LAW LETTER

Focus and Context

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Your strategic partner at law

We welcome readers to this first edition of Law Letter 2015. We look at what is required to be admitted as an attorney, and what our courts have recently ruled on debt review, business rescue, directors' duties, trade mark registration and the rights of refugees. 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 OUR COURTS

The Legal Profession

■ *Character Reference*

"How awful to reflect that what people say of us is true!"
– Logan Pearsall Smith (1865 - 1946)

A FULL BENCH of the Pretoria High Court heard an application to set aside a decision of the Law Society not to register the applicant's articles on the ground that he was not a "fit and proper person" as required by Section 4(b) of the **Attorneys Act** 53 of 1979 because he had been convicted of murder, robbery and the illegal possession of a firearm and was still on parole.

The court has a discretion to decide whether or not an applicant is a fit and proper person to be admitted as an attorney. It has to consider his personal qualities and decide in relation to such matters as the prestige, status and dignity of the profession, and the integrity, standards of professional conduct and responsibility of practitioners whether it is satisfied that the applicant has the kind of personal qualities required by the Act.

The applicant had been convicted of serious crimes involving murder, violence and dishonesty. Judge Rabie spelled it out: *"There can be no doubt that those crimes are of such a disgraceful character that a person committing them cannot be admitted to an honourable profession. This was also not disputed by the applicant. Consequently, in applying the principles referred to above, and in order to prove that he was a fit and proper person to have his contract of articles of clerkship registered, the applicant would at least have had to prove to the satisfaction of the Law Society that he had undergone a complete and permanent reformation in respect of such conduct and accompanying character defects which caused him to commit the crimes in the first place."*

The fact that the Department of Correctional Services had placed the applicant on parole was based on different criteria to that required to establish whether he is a fit and proper person to serve articles of clerkship, or to be admitted to practise as an attorney. Being released on parole meant that the applicant was still serving his criminal sentence.

The court concluded that the evidence presented fell far short of showing that there had been a genuine, complete and permanent reformation on the part of the applicant. The application was dismissed with costs.

Thukwane v. Law Society, Northern Provinces 2014 (5) SA 513 (GP).

■ *Premature Expectation*

APPLICATION WAS made to two judges in the Mthatha High Court by an applicant who had previously had his name struck from the roll of attorneys at the instance of the Law Society after he was convicted on various counts of fraud and sentenced to eight years imprisonment. After release on parole, he applied for readmission. The fundamental question was whether such a person could be readmitted and re-enrolled as an attorney.

Where a person who has previously been struck off the roll of attorneys on the ground that he was not a fit and proper person to continue to practise as an attorney applies for his readmission, the onus is on him to convince the court on a balance of probabilities that there has been a genuine, complete and permanent reformation on his part; that the defects of character or attitude which led to his being adjudged not fit and proper no longer exist; and that, if he is re-admitted, he will in future conduct himself as an honourable member of the profession and will be someone who can be trusted to carry out the duties of an attorney in a satisfactory way as far as members of the public are concerned.

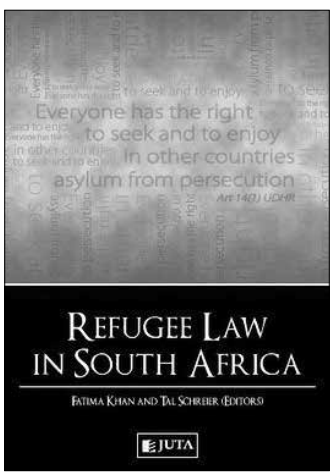
Judge Goosen stated: *"Public interest necessarily plays a critical role in the decision to readmit to practice a person previously struck off the roll of attorneys. The protection of the public against unscrupulous legal practitioners goes hand in hand with the court's obligation to protect the integrity of the courts and the legal profession. Public confidence in the legal profession and in the courts is necessarily undermined when the strict requirements for rehabilitation are diluted. In our view considerations of public policy and legal policy are critical in determining whether as a matter of principle a parolee may be readmitted to the roll of attorneys."*

Book review

REFUGEE LAW IN SOUTH AFRICA

By Fatima Khan & Tal Schreier
(278 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

THIS GROUND-BREAKING book on a rapidly evolving branch of the law brings together nine expert contributors under the editorial oversight of Fatima Khan, Director, and Tal Schreier, Senior Researcher of the Refugee Rights Unit of the University of Cape Town.



