LAW LETTER

Linking Attorney & Client

November 2013

MacRobert
Attorneys

Your strategic partner at law

This Summer edition of Law Letter highlights decisions of our Constitutional Court, Supreme Court of Appeal and High Courts on building contracts and regulation of construction, rights against and obligations to municipalities and aspects of marriage. We also focus on what you can do about paying your income tax, and review an important book on the Bill of Rights. 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 judgments

Law of Contract

■ *Don't Let the Rain Come Down*

"Lord, Thou hast given me a cell
Wherein to dwell
A little house, whose humble roof
Is weather-proof."
– Robert Herrick (1591 - 1674)

THE OLD Roman-Dutch principle of *voetstoots* was considered by the Supreme Court of Appeal in regard to the sale of a house with a thatched roof that leaked. In the case of a sale agreement which is subject to a *voetstoots* clause the seller is not liable for latent defects which manifest themselves after the sale unless the purchaser can show that, at the time of the sale, the seller was aware of the defect and craftily or fraudulently concealed its existence.

The trial court had found that there were two defects in the roof which were latent but that the seller was excused liability by virtue of the *voetstoots* clause because the purchaser had not proved that the seller had had knowledge of the defects and had improperly concealed their existence. One of the defects was that the wooden roof poles did not properly support the weight of the thatch roof with the result that the roof was gradually collapsing and allowing the ingress of rainwater. The other was that the pitch of the roof was inadequate – less than 30 degrees in places when it should have been 45 degrees.

It was common cause between the parties that the seller had been aware of the first defect and had had repairs effected to the roof before the sale. However the purchaser then raised the issue of whether, to the knowledge of the seller, those repairs had properly or adequately rectified the defect to prevent the roof from leaking. The seller's case was that he had a *bona fide* belief in the adequacy of the repairs. He contended that he continued to enjoy insurance cover over the roof after the repairs had been effected, suggesting that the insurer had been satisfied as to the effectiveness of the repairs.

That was not enough to save the seller. To cover the purchaser against possible problems relating to the roof the parties had executed an addendum to the sale agreement. This provided that a guarantee on the thatch roof from the contractor who had effected the repairs would be transferred from the seller to the purchaser. The guarantee was for a period of six months only. On the evidence the court held that the seller must have known of its limited duration. In fact, in his evidence he had to concede that when he signed the addendum to the agreement he knew that there was, in fact, no longer any guarantee in existence because the six month time period had already expired. The Appeal Court concluded that the seller's "wilful abstention" from ascertaining certain facts from his insurers to satisfy his alleged belief in the adequacy of the repairs indicated that he did not honestly believe that the repairs were sufficient to prevent the roof leaking.

The seller was unaware of the second cause of the leaking roof, namely the inadequate pitch, but that did not matter. His conduct in concealing the absence of a valid guarantee was fraudulent. It indicated that he knew about the structural defect. He thus forfeited the protection of the *voetstoots* clause. The purchaser was entitled to be paid the difference between the purchase price of the house and its value with the defective roof. The cost of repairs could be used to determine that difference and judgment was granted in favour of the purchaser in an amount of R449 499.

Banda and Another v. Van der Spuy and Another 2013 (4) SA 77 (SCA).

Consumer Protection

■ *Erection Correction*

"Man seeketh in society comfort, use and protection."
– Francis Bacon (1561 - 1626)

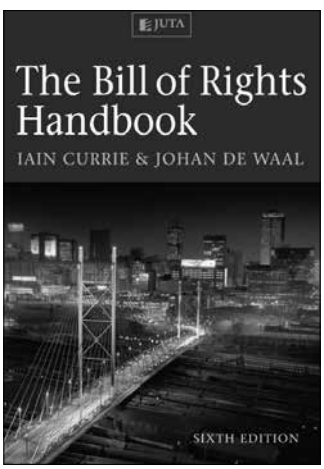
THE **HOUSING Consumers Protection Measures Act** of 1998 is designed to protect those who acquire badly built houses from incompetent home builders. It does so by requiring home builders to be registered which makes them subject to a

Book review

THE BILL OF RIGHTS HANDBOOK (Sixth Edition)

By Iain Currie & Johan de Waal
(851 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

NOT A day goes by without South Africans being confronted with events that impact directly and indirectly on the fundamental human rights enshrined in our Bill of Rights – equality, human dignity, education, privacy, freedom of movement, property, language, culture, socio-economic rights, access to information – all these and other rights have been tested and wrestled with in our courts.



