LAW LETTER

Your Key to the Issues

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Our spotlight in this edition of Law Letter falls on money – payment of rates, tax, banking, notice to debtors and repayment when a contract fails. 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.

Recent cases

Consumer Law

▪ *Letting the Debtor Know*

"Return to sender, address unknown,
No such number, no such zone."
– Elvis Presley (1935 - 1977)

IN 2012 the Constitutional Court decided a question on which there were already a number of differing views expressed by various High Courts in the country, namely what was meant by the word "deliver" in Section 130 of the **National Credit Act**, 2005, read with Section 129(1). The former section provides that before a credit provider may sue a consumer who is in default of a credit agreement, the credit provider must first have delivered a notice to the consumer as contemplated in Section 129(1) of the Act. Constitutional Court Judge Edwin Cameron in the case of *Sebola v. Standard Bank* ruled that the credit provider must prove that the notice was delivered to the consumer and that where the notice is posted, proof of registered despatch to the consumer's address, together with proof that the notice reached the appropriate post office for delivery would, in the absence of contrary indication, constitute sufficient proof of delivery.

But this was not an end to the problem. In 2013 the issue was once again before the Constitutional Court. The consumer, Mr Kubyana, fell into arrears with his payments to Standard Bank relating to his purchase of a motor vehicle. After various attempts to get Mr Kubyana to pay, in July 2010 the Bank sent to him by registered post the required notice under Section 129(1). The letter was posted on 15 July by registered mail to the address nominated by Mr Kubyana in the credit agreement and according to the "track and trace report" from the Post Office, the notice reached the Pretoria North Post Office on 20 July. On the same day that Post Office sent notification to Mr Kubyana at his nominated address informing him that a registered item was awaiting his collection. When he failed to collect the registered letter the Post Office sent him further notification seven days later. This also was not collected. The Bank then issued summons. Mr Kubyana defended the action. He argued that he had not received the required notice.

At the trial, the Bank proved the sequence of events but Mr Kubyana did not testify in response. He failed to explain why he had not collected the notice from the Post Office. He argued, however, that because the notice had been returned to the Bank by the Post Office, this was itself proof that it had not been delivered to him.

Acting Constitutional Judge Mhlantla held that this argument could not be sustained. There is no obligation on the credit provider to bring the Section 129 notice to the subjective attention of the consumer. The consumer must act responsibly when advised of his or her default because the credit provider does not bear the sole responsibility for ensuring that the objective underlying Section 129 is achieved. The required notice had to be taken to the consumer but it did not need actually to come to his or her attention. In terms of the *Sebola* case the credit provider must prove that the notice reached the consumer but it is then for the court to decide on the facts of each case whether this satisfies the requirement for delivery.

Kubyana v. Standard Bank of South Africa Limited 2014 (3) SA 56 (CC).

Law of Contract

▪ *Hand it All Back*

"The good old rule
Sufficeth them, the simple plan,
That they should take, who have the power,
And they should keep who can."
– William Wordsworth (1770 - 1850)

UNDER THE common law the general rule is that when an agreement fails the parties to it must restore each other to the position they were in immediately before the conclusion of the agreement. This rule may, however, be excluded by agreement. It often is in the case of sales of immovable property where the parties agree that in the case of the purchaser's default the seller may cancel the agreement and keep certain amounts paid to it.

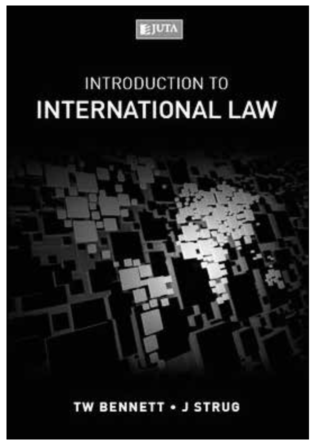
BOOK REVIEW

INTRODUCTION TO INTERNATIONAL LAW

"No nation was ever ruined by trade."
– Benjamin Franklin (1706 - 1790)

By: T.W. Bennett and J. Strug
(958 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

WITH THE growth of global trade in goods and services, massive movement of persons across national borders, multi-national economic and political activity and the world-wide impact of environmental issues and technology, the scope of international law has expanded enormously in recent decades.



