LAW LETTER

Your Key to the Issues

June 2014

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Your strategic partner at law

This mid-year edition of Law Letter examines recent decisions of our courts dealing with labour law, property problems and claims for negligence. 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

Labour Law

■ *Absent Without Leave*

"I was courtmartialled in my absence
and sentenced to death in my absence,
so I said they could shoot me in my absence"
– Brendan Behan (1923 - 1964)

MR SEETA was employed by the Department of Health as a Chief Professional Nurse. He submitted an application when the post of Nursing Manager was advertised. Mr Seeta and six other candidates were called for an interview.

Mr Seeta obtained the highest score at the interview, followed by Mr Batsietseng, an external candidate.

The Department then decided to assess the two highest scoring candidates on two additional factors: their performance evaluation results for 2007/2008 and their 2008 leave records. The Department did not disclose to the candidates that it intended using these criteria to make a final decision between Mr Seeta and Mr Batsietseng.

Mr Batsietseng's performance results were significantly higher than those of Mr Seeta. In addition, Mr Seeta was found to have taken 5 days unplanned leave more than Mr Batsietseng. In the light of these additional factors, Mr Batsietseng was found to be the best candidate and was given the job.

Mr Seeta was unhappy with the decision. He claimed that he had been the victim of an unfair labour practice relating to promotion. The dispute went to mediation and then arbitration, with the arbitrator finding that the failure to appoint Mr Seeta to the Nursing Manager position was not an unfair labour practice.

Mr Seeta then approached the Labour Court, asking for an order overturning the arbitrator's decision. He argued that it was unfair for the Department to consider performance scores and leave records after the interview and without having disclosed this to the prospective candidates. He also pointed out that the public service regulations prescribed the criteria to be taken into account by a selection committee and these were limited to training, skill, competence and knowledge of the post, as well as the need for the Department to develop human resources and its affirmative action programme. Mr Seeta conceded that consideration of performance evaluations fell within these categories, but argued that a comparison of leave records was not in accordance with the regulations.

The Department, on the other hand, maintained that the post of Nursing Manager was a senior post. The Department had compared leave records because it was looking for a manager who would lead by example and would always be 'there'.

Judge Cele determined that the consideration of unplanned leave was a valid method for selection. Employees need to be present at work for effective production in the workplace, failing which the Department and the taxpayer lose out. Mr Seeta did not suggest that the Department had an ulterior motive in using unplanned leave as a selection criterion. Mr Seeta did not satisfy the court that an unfair labour practice had been committed and his application was dismissed.

Health and Other Service Personnel Trade Union of SA (Hospersa) and Another v. Public Health and Welfare Sectoral Bargaining Council and Others (D678/09) [2013] ZALCD 31 (20 December 2013).

■ *Great Expectations*

MR LESOLANG was employed by the City of Johannesburg Metropolitan Municipality on a five year fixed-term contract commencing from 13 December 2004. It came to light that there was an error in Mr Lesolang's written contract of employment, which stated that his contract would terminate on 31 December 2010 instead of 31 December 2009.

Mr Lesolang was unhappy when he received a letter from the Municipality informing him of this error and its rectification. He interpreted this as being a dismissal and referred a claim to the relevant bargaining council six months before the termination of his contract on 31 December 2009. The bargaining council found that Mr Lesolang had been unfairly dismissed and awarded him monetary compensation. The dispute eventually came before the Labour Appeal Court.

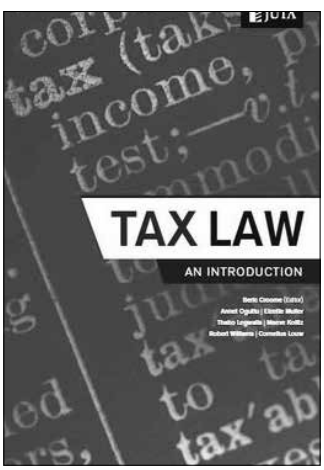
Book review

TAX LAW: An Introduction

Editor: Beric Croome
(627 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

ONE HUNDRED years ago the first Income Tax Act 28 of 1914 became law in South Africa.