The structure and content of our society in a constitutional democracy are largely shaped by the extent to which all these rights are protected, upheld and brought to life in a real and meaningful way.

This welcome sixth edition of one of the leading works on the subject covers almost two decades of jurisprudence, interpreting and applying the South African Bill of Rights. The handbook's comprehensive coverage and its ease of use have made it an indispensable source of reference for this important area of law. Well-organised and clearly set out, this practically-oriented guide is precisely what legal practitioners at all levels require to advise and assist their clients.

Entirely new chapters, reflecting recent case law and statutory developments, have been contributed by a range of eminent authors. These include chapters on the environment, labour relations, children and just administrative action. The book has been thoroughly revised for this edition, in particular to cover the critical areas of constitutional jurisdiction, remedies and socio-economic rights.

The co-authors Professor Iain Currie and Advocate Johan de Waal, together with their contributing authors, with the support of the Law Society of South Africa and publishers, Juta & Co. Limited, are to be commended for an exceptional contribution not only to a greater understanding and appreciation of our Bill of Rights, but also to its application.

number of fairly stringent conditions that favour the consumer. For the unregistered home builder the penalty can be severe. Section 10 provides that no person shall run a home-building business, build a home, or receive consideration under an agreement for the building or sale of a home, unless he is a registered home builder. This prohibition does not affect the validity of home building agreements but precludes unregistered home builders from claiming payment for what they have built or sold.

Ms Hubbard had contracted with a builder to construct a residential dwelling unit for her for a contract sum of R2 695 600. Disputes arose between them in regard to the building work. Ms Hubbard claimed R1 231 300 from the builder being the alleged cost of remedial work which would have to be carried out on the dwelling. The builder opposed her claim and in turn claimed the outstanding balance on the contract price of R550 211. The dispute was referred to arbitration in accordance with the building contract. The arbitrator, having found for the builder, made an award in its favour for the amount it claimed. When Ms Hubbard failed to pay the amount awarded, the builder applied to court for the award to be made an order of court but Ms Hubbard opposed the application. For the first time, she raised as a defence the fact that the builder was not registered as a home builder and could not claim any consideration in respect of his work. The High Court rejected the defence and ordered Ms Hubbard to pay.

Instead, she appealed to the Supreme Court of Appeal. In a majority judgment, her appeal succeeded. Having regard to the clear wording of the Act, the court was precluded from enforcing the builder's claim.

In an interesting dissenting judgment, Acting Judge of Appeal Willis pointed out that even the old Roman-Dutch jurists were troubled by the question of the effect of illegality in contracts. He observed that the courts today have to face situations not anticipated by the Roman and Roman-Dutch lawyers who could not have anticipated "modernity". After referring to a number of judgments in which the courts concerned concluded that contracts were not invalid merely because they were contrary to some statutory provision, Judge Willis also emphasised the principle of judicial deference to arbitration awards. Parties who agree to arbitrate abandon the right to litigate and agree to be finally bound by the decision of the arbitrator. His was, however, a lone voice and the builder lost.

Hubbard v. Cool Ideas 1186 CC 2013 (5) SA 112 (SCA).

Municipal Law

■ *End of the Tunnel*

PROTEST ACTION against poor service delivery by a municipality often involves noisy gatherings, marches and the erection of barricades. Ms Rademan, a resident of Kroonstad took on the Moqhake Local Municipality in the Free State by following a different form of civil disobedience. She refused to pay the rates on her property. The municipality responded by disconnecting her electricity supply. The dispute was eventually decided by the Constitutional Court.