The co-authors of this overview of the vast body of international law, Professor Tom Bennett and Jadavji Strug, have done an outstanding job in arranging their material. Readers are introduced to the sources and principles of international law, and how it deals with the crucial questions of jurisdiction and national sovereignty.

Separate chapters deal with aspects such as diplomatic immunity, the treatment of aliens and state responsibility. There are numerous maps and graphic illustrations which effectively illuminate the text. Particular relevant topics are highlighted within screened borders. Many pertinent subjects are individually addressed – these include the extent of marine territory, outer space, the Arctic and Antarctic, potential conflicts between treaty obligations, refugees, regional organisations such as the European Union, the International Court of Justice, terrorism, mercenaries, extradiction, piracy and hijacking, human trafficking and peacekeeping by international organisations.

Detailed information on 220 countries is included as well as an index of case law and bibliography of sources for further reference. 140 International treaties are listed.

This work is an exceptionally useful resource. It is recommended not only for legal practitioners and students, but for both government officials and non-governmental organisations. It is also an ideal handbook for any business corporation transacting across international boundaries.

The co-authors and publisher Juta are to be applauded for producing such extensive coverage of a compendious subject in a crisp, clear and comprehensible package.

That was the situation in this case. The clause in question provided that:

> "If the [purchaser] is in default of this agreement and refuses to rectify the default within 14 (fourteen) days after acceptance of this written notice, the [seller] will be entitled, without prejudice to any other rights that he may have such as liquidated damages, to cancel the agreement and to keep any other amounts payable, as *rouwkoop* or by means of any pending decision by a court of the real damages suffered or demand specific performance of the conditions of the contract with or without a claim for damages."

The purchaser had paid to the appointed conveyancer a deposit of R720 000 and a further amount of R264 723 in respect of transfer duty but had not, according to the seller, obtained the requisite loan finance timeously. After some dispute between the parties, the sale was cancelled. On the instructions of the seller, the conveyancer declined to make any repayment to the purchaser and relied upon the above clause as the reason for not doing so.

Judge Eric Leach, writing for the Supreme Court of Appeal, did not agree. He pointed out that the problem facing the seller was that the clause referred to amounts which the seller would be entitled "to keep". This meant amounts which the seller had received and was holding. The deposit had not been paid to the seller but to the conveyancer who had received the deposit in that capacity and held it in trust pending registration of the transfer.

The seller then attempted to argue that the deposit fell within the words "any other amounts payable" as set out in the clause. Elsewhere in the agreement, however, was a reference to the deposit and any other amounts which were to be paid over to the seller on registration of transfer. There was a further provision that the deposit would be repaid to the purchaser in the event of the agreement lapsing should any suspensive condition not be fulfilled. The deposit was held not to fall within the words "any other amounts payable".

With regard to the amount paid by the purchaser in respect of the transfer duty, such amount had been paid to SARS and not to the seller who had no right to claim it.

Royal Anthem Investments 129 (Pty) Ltd v. Lau 2014 (3) SA 626 (SCA).

Municipal Law

■ *Sharing the Burden*

*"Houses are built to live in and not to look on;
therefore let use be preferred before uniformity,
except where both may be had."*
– Francis Bacon (1561 - 1626)

SECTION 2 of the **Local Government: Municipal Rates Act** of 2004, allows a municipality to levy rates on property within its municipal area. Section 8 provides that it may levy different rates for different categories of rateable property according to the use of the property, its permitted use or its geographical area. Among the categories are "residential properties", "business and commercial properties" and "properties used for multiple purposes". Those used for business and commercial purposes attract a higher rate than those categorised for residential purposes.

In this case the property was a ten-storey building known as Park Mews. It comprised a ground floor used for business purposes and the remaining nine floors for residential purposes. Although Park Mews was zoned as a property for multiple purposes and one of its permitted uses was to have shops and offices on the ground floor, the municipal council had determined the rates payable by applying the higher business rate to the overall value of the building.

The owner filed an objection to the valuation roll, contending that there ought to have been an apportionment of the market value between the "business" and the "residential" categories. The municipal valuer rejected the objection, stating "Property category is correct. Multiple purpose." The owner then appealed under the Act to the Valuation Appeal Board of the City of Johannesburg.

