LAW LETTER

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Your strategic partner at law

This Winter edition of Law Letter extracts from recent judgments of our highest courts aspects of process, procedure, claims and liability, rights and obligations which can affect us all. 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

Class Actions

▪ *Safety in Numbers*

"All for one, one for all."
– Alexandre Dumas (1802 – 1870)

THIS APPEAL in the Supreme Court of Appeal was about class actions and involved what Judge Malcolm Wallis called a *"novel area of procedural law"*. It was only recently that the type of class action dealt with by the court was recognised in our jurisprudence, that is, one in which a representative brings proceedings on behalf of a group of persons who have not authorised the representative to act on their behalf. An express provision for a class action in this form was incorporated into the Constitution by Section 38(c) which provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> . . .
>
> anyone acting as a member of, or in the interest of, a group or class of persons."

A number of class actions have been brought in accordance with that section but despite recommendations by the South African Law Commission and other interested parties that similar procedures be prescribed by statute in cases other than those involving constitutional rights nothing has yet been done. The novelty to which Judge Wallis referred was whether, in any event, the courts have jurisdiction to deal with class actions where a non-constitutional right is involved. The appeal followed a decision in the Cape Town High Court where the court had refused to certify a class action in respect of a national complaint and had also refused to certify a class action in regard to a Western Cape complaint.

Stepping boldly into new territory, the Supreme Court of Appeal held that, in principle, a class action is available in cases not involving constitutional rights. It formulated the requirements which must be satisfied for the action to be certified. These are:

- the existence of a class;
- a common claim or issue that can be determined by a class action;
- evidence of a valid cause of action;
- the suitability of the representative of the class;
- the court being satisfied that a class action is the most appropriate procedure for the adjudication of the claims.

Children's Resource Centre Trust and Others v. Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA).

In this case, as in the previous one, the same respondents were producers of bread in the Western Cape who allegedly engaged in practices prohibited by the **Competition Act** 89 of 1998, such as the co-ordinated fixing of prices, the fixing of discounts and agreements whereby distributors undertook not to deal with one another's distributors. The applicants in the case were purveyors of bread who alleged that they and about 100 other distributors suffered financial loss because of the producers' prohibited conduct, particularly the fixing of discounts the distributors received from the producers. The class action they sought to bring was a so-called "opt-in" action. This means that the class to be represented in the action is confined to claimants who come forward and identify themselves as such – in this case by written notification to the applicants' attorneys. But the court ruled that in such a case, the claimants who come forward positively to advance their claims need no representative to do so on their behalf.

The only advantage advanced by the claimants for proceeding by way of a class action instead of a joint action was that where the action is brought by a representative, the claimants are immunised against personal liability for costs. The court held that that was not a good reason for allowing a class action and the appeal was dismissed.

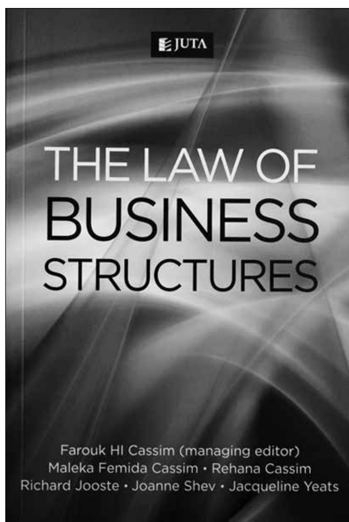
Mukkaddam and Others v. Pioneer Food (Pty) Ltd and Others 2013 (2) SA 254 (SCA).

Book review

THE LAW OF BUSINESS STRUCTURES

By Farouk HI Cassim, Maleka Femida Cassim, Rehana Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats
(613 pages) (Juta & Co Ltd) www.jutalaw.co.za

THE INTRODUCTION of the new **Companies Act** of 2008 thoroughly and extensively overhauled company law in South Africa. This was because basic and fundamental corporate law doctrines and concepts were deemed to be outdated, obsolete or archaic, to have outlived their usefulness, and no longer to be appropriate to the contemporary economic and business environment. In addition, there was the need to harmonise South African company law with that of our main trading partners internationally, so as to ensure that South African companies do not have to compete at a disadvantage because of an overly restrictive company law regime.