Taxation is a central component of any modern state, which both burdens and benefits each of its citizens directly and indirectly. Judge Dennis Davis, in his Foreword to this important new work, comments:



> *"Tax has become increasingly complicated in this country. Every year one, if not two, voluminous bills pass through Parliament and effect vast and complex changes to our tax law. It is probably not inaccurate to observe that due to the unnecessary over-ambition of the drafters of tax legislation, there is hardly anyone within the legal or accounting profession who specialises in tax who can claim to have a comprehensive legal or knowledge of all areas of our tax law."*

TAX LAW: An Introduction fills an important gap. It deals with the fundamentals of income tax in a practical and clear manner. It simplifies and explains the key objectives, concepts and principles of taxation. It avoids unnecessary jargon and effectively covers the process of tax collection and the interpretation of tax legislation.

Separate chapters deal with taxation of companies, employees' tax, capital gains tax, deductions, exempt income, allowances, avoidance and evasion and international tax issues. The book includes a CD that contains all the relevant Acts for easy reference.

This is the ideal toolkit not only for tax practitioners and advisors, but all those responsible for the all-important financial planning and compliance in a business environment.

Under the editorship of tax expert Beric Croome, the panel of contributors include Professor Annet Oguttu, Professor Maeve Kolitz, Dr Elzette Muller, Professor Bob Williams, Advocate Cornelius Louw and Dr Thabo Legwaila.

The co-authors and publisher Juta are to be congratulated for producing a resource that can only enrich the understanding of this critical area of commercial law.

An employee on a fixed-term contract may claim unfair dismissal if he or she has a reasonable expectation that the fixed-term contract will be renewed. Mr Lesolang relied on the fact that the Municipality had awarded him a bursary towards a Diploma in Labour Law. The diploma was a two year course, terminating in 2011 (by which time Mr Lesolang's fixed-term contract of employment would otherwise have terminated). Mr Lesolang expected that, for as long as he was awarded financial aid for his studies, he would remain in the employ of the Municipality. The question arose: was this a reasonable expectation?

Judge Musi took the view that the Municipality's letter to Mr Lesolang, which amended the date of termination of his fixed-term contract, was a clear indication that he would not be offered another fixed-term contract of employment. The bursary agreement was a different contract to the contract of employment, and therefore had no bearing on the contract of employment. If the bursary agreement was interpreted to mean that the employee would continue to be employed for the period of his bursary or beyond, this would mean that the contract of employment would be varied by the award of the bursary. This could not be the case.

The judge also concluded that the claim of dismissal was premature as Mr Lesolang referred the matter to arbitration six months before his contract of employment was due to end. As a result, the bargaining council did not have jurisdiction to hear the matter.

Independent Municipal and Allied Trade Union and Another v. City of Johannesburg Metropolitan Municipality and Others (JA49/2013) [2014] ZALAC 3 (4 March 2014).

■ *Sink or Swim*

"And let the day be time enough to mourn
The shipwreck of my ill-adventured youth."
– Samuel Daniel (1562 - 1619)

FACED WITH sexual harassment charges at work and armed with a keyboard, the Internet and a turn of phrase, Mr Moloi, an employee of Macsteel Service Centres, found himself taking a rather long walk off a short plank when he informed his employer that he intended to 'jump ship'.

In this case, the requirements for what is considered to be a valid resignation came under the spotlight. On 8 March 2013 Mr Moloi emailed the management of Macsteel as follows:

> *"Seeing that (the) … future is not that bright and … business (is) taking a nose dive and that soon enough most of (the) employees won't have jobs anyway, I have decided to jump ship in order to focus on steering my own little ship which I have been privately building with the little remuneration that you have been paying me for the last 8 years of service to you… On Monday I'll be coming in to render my resignation formally and to claim what is legally mine in terms of pension pay-outs and outstanding remuneration…"*

However, by the time Monday arrived, Mr Moloi had had a change of heart and no longer wished to resign. Unfortunately for him, his employer insisted that he was no longer employed at Macsteel.

Mr Moloi argued that his email merely expressed an intention to resign and was not a "formal resignation". He did not want to withdraw his resignation, but rather to withdraw his intention to resign. He had not actually resigned.