Ms Rademan was a member of the local Ratepayers and Residents' Association. Together with other members of the Association, she resolved in the light of the poor service delivery from the municipality to cease paying their rates. She continued to pay her electricity charges but the municipality nonetheless notified her that unless she paid the whole amount she owed, it would cut off the electricity supply to her property. She stood firm and the municipality carried out its threat. Then began a series of legal proceedings.

In the Magistrates Court Ms Rademan applied for and was granted an order for the restoration of the supply when she argued that the municipality had no right to disconnect because there was no court order entitling it to do so and because the conditions prescribed in the **Electricity Regulation Act** of 2006 (ERA) for a disconnection were not present.

The municipality appealed to the High Court which held that no court order was necessary. Although Ms Rademan was not in arrears in respect of her electricity account this did not help because she was indebted to the municipality. The success of the municipality's appeal meant that Ms Rademan's application for the restoration of supply was dismissed. She continued her battle by lodging an appeal to the Supreme

Court of Appeal where she again argued that the municipality should have obtained a court order before disconnecting the electricity supply and that it was not, in any event, entitled to do so because her electricity account was not in arrears. These arguments were dismissed by the Appeal Court which held that the **Local Government: Municipal Systems Act** of 2000 did not require a court order before an electricity supply was cut off. It empowered a municipality to consolidate all a resident's accounts into one account which, if it were not paid, allowed the municipality to cut off the electricity supply.

Ms Rademan then approached the Constitutional Court. It agreed that the case was a constitutional matter but that her appeal to that court should fail on the basis that if she elected to pay for certain components of her consolidated account but not for others she would be in contravention of the bylaws and in default of a payment which would entitle the municipality to make the disconnection. Her appeal was dismissed.

Rademan v. Moqhaka Local Municipality 2013 (4) SA 225 (CC).

Family Law

■ *Until Death Do Us Part*

"The fights are the best part of married life.
The rest is merely so-so."
– Thornton Wilder (1897 - 1975)

SECTION 7(3) of the **Divorce Act** of 1979 provides that a court granting a decree of divorce in respect of a marriage out of community of property may, on the application of one of the parties to the marriage, make an order for the redistribution of their assets. The plaintiff wife had applied for such an order but prior to the hearing of the trial action, the husband died. The wife contended that she was nonetheless entitled to a redistribution order. The court pointed out that divorce proceedings are personal to the parties and where the marriage is already dissolved by the death of the spouse, the main claim – for a divorce – must fail. Accordingly any ancillary relief, including a claim for the redistribution of the assets must likewise be extinguished by death.

YG v. Executor, Estate Late CGM 2013 (4) SA 387 (WCC).

This was another case in which the death of a husband raised questions that would affect the rights of a wife to the assets of her late husband's estate. The basis of the issue was, however, very different from the preceding case. It concerned the validity of a second marriage under Tsonga customary law.

The husband had married a wife and later, under that law, had married a second woman. After the death of her husband the first wife challenged the validity of the second marriage when both women sought, and obtained, registration of their respective marriages under the **Recognition of Customary Marriages Act** of 1998. The first wife (M) applied to the High Court for an order declaring her marriage valid but that of the

second woman (N) null and void upon the basis that she – the first wife – had not consented to it as required by customary law. The High Court granted both orders. N appealed to the Supreme Court of Appeal which decided that both marriages were valid.

A further appeal was then brought to the Constitutional Court. It had to decide whether the Recognition Act or Tsonga customary law required a husband to obtain his wife's consent before concluding a second customary marriage, and if it did not, whether the customary law should to be developed to include such a rule.

The Recognition Act contained no such provision and the Tsonga customary law included no uniform rule to that effect. The court accordingly extended the customary law to include a rule that the failure to obtain the consent of the first wife to the second marriage would result in the invalidity of a subsequent marriage. The customary marriage between the deceased and N was declared null and void.

This is an example of the Constitutional Court using its powers to develop the common law and customary law, neither of which are static, to respond to changes in society and conform to the ethos and principles of the Constitution.

MM v. MN 2013 (4) SA 415 (CC).