The owners' appeal accepted the valuer's assessment of the market values of the two erven which constituted the property, namely R170 000 for the one and R3 209 000 for the other and also their categorisation as "multiple purposes". The owner contended, however, that their respective market values should be apportioned between "residential" and "business" for the purpose of assessing rates. The valuation appeal board upheld the appeal. It agreed that the Act required the valuation roll to reflect the apportionment of the market value of each property between the different purposes for which it was being used. It accordingly directed how these values should be apportioned.

Arguing that it had elected to levy rates according to the permitted uses of properties as zoned and not on their actual use, the City applied to the High Court to review this decision. When unsuccessful in its review, the City appealed to the Supreme Court of Appeal. It failed in that forum also where the proper approach was summed up by Judge Eric Leach:

> *"The inevitable conclusion is that where a property is being used for multiple permitted purposes, it is necessary for the municipal valuer compiling the valuation roll to determine and record those uses and to apportion the market value of the property between them."*

City of Johannesburg Metropolitan Municipality v. Chairman of the Valuation Appeal Board for the City of Johannesburg and Another [2014] 2 All SA 363 (SCA).

Banking

■ *Clean Hands Required*

*"I never wonder to see men wicked,
but I often wonder to see them not ashamed."*
– Jonathan Swift (1667 - 1745)

MR NM Mistry operated agencies for ABSA Bank at Marabastad and Laudium in Pretoria. In February 2009 it was discovered that Mistry had perpetrated massive frauds at these two agencies. A forensic audit revealed that he had stolen millions of rands from the investments of ABSA's clients. His estate was sequestrated and he fled the country. Nothing from the proceeds of his crime was recovered.

Among the clients of ABSA who claimed to be victims of Mistry's swindle were Mr A Mohamed and Mr S Abdul. Mohamed claimed a total amount of R5 432 099 which had been paid into four accounts during 2007 and which were allegedly to mature in 12 months and bear interest at 17.5% per annum. Abdul claimed R2 020 853 which was said to earn interest at varying rates over a twelve month period. None of the alleged investments showed on ABSA's banking system and records. It was revealed that the claimants and Mistry, unbeknown to ABSA, had used fictitious names in concluding the investment agreements to conceal the substantial taxable funds which they had deliberately failed to declare to SARS to evade tax. Although both were armed with purported deposit certificates to prove their investments Mohamed and Abdul had no other documents to verify their claims which were rejected by the bank. In response, they threatened to liquidate ABSA and to lay criminal charges against its directors and officers. This caused ABSA to launch an urgent application to prevent the threatened liquidation.

Undeterred, the claimants pursued their claims in the High Court. In its defence, ABSA admitted only that Mistry had authority to operate the Marabastad agency as its agent. It disputed the genuineness of the deposit receipts. Alternatively, if the investment agreements were concluded, Mistry's authority to act on behalf of ABSA in doing so, was denied. The bank further pleaded that the claimants, acting independently or in concert with Mistry, had unlawfully concealed the investments to hide the source of the funds from SARS and so evade tax. The claimants admitted these allegations but said that they had subsequently sought and obtained amnesty from SARS, thus curing any illegality which had tainted the investments.

The trial court, notwithstanding numerous unsatisfactory features in the evidence of the claimants, nevertheless found that it was not disputed that Mistry had held himself out as, and was in fact, ABSA's duly authorised agent with actual and ostensible authority to transact business on ABSA's behalf as he had done when the investment transactions were effected. ABSA appealed to the Supreme Court of Appeal.

The Appeal Court commented adversely on the unsatisfactory elements in the evidence of the claimants. On the evidence as a whole, the court came to the conclusion that the bank was not liable for losses suffered by clients resulting from the theft of money from their deposits when those clients, on their own version, had intentionally and knowingly colluded with Mistry to open investment accounts in fictitious names to facilitate their tax evasion. The agent had neither express nor implied authority to represent ABSA in such agreements.