Obviously disgruntled with the fact that he found himself jobless Mr Moloi declared a dispute with the Centre for Dispute Resolution in Johannesburg claiming that he had been unfairly dismissed.

In deciding whether Mr Moloi had in fact voluntarily resigned or had been dismissed, Commissioner Van Wyk reiterated the principle in law that he who alleges must prove. Reference was made to a case in which Judge Van Niekerk stated the following:

> *"A resignation is established by a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention."*

The commissioner found that, not only had Mr Moloi failed to prove on a balance of probabilities that he had been unfairly dismissed, but that, given the contents of his email to his employer, his conduct clearly illustrated that his resignation was unequivocal. Out he went.

Moloi v. Macsteel Service Centres (VRN Reef) [2014] 2 BALR 117 (MEIBC).

Law of Property

■ *Traffic-controlled Intersection*

"The long and winding road
That leads to your door
Will never disappear…"
– John Lennon and Paul McCartney

MORE OFTEN than not, land owners do not understand the nature and consequence of servitudes in respect of their land. This is largely due to the fact that South African property law hinges on old Roman-Dutch law, which is the foundation of our common law.

In a recent case a full bench of the Western Cape High Court held that the Roman-Dutch principle of *blokland* is still very much alive in our law today. A company in Stellenbosch subdivided its land into two portions. The western landlocked portion was transferred to Fleurbaix Farm (Pty) Ltd and the eastern portion, accessible by public road, was transferred to Van Rhyn. By operation of law, and without having being required to be registered in the Deeds Registry, Fleurbaix had an automatic right of way servitude over Van Rhyn's property in order to access the public road. Later, Van Rhyn made improvements and altered the landscaping of his property. In doing so Van Rhyn unilaterally closed Fleurbaix's access to the right of way and replaced it with a right of way running across the northern section of his property. Fleurbaix was not happy with this new arrangement and approached the court.

Judge Binns-Ward pointed out that the two properties were what were known in Roman-Dutch Law as *blokland*. The general rule with regard to *blokland* is that the landlocked property is automatically entitled to a right of way servitude over the adjoining subdivision in order to access a public road. In terms of the principle of *blokland* Fleurbaix was entitled to choose the path of the servitude over Van Rhyn's land. The caveat to this rule is that Van Rhyn can unilaterally alter the path of the right of way, provided that this does not amount to unreasonable conduct and does not prejudice Fleurbaix's common law right to access the public road through Van Rhyn's property.

Van Rhyn did not act unreasonably by altering the path of Fleurbaix's right of way as in doing so no prejudice was created.

Van Rhyn & Others NNO v. Fleurbaix Farm (Pty) Ltd 2013 (5) SA 521 (WCC).

■ *Family Planning Failure*

"I have a big house – and I hide a lot."
– Mary Ure (1933 - 1975)

WHETHER YOU are investing in your first house or simply exploring the opportunities that property ownership holds, buying property is daunting enough without having to look for defects undetectable to the common eye. Undetectable until you move in, that is.

Mr Heydricks and his wife bought a residential property in Port Shepstone from Mrs Haviside. Mrs Haviside had originally bought the property for her mother. There was a carport on the property at the time they acquired the property but, unknown to them, the carport had not been approved by the municipality, thus rendering the structure illegal. Mrs Haviside's mother had decided to turn the carport into a double garage by filling in the walls. This was not only done without the knowledge of Mrs Haviside, but also without the necessary approval from the municipality. When Mrs Haviside visited her mother later that year, the garage was already completed and at no point did it occur to her to ascertain whether there had been compliance with building regulations. Only after the property was sold to the Heydricks family and they wanted to add a second storey onto the garage, were they advised that the entire structure was unlawful and would need to be demolished and reconstructed in accordance with building standards.

Judgment was initially granted against Mrs Haviside and she was ordered to pay for the costs of demolition and reconstruction. She took the matter on appeal, using the *voetstoots* clause in the sale agreement as a defence. In short, *voetstoots* means to "take as is". If you buy a property where a *voetstoots* clause is included in the sale agreement, you agree to buy the property in its current state and the seller cannot be held liable for any latent or patent defects.

