Ms Fredericks argued at the CCMA arbitration that dismissal had been too harsh a sanction for her comments and that her employer had, in any case, breached her constitutional right to privacy by searching her Facebook page.

If a Facebook user does not activate any privacy settings on his or her wall, then that wall can be accessed by any person with a Facebook account. If the privacy setting is restricted to 'friends only', then it is only at the point of confirmation of friendship

that the prospective friend can access that person's wall. If the user does not put in place any access restrictions to his or her wall, then anyone with a Facebook account can freely read all postings. In this case, Ms Fredericks had not activated the privacy settings on her page and her derogatory postings were open to the public.

The CCMA Commissioner found that Ms Fredericks' comments had brought the employer's name into disrepute. He stated that it was clear that Ms Fredericks knew what she was doing and that her actions had negatively impacted on the image of the employer. The employer was entitled to dismiss Ms Fredericks and, in these circumstances, was not obliged to first take corrective steps short of dismissal – dismissal was an appropriate sanction.

The Commissioner also found that Ms Frederick's right to privacy had not been infringed. Her Facebook wall had effectively been a public forum as a result of her failure to place any privacy restrictions in place. Ms Frederick had no right to privacy with respect to Facebook postings which she herself had made public.

Fredericks v. Jo Barkett Fashions [2012] 1 BALR 28 (CCMA).

■ *Refusing to Bend the Rules*

"Women would rather be right than reasonable."
– Ogden Nash (1902 - 1971)

AN UNUSUAL case has been heard in the Labour Court in Johannesburg. Unlike most of the disputes about the performance of an employee's duties, this case concerned an employee who claimed to have been prejudiced on account of her diligence and conscientiousness.

Ms N Motaung was employed by the Department of Education. She claimed that she had been unfairly discriminated against because she had refused to bow to pressure from her superiors to ignore aspects of the statutory framework governing the performance of her duties. Her case was that she had been unlawfully prevented from doing her normal work by being stripped of her functions; having been given unsatisfactory performance evaluations; and consequently denied certain notch salary increases. She claimed this was unfair discrimination against her in violation of Section 9(3) of the **Constitution** and Section 6(1) of the **Employment Equity Act** of 1998. She said this happened because she had refused to be party to flouting the regulatory framework governing the registration of private higher education institutions, which she felt would have been morally wrong as a civil servant and would have entailed her committing misconduct in terms of the **Public Service Act** of 1994.

Judge La Grange considered the facts in detail. He concluded that because she had been stripped of her functions, no meaningful assessment of her performance could be conducted for that financial year. Yet her performance was rated as unsatisfactory and as a result she did not receive a notch salary increase as in previous years. He was satisfied that she had been discriminated against on account of her acting in accordance with her conscience. If she had complied with what was required of her, she would have been complicit in contravening the regulations in question and possibly guilty of misconduct in terms of the Public Service Act read with the relevant provisions of the Senior Management Service Handbook.

In the circumstances, the judge ordered that she be restored to her normal functions and that she be paid the notch increases which she should have received with retrospective effect.

Motaung v. Department of Education and Others 2013 (3) SA 44 (LC).

Criminal Law

■ *Bottom Gear*

"You're not drunk if you can lie on the floor without holding on."
– Dean Martin (1917 - 1995)

IT IS well known that it is illegal to drive a vehicle on a public road while under the influence of intoxicating liquor. It is also illegal to occupy the driver's seat of a motor vehicle of which the engine is running while under the influence of intoxicating liquor. The concentration of alcohol in the driver's blood can be measured with a blood test or a breathalyser test. A breathalyser is an instrument that measures the amount of alcohol exhaled as vapour.

In the case of a blood test, the concentration of alcohol in the driver's blood must be less than 0.05g per 100ml (or less than 0.02g per 100ml in respect of public driver permit holders). If it is equal to or more than this, the driver is liable to be arrested for driving under the influence. The **National Road Traffic Act** of1996 provides that if it can be proved that the concentration of alcohol in the persons blood was not less than 0.05g per

100ml at any stage within two hours after the alleged offence, it will be presumed that the concentration was also not less than 0.05g per 100ml at the time of the alleged offence. It is therefore very important that the blood sample should be obtained within two hours of the alleged offence.

In the case of a breathalyser test the concentration of alcohol in any specimen of breath exhaled by a driver must be less than 0.24mg per 1000ml (or less than 0.10mg per 1000ml in the case of public driver permit holders). Currently breathalyser test results are insufficient to prove a contravention of the National Road Traffic Act. However, if the breathalyser test result is indicative of an illegal concentration of alcohol, it will probably lead to an arrest and a blood test will be performed.

Any person who has been arrested for driving under the influence may not consume any substance that contains alcohol, except on instruction of or when administered by a medical practitioner during his or her detention. Such a person may also not smoke until the blood specimen has been obtained or a breathalyser test has been performed.

In normal circumstances, a health service, such as the drawing of blood, may not take place without a person's informed consent. As a result, if a person refuses to have a test performed, such refusal has to be accepted, provided that the person is an adult and mentally competent to refuse. However, the National Health Act of 2003 provides that a health service, including the drawing of blood, may be provided without informed consent if this is authorised by law or a court order.

The Criminal Procedure Act of 1977 provides that a medical officer of any prison, a district surgeon or any registered medical practitioner or registered nurse may take a sample of an arrested person in order to ascertain whether or not that person is under the influence. This is confirmed in the National Road Traffic Act which provides that in cases of driving under the influence "…no person shall refuse that a specimen of blood, or a specimen of breath, be taken of him or her." Police officials may also use restraints or force to allow the medical officer to obtain a sample.

The right to refuse medical treatment is therefore limited by this legislation in cases of driving under the influence.

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