A few weeks before the hearing of the appeal, and well out of time, Mahomed lodged an application with the Appeal Court to amend his pleadings by adding a plea that ABSA was estopped, that is, not entitled in law to deny the authority of Mistry to represent it. This application, argued during the course of the appeal, was refused. The court pointed out that even if estoppel had been an issue, the claimants would not have succeeded because, in any event, a party who knows that the transaction in question is unlawful or is part of an unlawful scheme and is aware or should reasonably be aware that the principal of the agent with whom it is contracting would not countenance the conclusion of such a transaction, is precluded from relying on the ostensible authority of an agent to represent that principal.

ABSA's appeal succeeded.

ABSA Bank Limited v. Arif and Another 2014 (2) SA 466 (SCA).

However, when economic conditions get tough, the developer may be unable to sell the properties and is forced to lease them to cover his costs.

Letting of a residential unit is an exempt supply for VAT purposes. This means that the input VAT credits, such as the building costs, cannot be deducted. SARS has always taken the position that the temporary letting of residential units by a developer constitutes a "change of use" and VAT then becomes payable on the open market value of the unit at the date the property is let. When the unit is eventually sold the developer can then deduct the VAT he paid over at the time the unit was let. But in the meantime payment of the VAT adversely affects the developer's cash flow, as the output VAT payable is likely to be more than the input VAT credits claimed when constructing the unit.

In January 2012 temporary relief was given to developers in Section 18B of the **Value Added Tax Act** of 1991. This allowed developers to let residential units for a period of 36 months from the date of concluding a lease agreement, without incurring a VAT liability. However, this relief only applies to developers who intend to sell the properties. A developer cannot rely on Section 18B if it is his intention to let the unit on a permanent basis. Furthermore, if the developer lets out a unit for longer than 36 months, he will be deemed to have changed the use and will become liable for the VAT.

The temporary relief provided to developers will come to an end on 01 January 2015 when Section 18B will cease to apply. Presumably, the legislators took the view that the economy would have recovered sufficiently by 2015 so that the relief would no longer be required by developers. It is possible that this date could be extended by legislation but there is nothing in the first batch of the 2014 draft taxation laws that suggests that this will happen.

Tax

■ *VAT Relief For Developers Set to End*

A PROPERTY DEVELOPER usually holds residential properties as trading stock and therefore accounts for VAT at a rate of 14% on the sale of developed units. The developer would also be allowed to claim input VAT credits for the land, building costs and other expenses incurred in making taxable supplies.

■ *Directors Can Sometimes Be Held Liable For A Company's Debts*

ONE OF the fundamental consequences of incorporating a company is that it is a legal entity separate from its directors and shareholders, and therefore the persons who manage and own the company will generally not be liable for the debts of the company. This principle would also apply to tax debts. There are, however, provisions in the **Tax Administration Act** of 2011 where personal liability may arise.

Every company has a representative taxpayer, namely the person who is responsible for paying tax as an agent on behalf of the company. The representative taxpayer of a company is the "public officer" who is designated in the IT77C form completed by the company when it registers as a taxpayer and is most likely to be a director of the company. A representative taxpayer becomes personally liable for the company's tax debt, if, while the tax remains unpaid, the representative taxpayer:

- alienates, charges or disposes of amounts in respect of which the tax is chargeable; or

- parts with funds in his possession which could have been used to pay the tax.

Another instance of personal liability arises where a person, which may include a director or shareholder, knowingly assists in dissipating the assets of the company in order to obstruct the collection of a tax debt due by the company. In such circumstances that person becomes liable, along with the company, for the tax debt to the extent that that person's assistance reduced the assets available to pay the tax debt.

A person who controls, or is regularly involved in, the management of the overall financial affairs of a taxpayer is personally liable if that person was negligent or fraudulent in the payment of the tax debts of the taxpayer. Thus, if a company is placed in voluntary liquidation, circumstances may arise where the shareholders become liable for an outstanding tax debt. If, within one year of the winding-up of a company, the shareholders received assets of the company in their capacity as shareholders, and the tax debt existed at the time they received such assets, they may be liable to pay the tax debt.

These are just some examples where personal liability may arise. If a director or shareholder is held personally liable for the tax debts of a company, he or she should always seek professional advice, as the legal principles of personal liability are complex.

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