This comprehensive book deals expertly with all the different types of business structures available in South African law, including sole proprietorships, partnerships, business trusts and close corporations. But its primary emphasis is on companies, whether large or small, and whether formed for a profit-making or non-profit-making objective. The co-authors offer careful and detailed explanations and analyses of core legal concepts and principles. They deal in clear and lucid style with corporate governance and finance, the duties and the liability of directors, the role of auditors, shareholder remedies and minority protection, business rescue and fundamental transactions. Also discussed are best practices, insider trading and market manipulation.

The Law of Business Structures will be welcomed as a reliable and ready source of information and guidance by lawyers, accountants, auditors, company secretaries and those in commerce responsible for planning, management and administration. Well-organised and indexed, with pertinent references to legislation and case law, the co-authors and publisher Juta are to be commended for assembling within one cover such an extensive but integrated treatment of the subject matter.

National Credit Act

■ *An Unjust Aspect*

"Logical consequences are the scarecrows of fools and the beacons of wise men."
– T.H. Huxley (1825 – 1895)

IN 2009 Mr O, a farmer, lent his friend Mr B, R7 million for property development. They concluded three written loan agreements to cover the transactions. Mr O was not a registered credit provider and, not being in the business of providing credit, was unaware of the need to register as such. He had no intention of violating the **National Credit Act** 34 of 2005. When Mr B was unable to repay the loans on due date, Mr O applied for his sequestration in the High Court and a provisional order was granted. When the matter later came before the court for a final order it was not opposed but the presiding judge refused to grant the order citing his concerns about the provisions of the Act and ordered the matter to be fully argued.

The National Credit Regulator was joined as a party. The High Court held that the loans were "credit agreements" as envisaged in the Act and Mr B was a "consumer". Furthermore, as Mr B's principal debt exceeded R500 000, Mr O should have been registered in terms of the Act. The result of these defects in the transaction was that the credit agreement was unlawful and in terms of Section 89(5) of the Act Mr O was not entitled to recover the money advanced either under the agreements or on the basis of Mr B having been unjustly enriched at the expense of Mr O. However, the High Court decided that there was insufficient reason to deprive Mr O of his right to restitution of the money lent and that Section 89(5) of the Act resulted in the arbitrary deprivation of Mr O's property in breach of Section 25(1) of the Constitution.

The National Credit Regulator took the High Court's decision on appeal to the Constitutional Court. A majority of the court held that although the wording of Section 89(5)(c) was problematic because of the number of different interpretations that had been advanced in argument about its meaning, the courts have a duty to interpret and apply the law and the High Court's interpretation of the section was the most plausible of the

various possible interpretations. That interpretation deprived Mr O of property belonging to him because it extinguished his right to claim restitution based on unjust enrichment without leaving any discretion to a court to consider a just and equitable order under the circumstances.

As a result the court dismissed the appeal and confirmed the judgment of the High Court that Section 89(5)(c) of the Act was constitutionally invalid. The difficulties in interpreting the section were demonstrated by the fact that three members of the court dissented from the majority decision.

National Credit Regulator v. Opperman and Others 2013 (2) SA 1 (CC).

Law of Defamation

■ *My Lips are Sealed*

UNDER THE Rules of Court relating to trial procedure a party must furnish information about relevant documents which it has to the other party who properly requires that information in order to prepare its case. In this matter, that right foundered on the contrary right of freedom of the press. The case was one of defamation, following an article in the *Mail and Guardian (M&G)* which reported on an alleged corrupt awarding of a tender. The company involved in the transaction sued the reporter concerned and the *M&G*.

In its pre-trial preparations the company called upon the defendants to disclose details of all the documents in their possession which were relevant to the issues before the court. The defendants filed their discovery affidavit setting out the necessary details but the company, believing that there were other relevant documents, called for additional discovery. The defendants then disclosed the further documents in which they had edited out the names of the defendants' sources for the story about the tender. The company contended that the defendants had no valid objection which entitled them to refuse to furnish this information and applied to court to compel the disclosure of the missing names.