The existing law relating to refugees in South Africa is set out, as well as the relevant international law, which is central to international refugee protection and jurisprudence.

Topics covered include a detailed analysis of the definitions in South African Law, the process of applying for refugee status, and the rights of refugees and asylum seekers. Aspects such as illegal entry, persecution, exclusion from refugee status, detention of illegal foreigners, reviews and appeals and procedural steps are all addressed. There is an insightful examination of how immigration and refugee law can be reconciled.

The book includes a CD, containing the relevant legislation such as the Refugees Act of 1998, and the Immigration Act of 2002, as well as their regulations, the Refugee Appeal Board rules, and the United Nations Convention and Protocol relating to the status of refugees. Case law and relevant conventions are listed, there is a bibliography for further reading and research, as well as a comprehensive index and useful footnotes which all contribute to making this an outstanding resource.

In a volatile world where political instability, wars, oppression of minorities and economic hardship abound, the often desperate plight of the displaced has resulted in a significant heightening of global awareness of the need to provide practical and sustainable protection and solutions to refugees. This well-researched, superbly, organised book makes a significant contribution to that challenge.

The judge pointed out that central to the concept of parole is the idea that the offender is in the process of being reintegrated into society. This implies that it is a conditional process which is not at odds with the objects of incarceration. Importantly, the sentence which has been imposed is not discharged by release on parole.

Taking into account the nature of the offences for which the applicant was convicted, and the reasons for his having been struck off the roll of attorneys, his status as a parolee precluded his readmission. His application was dismissed.

Mtshabe v. Law Society of the Cape of Good Hope 2014 (5) SA 376 (ECM).

Business Rescue

■ *No Life Jacket for Surety*

THE CREDITOR of a close corporation in business rescue under the **Companies Act** 71 of 2008 proceeded against the surety and co-principal debtor of the close corporation for the full amount of its claim. The surety brought an application in the Bloemfontein High Court to have the warrant of execution set aside.

Acting Judge Pohl confirmed that a defence by the principal debtor which goes to the root of the claim, for example that the debt has been discharged or has prescribed, is also available to the surety. However if the defence is personal only to the principal debtor that does not let the surety off the hook.

The creditor argued that the moratorium created by a business rescue plan is purely there to protect the debtor close corporation. It is exactly for this reason that creditors insist on personal suretyships to protect themselves in the event of a corporate entity going into either liquidation or into business rescue.

The court accepted that the definition of business rescue amounts to a temporary supervision of the close corporation and of the management of its affairs, throwing to it a lifeline to resuscitate it. From this it is evident that business rescue is a defence personal to the debtor alone. It does not bring an end to the obligation. The purpose of the whole business rescue scheme is to enable a corporate entity in financial distress to

get back onto its "financial feet". It is thus a temporary measure, by its very nature, which can only be achieved if it is afforded to the corporate entity and to the corporate entity alone. It could not have been the intention of the legislature to include sureties and co-principal debtors as beneficiaries within the scheme of business rescue provided for in the Companies Act. As a result, the surety remained fully liable to the creditor and the application was dismissed with costs.

Blignaut v. Stalcor (Pty) Ltd and Others 2014 (6) SA 398 (FB).

Company Law

■ *Dolus Directus*

"Never explain – your friends do not need it and your enemies will not believe you anyway."
– Elbert Hubbard (1859 - 1915)

JUDGE OWEN Rogers in the Cape Town High Court had to consider whether directors of a company had complied with their fiduciary duties. Section 76 of the **Companies Act** 71 of 2008 sets out the duties of directors where they have been entrusted by the Memorandum of Incorporation of the company to act. The power must be exercised –

"(a) in good faith and for a proper purpose;

(b) in the best interests of the company;

(c) with the degree of care, skill and diligence that may reasonably be expected of a person –

(i) carrying out the same functions in relation to the company as those carried out by the directors; and

(ii) having the general knowledge, skill and experience of that director."