The Pietermaritzburg High Court confirmed that lack of the statutory permission which is required to render a structure authorised, is indeed a defect to which the *voetstoots* clause applies. For a buyer to escape the provisions of the *voetstoots* clause he needs to prove that the seller deliberately concealed the lack of building approval with the intention to defraud the buyer. The purpose of the *voetstoots* clause is to protect the seller against liability for defects of which he or she is unaware, as it was in Mrs Haviside's case.

Haviside v. Heydricks and Another 2014 (1) SA 235 (KZP).

Damages

■ *The Long Arm of the Law*

"The innocent and the beautiful
have no enemy but time."
– W.B. Yeats (1865 - 1939)

MS KWEYIYA was four years old when she was involved in a motor vehicle accident in 1988. The accident left her as a paraplegic. Mr Macleod, an attorney, was appointed by Ms Kweyiya's mother to claim damages from the Road Accident Fund.

A claim was instituted for R2 300 000, but was subsequently settled at a mere R99 500. The settlement was accepted by Ms Kweyiya's mother on her behalf.

THE TAX OMBUD

THE OFFICE of the Tax Ombud was launched on 7 April 2014 by Finance Minister Pravin Gordhan. South Africa's first Tax Ombud is retired Judge President Bernard Ngoepe. The objective of the Tax Ombud is to review and address complaints by taxpayers regarding service, procedural or administrative issues relating to their dealings with the South African Revenue Service (SARS). This is an additional and free avenue to deal with complaints by taxpayers that cannot be resolved through SARS's internal mechanisms.

The Finance Minister says that the Tax Ombud is intended to be a simple and affordable remedy to taxpayers who have legitimate complaints that relate to administrative matters, poor service or the failure by SARS to observe taxpayer rights.

Judge Ngoepe served as the Judge President of the North and South Gauteng High Courts for 14 years. He was the first black judge to be accepted onto the Pretoria Bar in 1995. He also acted for a term as a Constitutional Court Justice. According to Judge Ngoepe, the office operates independently of SARS and treats all communication between it and taxpayer in strict confidence. The Chief Executive Officer of the office of the Tax Ombud is Advocate Eric Mkhawane. Complaints received thus far have been from both individuals and businesses. Complaints can be lodged online.

The Tax Ombud can be reached at: tel: 0800 662 837; fax: 012 452 5013; email: *complaints@taxombud.gov.za*. Physical address: IParioli Building, Block A3, Ground Floor, 1166 Park Street (between Jan Shoba and Grosvenor Streets), Hatfield, Pretoria, Gauteng.

Ms Kweyiya consulted with Mr Macleod in 2006 on a different issue and was given a copy of the documents from her earlier claim. It was only later, in February 2009, that Ms Kweyiya consulted other attorneys and was advised that Mr Macleod had acted negligently in settling the claim. Summons was issued against Mr Macleod.

Ms Kweyiya alleged that Mr Macleod had acted negligently, in breach of contract and of his duty of care. She claimed that she was due R2 100 000 at the time of settlement and quantified the monetary value of that amount (at the time she issued summons) to be R4 800 000.

Mr Macleod raised the defence of prescription, arguing that the time for Ms Kweyiya to institute her claim had expired. The prescription period for this type of claim is three years. Ms Kweyiya argued that she only became aware of the terms of the settlement agreement when she received the documents in 2006. She also alleged that she first consulted with her present attorneys in February 2009, and that it was only then that she became aware that Mr Macleod had acted negligently.

The dispute came before the Supreme Court of Appeal which held that, in terms of our **Prescription Act** of 1969, a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Mr Macleod claimed that Ms Kweyiya should have been wary of her mother and should have demanded the details of the settlement within a year of her reaching the age of majority. Ms Kweyiya's response was that it was perfectly reasonable for her to trust that her mother and her attorney had acted in her best interests.

Judge Tshiqi decided that taking into consideration what is reasonable with reference to the particular circumstances in which Ms Kweyiya found herself, she was entitled to sue her attorney 25 years after the event.

Macleod v. Kweyiya 2013 (6) SA 1 (SCA).

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