INCOME TAX

■ *Striking a Deal*

"Necessity never made a good bargain."
– Benjamin Franklin (1706 - 1790)

COMPROMISE IS often said to be the best and cheapest lawyer. In certain circumstances the South African Revenue Service (SARS) can enter into a compromise agreement with a taxpayer, where the taxpayer undertakes to pay less than the full amount of a tax debt and SARS undertakes to permanently write off the remaining portion.

A senior SARS official may upon request from a taxpayer, authorise a compromise if the purpose of the compromise is to secure the highest net return from the recovery of the tax debt, and it is consistent with the considerations of good management of the tax system and administrative efficiency.

When submitting a request for a compromise the taxpayer must include a detailed statement of his financial affairs with supporting documents. In considering the request SARS may have regard to the extent that the compromise may result in –

- savings in the costs of tax collection;
- collecting tax at an earlier date then would have been the case;
- collecting a greater amount of tax then would have been the case; or
- the abandonment by the taxpayer of some claim or right under a Tax Act which has monetary value.

SARS does not have unfettered power to compromise. A compromise may not be concluded if –

- the taxpayer's other tax affairs are not up to date;
- the taxpayer has entered into a compromise in the three years preceding the request for compromise;
- other creditors intend instituting insolvency proceedings against the taxpayer;
- other creditors will either be prejudiced or placed in a position of advantage relative to SARS;
- a compromise will adversely affect broad taxpayer compliance.

In order to compromise a tax debt an agreement must be concluded between SARS and the taxpayer. The agreement must set out the amount payable by the taxpayer in full satisfaction of the debt together with an undertaking by SARS not to pursue recovery of the balance of the debt. If the compromise is subject to any conditions these would also need to be included in the agreement.

Taxpayers must be mindful that SARS will not be bound by the compromise if material facts were not disclosed, or materially incorrect information was supplied to SARS to which the compromise relates. Further, SARS will not be bound if the taxpayer does not comply with a condition of the agreement or is liquidated before complying fully with a condition of the agreement

■ *Easing the Pain*

THERE ARE provisions in the **Tax Administration Act** of 2011 which allow the South African Revenue Service (SARS) to enter into an agreement with a taxpayer where he may, within an agreed period, pay a tax debt in one sum or in instalments.

Certain criteria must be met before a senior SARS official can conclude an instalment payment agreement. The taxpayer must suffer from a deficiency of assets or liquidity which is reasonably certain to be remedied in the future. Notwithstanding this deficiency, the taxpayer must anticipate that there will be income or other receipts which

can be used to satisfy the tax debt. At the time of concluding the agreement the prospects of collecting the tax debt must be poor or uneconomical, but likely to improve in the future. Moreover, the deferral should not prejudice the collection of the tax debt.

If the taxpayer is a company the SARS official is likely to request security for payment of the tax debt in instalments. This could be in the form of a personal surety from the director or shareholder of the company. When signing a surety, the director or shareholder must be mindful that their personal assets will be at risk if the taxpayer defaults on the agreement.

The instalment agreement may contain conditions that SARS deems necessary to secure the collection of the tax. SARS may also terminate the agreement if a taxpayer fails to pay an instalment or comply with its terms. Furthermore, the Tax Administration Act allows SARS to modify or terminate the agreement if:

- the collection of tax is in jeopardy;
- the taxpayer furnished materially incorrect information in applying for the agreement; or
- the financial condition of the taxpayer has materially changed.

If SARS terminates or modifies the agreement because the taxpayer has not paid, complied with the terms, or the collection of tax is in jeopardy, then such termination or modification will be effective from the date stated in the SARS notice. If the reason for termination or modification is the furnishing of materially incorrect information or the change of the taxpayer's financial condition, then the termination or modification is effective 21 business days after the notice is sent to the taxpayer.

What is apparent from the Tax Administration Act is that taxpayers deferring payment of tax by an instalment payment agreement must be certain that they can keep to the agreed payment terms.

Electronic copies are available on request from:
apitts@macrobert.co.za

PRINTED BY HANDY PRINTING WORKS CC CAPE TOWN