Judge Rogers pointed out that the duty imposed by Section 76 to act in the best interest of the company is not an objective one, in the sense of entitling a court, if a board decision is challenged, to determine what is, objectively speaking, in the best interest of the company. What is required is that the directors, having taken reasonably diligent steps to become informed, should subjectively have believed that their decision was in the best interests of the company and this belief must have had "a rational basis".

As to the duty to act for a proper purpose, that was objective. One has to determine the actual purpose for which the power was exercised, the purpose the power was conferred for, and whether the actual purpose fell within the intended purpose.

Applying the law, the judge was satisfied that the directors had acted in the best interests of the company by refusing to register a transfer of shares. They had been sufficiently informed, subjectively believed the decision was in the best interests of the company, and had acted rationally. They had also acted for a proper purpose. The actual purpose of refusing transfer had been to prevent a party from increasing its shareholding, where this was believed to be against the best interests of the company. This actual purpose echoed the intended purpose of the provision. Accordingly, the standard set out in Section 76 having being met, the refusal of the directors to approve the transfer was lawful. The application was dismissed with costs.

Visser Sitrus (Pty) Ltd v. De Goede Hoop Sitrus (Pty) Ltd and Others 2014 (5) SA 179 (WCC).

Intellectual Property

■ *Not So Fast*

"Not only is there but one way of doing things rightly, but there is only one way of seeing them, and that is, seeing the whole of them."
– John Ruskin (1819 - 1900)

JUDGE MURPHY in the Pretoria High Court was called upon to decide whether a trade mark should be removed from the register due to unethical conduct in the registration of the mark.

Presto applied for the removal of PRS's GEOWEB mark on the ground that PRS was not its proprietor in good faith, alternatively that the registration was made in bad faith. Presto relied on a licensing agreement the parties had concluded in 1996. Under it Presto had granted PRS exclusive rights to sell GEOWEB products internationally in an area which later included South Africa. The agreement recorded that Presto was the owner of the GEOWEB mark and that PRS would not "during or subsequent to this agreement" use any mark identical or similar to it.

PRS argued that the obligation imposed by the agreement ended when that agreement was replaced by a new agreement in 2001. The 2001 agreement expired in 2006, and in 2007 PRS applied for the registration of the GEOWEB mark.

Presto's case was that since it was the originator of the mark and had gained an international reputation as the source of GEOWEB products, it had the stronger moral claim to proprietorship of the mark in South Africa.

Judge Murphy observed that since the concept of good faith involved considerations of public policy, an ethical value judgment was called for. Although recent trends favoured greater recognition of the goodwill and reputation attached to the trade marks of multinational corporations, this was not decisive in this case. Here PRS's appropriation of the mark while a licensing agreement was still in force cast doubt on the ethics of its claim to proprietorship.

While the obligation imposed on PRS by the original agreement might – strictly speaking – have expired under the new 2001 agreement, PRS's sharp reliance on this was unethical. Since bad faith in claims of proprietorship and trade mark registration do not necessarily require the breach of a legal obligation, PRS's claim to proprietorship was tainted even if it had gained a reputation in the mark in South Africa. Accordingly, the GEOWEB mark would be removed from the register on the ground that the entry had been wrongly made. PRS was ordered to pay Presto's costs.

Reynolds Presto Products Inc t/a Presto Products Co v. PRS Mediterranean Ltd 2014 (5) SA 353 (GP).

Consumer Credit Law

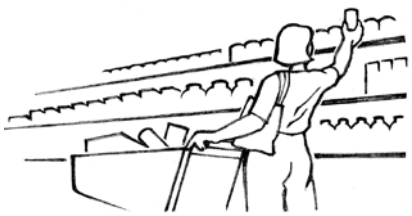
■ *Scales of Justice*

MR AND Mrs Thompson were under a debt review order in terms of the **National Credit Act** 34 of 2005. They made monthly payments and the National Payment Distribution Agency (NPDA) appointed by their debt counsellor then paid their creditors.