The defendants opposed the application, arguing that the names were not relevant to the issue of defamation, that to reveal them would limit their constitutional right to freedom of expression and that they had promised their sources that they would not reveal their names. Judge Tsoka agreed. After referring to a number of both local and foreign judgments, he held that subject to certain limitations (none of which were here present) journalists are not required to reveal the identity of their sources. The court also decided that the names of the sources was not relevant to the issue of defamation. It dismissed the company's application.

Bosasa Operations (Pty) Ltd v. Basson and Another 2013 (2) SA 570 (GSJ).

Land Restitution

■ *The Price of Delay*

THIS CASE was about interest which was described in 1952 by then Chief Justice Centlivres as "the lifeblood of finance". The Regional Land Claims Commission for Mpumalanga and the National Department of Land Affairs (the purchasers) had, in 2009, entered into an agreement with the seller to buy certain land in that Province for the purpose of land restitution. In May 2010 the seller, tired of waiting for the purchasers to pay the purchase price and take transfer of the land, commenced proceedings against them to compel them to get on with the deal.

After formal demands by the seller that the purchasers proceed with the transaction had not been complied with (because of alleged funding constraints), the seller launched an application in the Pretoria High Court. It asked for the purchasers to furnish a written undertaking to pay the purchase price in terms of the sale agreement and to pay interest at the prescribed rate of 15.5% from 6 October 2009, which was the date by which payment should have been made, until date of payment. The purchasers opposed the application but, on 5 July 2010, paid the purchase price of R200 million into the trust account of the appointed conveyancers. That left unresolved the claim for interest which the purchasers declined to pay. This became the issue which was then argued before the Pretoria High Court. The interest was computed at R84 931 per day.

Acting Judge Sapire dismissed the application. He did so on the basis that the claim for interest was a damages claim arising out of the purchaser's breach of contract. The proper measure of damages was not the amount of interest but the seller's overall financial loss occasioned by the delay which had to take into account also the benefits that accrued to the seller by remaining in occupation during the period of the default.

Not surprisingly, this judgment was taken on appeal to the Supreme Court of Appeal where the seller was successful. The appeal court agreed that *mora* interest for unlawful delay was a species of damages but Appeal Judge Ponnan pointed out that the judge in the lower court had overlooked an important distinction. The one approach is to treat the delay as merely one element among many which the court may consider in computing or estimating the damage which a plaintiff has suffered. The other approach –

> *" . . . is that of dealing with the liability to pay interest as a consequential or accessory or ancillary obligation . . .*

automatically attaching to some principal obligation by operation of law. The best illustration of this type is the liability for interest a tempore morae [from the time of delay] falling on a debtor who fails to pay the sum owing by him on the due date. Here the court does not make an assessment; it does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest-bearing potentialities of money are to be taken into account in computing its award. The only issue is whether the legal liability exists or not; if it does, the rest is merely a matter of mathematical calculation; the rate of interest on a definite sum from a definite date until date of payment."

The court accordingly awarded interest to the seller on the amount of R22 761 643.85 at the rate of 15.5% per annum from 6 July 2010 to date of payment. In concluding, Judge Ponnan severely criticised the conduct of the officials involved in the matter, saying –

"It remains to observe that the conduct of the officials in the employ of the respondents evokes strong feelings of disquiet. Because of their conduct the public purse is much the poorer. As I have already pointed out – for as long as the purchase price remained unpaid, interest accrued at R84 931 per day. To that must be added the costs of what can only be described as ill-advised and morally unconscionable litigation."

Crookes Brothers Limited v. Regional Land Claims Commission, Mpumalanga, and Others 2013 (2) SA 259 (SCA).

Employment Law

■ *Chain of Command*

"A servant's too often a negligent elf;
– If it's business of consequence,
do it yourself."
– R.H. Barham (1788 – 1845)

THIS CASE was an appeal to the Supreme Court of Appeal by the Minister of Defence who had been found liable by the High Court for a claim by the plaintiff who had been shot during a robbery by one Mahlangu. He was not an employee of the South African National Defence Force (SANDF) but the weapon he used was an R4 rifle, the body of which had been stolen from an SANDF base in Pretoria. Furthermore, other components of the weapon had also been stolen, in this instance by one Motaung, from a military base in Middelburg where he was employed as a member of the SANDF and was responsible for the safekeeping and storage of various dangerous infantry weapons and their parts, ammunition and magazines. Some of these Motaung provided to Mahlangu to enable the latter to render the rifle operable although Motaung knew or ought to have known that Mahlangu intended to use the rifle to commit armed robberies. The question was, therefore, whether the Minister was vicariously liable, as his employer, for the actions of Motaung. The trial court found that he was.