One of the creditors, Nedbank, sued the Thompsons for payment of the sum of R949 012.15 and interest outstanding on a bond over their immovable property. Acting Judge Gautschi in the Johannesburg High Court however found that the reason that the payments fell into arrears was because of an error on the part of the NPDA, and through no fault of the Thompsons. At the time when the application for judgment was launched, the Thompsons were technically still in default of their obligations under the debt review order, but only by the relatively insignificant amount of R440.91.

The judge pointed out that he has to interpret the National Credit Act in a manner which gives effect to its purposes. This includes the protection of consumers by *"promoting equity in the credit market by balancing the respective rights and responsibilities of creditor providers and consumers."* This would require him to exclude minor, unwitting and excusable defaults of the nature which occurred here and for which the Thompsons were not to blame. As a result the bank's application was dismissed with costs.

Nedbank Ltd v. Thompson and Another 2014 (5) SA 392 (GJ).



Personal Injury

■ *Slip Slop*

"We need more understanding of human nature, because the only real danger that exists is man himself."
– Carl Gustav Jung (1875 - 1961)

CHRISTINA VENTER was shopping at a supermarket when she slipped and fell on the damp floor. She sustained bodily injuries and sued the supermarket for damages. Her claim was upheld by Judge Pillay in the Durban High Court.

The supermarket appealed to the Supreme Court of Appeal.

The facts showed that a routine cleaning operation of the store was in operation. The cleaner mopped the floor and moved away from the area while it was still damp or wet. The mopping of the supermarket floor created a potential danger to shoppers. A warning sign indicating that the floor was wet or slippery was beyond the point where Venter fell. There could be no doubt that the reasonable possibility of a person slipping and falling as a result of the damp floor was foreseeable. The supermarket was accordingly obliged to take such precautions as were reasonable to guard against that eventuality.

Appeal Judge Mhlantla concluded on the evidence that the cleaner did not ensure that the area was dry when he moved on. Nor did he place a warning sign for the benefit of the shoppers sufficiently close to the area concerned to warn them that it was slippery or wet. The judge accepted that there is a need to mop the floors of a store to ensure that it remains clean. However the manner of doing so is crucial. It was clear that the cleaner's conduct caused the danger. The routine cleaning operation was done during a busy period. The cleaning operation should have been conducted in such a manner that the cleaner ought to have worked on a small area and ensured that that area was dry before moving on. The judge concluded that negligence had been established. The supermarket's appeal was dismissed with costs.

Avonmore Supermarket CC v. Venter 2014 (5) SA 399 (SCA).

Refugee Law

■ *A Welcome Hand*

"It is a folly to expect men to do all that they may reasonably be expected to do."
– Richard Whately, Archbishop of Dublin (1787 - 1863)

APPLICATION WAS brought in the Cape Town High Court to review and set aside a decision of the Refugee Appeal Board which had rejected an application for refugee status and asylum in terms of the **Refugees Act** 130 of 1998. The applicant came from Bujumbura on the north-western border of Burundi, close to the heartland of the area which had been controlled by rebel militia who were active throughout the eastern parts of the Democratic Republic of Congo. He had experienced severe trauma in his life. At the age of 16 he witnessed his father being murdered. Two years later he fled his home and made his way through Tanzania, Zambia and Zimbabwe to South Africa. At 19 he suffered xenophobic attacks in South Africa. He was 25 years old with no family remaining in Burundi. His only family is his brother also living in South Africa.

Almost four years after his initial interview with a Refugee Status Determination Officer (RSDO) and five years after he had first applied for refugee status and asylum, he was notified that his claim for refugee status and asylum had been unsuccessful.

Judge Denis Davis reviewed the procedure taken by the Refugee Appeal Board. He found that it had not been properly constituted and its decision was legally invalid. He was not satisfied that it was sufficiently fair and impartial. He pointed out that regrettably recent research on South Africa's refugee system indicated that this case may not be exceptional. In a review of 324 negative-status determination decisions made by RSDOs it was found that these decisions *"were characterised by errors of law and absence of reasons, a lack of individualised decision-making, and a general failure by the decision-maker to apply his or her mind or to use sound reasoning."*

As a result the decision of the Refugees Appeal Board was reviewed and set aside and the applicant was granted asylum and refugee status in South Africa.

Harerimana v. Chairperson, Refugee Appeal Board and Others 2014 (5) SA 550 (WCC).

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