In an appeal by the Minister to the Supreme Court of Appeal, Judge Heher pointed out that the pre-constitutional standard test for vicarious liability might not have provided a remedy for the plaintiff. Subjectively considered from Motaung's point of view, he deliberately turned his back on his employment and its duties, pursuing instead his own interest and profit. Objectively, his theft of the rifle parts formed no part of his duties and there was no link between his own interests and the business of his employer. Indeed, Motaung's conduct constituted a negation of or disassociation from the employer/employee relationship. However, the Constitutional Court has held that a court may need to ask itself whether the rule, which was once based on the question of whether the employee was *"on a frolic of his own"* disassociated from the duties for which he was employed, does not require development and extension. Judge Heher accordingly went on to say in this matter that:

Supreme Court of Appeal

"In answering the question, the normative values of the Constitution direct the policy that must influence the decision, and they do so in relation to the objective element of the test, ie the closeness in relationship between the conduct of the employee and the business of the employer. . . . It is no longer necessary, if the constitutional norms so dictate, to limit the proximity to those cases where the employee, although deviating from the course and scope of employment, is nevertheless acting in furtherance of the employer's business when the deviation occurs."

On the facts of this case there was an intimate connection between Motaung's wrong-doing and his employment. He stole the components and the ammunition while under a positive duty to preserve and care for the items in question. The most probable inference was that his ability to commit the theft was provided by the scope of his duties, without which he would have possessed neither access to them nor the knowledge to avoid whatever security controls the SANDF had in place. The answer may have been different if the Minister had shown that, as required by its constitutional responsibilities, the SANDF had taken all reasonable steps to prevent the theft of weapons by its responsible employees, but he had not done so. On the available facts, Motaung's conduct was linked to the harm sufficiently closely or directly for legal liability to ensue and the Minister's appeal was dismissed.

Minister of Defence v. Von Benecke 2013 (2) 361 (SCA).

Damages

■ *Growing up Fast*

"Ah, but I was so much older then,
I'm younger than that now."
– Bob Dylan

THE PLAINTIFF, Ms Apdol, suffered loss when her breadwinner was killed in a motor collision in 2004. She was 16 at the time and still a minor. In terms of the **Road Accident Fund Act** of 1996 a claim for damages is barred by prescription three years after the date upon which the cause of action arose. Because Ms Apdol was a minor she was protected by Section 23(2) of the Act which provides that prescription of a claim for compensation does not run against a minor. At the time of the collision, the age of majority in South Africa was 21 but in 2007 an amendment was made to the **Age of Majority Act** of 1972, which reduced that age to 18. At the date upon which that amendment became law, Ms Apdol was already 19 years old and thus became a major.

Ms Apdol's claim for compensation was lodged with the Road Accident Fund in August 2010 and was met with a special plea of prescription when she instituted action against the Fund in February 2011. The special plea averred that Ms Apdol had become a major on 1 July 2007, when the age of majority was reduced to 18 and that prescription had, therefore, begun to run against her from that date. She was therefore obliged to have instituted her claim on or before 30 June 2010.

In response Ms Apdol relied upon the provisions of the **Interpretation Act** of 1957 relating to the effect of a repeal of a law. Section 12(2) of that Act states that a repeal shall not affect any right or privilege acquired or accrued under the law that is repealed nor affect legal proceedings in respect of such right or privilege. Following from this, it was argued that because Ms Apdol's right to claim compensation had arisen when she would have had three years from the date of her twenty-first birthday within which to institute her claim, that right could not be adversely affected by the amendment to the age of majority. Judge Prinsloo in the Pretoria High Court agreed with that argument. Relying also on Section 28 of the Constitution that a child's best interests are of paramount importance in every matter concerning the child, he dismissed the special plea of prescription.

Apdol v. Road Accident Fund 2013 (2) SA 287 (GNP).

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