

# LAW LETTER

*Your Key to the Issues*

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*This Summer edition of Law Letter turns its spotlight onto the rights of union workers, search and seizure of documents, parental responsibilities, rights to assets on divorce, and the termination of contracts. 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

### Constitutional Law

#### ■ *Tata ma chance*

THE NATIONAL Union of Public Service & Allied Workers was unhappy with the chief executive officer of the National Lotteries Board and demanded a copy of his contract of employment. When the National Lotteries Board refused, the Union referred a dispute to conciliation at the CCMA under the **Labour Relations Act** of 1995. During conciliation, the Union was given the opportunity to motivate why the contract of employment should be made public. It did so in a letter which also listed a number of complaints against the chief executive officer. Certain employees then signed a petition, supporting the Union, and demanding the dismissal of the chief executive officer. The employees indicated that they would not work in the same building as the CEO if he were not dismissed by a particular date. This letter was then leaked to the press. The employees were dismissed for insubordination and for bringing the CEO and their employer into disrepute.

Ultimately, this came before the Constitutional Court. An argument raised by the dismissed employees was that they had been exercising their constitutional right to freedom of expression and had been engaging in union activities when they signed the petition. Under the Labour Relations Act, it is automatically unfair to dismiss an employee for engaging in union activities.

The Constitutional Court was satisfied that the employees had clearly been insubordinate and had brought their employer into disrepute. However, the question was: had the dismissed employees been engaging in union activities?

Workers and trade unions have the right to express themselves freely but that freedom is not unlimited – it does not extend to undermining the reputation and dignity of others. When trade unions and workers choose to use the dispute resolution machinery of the Labour Relations Act, they are only entitled to the protection of the Act to the extent that they comply with the requirements of that process. Had the employees restricted themselves to the purpose of the CCMA's ruling, namely to draft a motivation to the Board outlining the reasons why it is important for the contract of employment of the CEO to be made public, there would have been no cause

for any complaint. Instead, they abused the opportunity by demanding that the Board terminate the CEO's employment and threatening that, if this was not done, they would stop working.

The Union and the dismissed employees had remedies under the Labour Relations Act. If conciliation had failed, the matter could have been referred to arbitration. The Union, if dissatisfied with the arbitration award, was entitled to take it on review to the Labour Court. The Union and the dismissed employees did not follow these procedures and, as a result, forfeited the protection of the Labour Relations Act. The result was that the employees were not engaging in union activities by signing the petition and their dismissal was not automatically unfair.

*National Union of Public Service & Allied Workers and Others v. National Lotteries Board [2014] ZACC 10.*



#### ■ *Going, Going, Gone*

THE ESTATE Agency Affairs Board is responsible for regulating the conduct of estate agents. As such, the Board is empowered, in terms of the **Estate Agency Affairs Act** of 1976, to carry out routine inspections of estate agencies, as well as non-routine search and seizures where there is a suspicion of misconduct.

Auction Alliance was subject to an investigation by the Estate Agency Affairs Board. Upon receipt of grapevine information that Auction Alliance was destroying documentation relevant to the investigation, the Estate Agency Affairs Board swept into action to search and seize the documents, relying on a provision in the Act which allowed for search and seizure without a court order.

As expected, Auction Alliance objected. It launched an application to court to prevent the warrantless search and seizure and to challenge the constitutionality of the provisions relied upon.

The Western Cape High Court found that search and seizure obviously limited the constitutional right to privacy. However,

## BOOK REVIEW

### CRIMINAL PROCEDURE HANDBOOK

Editor: J.J. Joubert (Eleventh Edition)  
(537 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

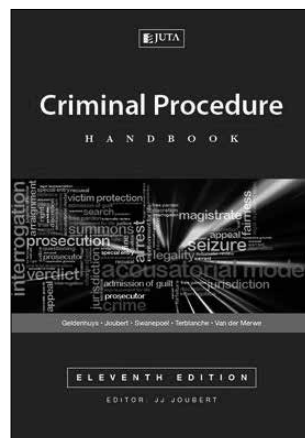
*"The judge is condemned when  
the criminal is acquitted".*  
– Publius Syrus (42 BC)

THIS COMPREHENSIVE introduction to the fundamental principles and values underlying the rules that apply in criminal cases is an indispensable guide to this area of law. The authors set the context:

*"Crime is a reality of life, especially in South Africa; and each country needs rules, principles, mechanisms and state structures to prevent, detect, cope with and control criminal behaviour. Criminal procedural rules play a pivotal role in this regard."*

Every aspect of the criminal process is dealt with in a clear and logical manner. This includes the rights to legal representation, search and seizure, bail, pre-trial examinations, charge sheets, plea bargaining, sentencing, review and appeal.

All the case references are listed as are extracts from the Criminal Procedure Act, the Constitution, the Child Justice Act, and the Superior Courts Act. A subject index allows quick access to the contents covered.



Not only students and legal practitioners will find this book invaluable. The layout, style and presentation makes it readily accessible to a general and specialist readership who require a grasp and understanding of how crime is dealt with, from journalists and political commentators, to sociologists and educators. Of particular interest will be the commentary on aspects such as correctional supervision, restorative justice, community based sentences, mercy and pardon. US Chief Justice Warren in a judgment is quoted as citing with approval from an article in Harvard Law Review:

*"The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law."*

The panel of authors assembled by publishers Juta are to be commended for the exceptional quality of this book. Under the editorship of Emeritus Professor of

Law J J Joubert BA LLB (Pret) LLB LLD (Unisa), they are Dr T Geldenhuys BA LLB LLD who serves as head of governance, policy and legislation management of the S A Police Service, Prof S S Terblanche BLR, LLB LLD, who is a former magistrate, Prof J P Swanepoel BA LLB LLM, and Prof S E van der Merwe BLR LLB LLD. All are admitted advocates and experts in their field.

estate agents had a limited right to privacy, given that the Board was mandated to regulate their conduct. As such, estate agents could expect routine inspections, but the question was whether a non-routine search and seizure was permissible without a warrant in these circumstances.

The High Court concluded that the provision was overly-broad and unconstitutional. The Act allows inspectors appointed by the board to search "any place" and seize "any document" without any limitation on the relevance of the document. The Act was so broad that inspectors could conceivably use the provision to search the houses of former clients of an estate agent.

On appeal, the Constitutional Court confirmed that the provision is clearly unconstitutional, primarily because the provision assumes that all searches authorised require no

warrant. The provision makes no differentiation as to the nature of the search or the nature of the premises searched. The result is that the provision goes too far, in authorising warrantless searches in circumstances where no justification can exist for not requiring the Board to obtain a warrant. The court agreed that the provision is overly broad, leaving almost any property-related business vulnerable to search and allowing inspectors to demand documents not limited to the business of an estate agency.

The relevant provision of the Estate Agency Affairs Act was declared to be unconstitutional, but this declaration was suspended for 24 months to allow the legislature an opportunity to pass amendments to cure this unconstitutionality.

*Estate Agency Affairs Board v. Auction Alliance (Pty) Ltd and Others [2014] ZACC 3.*

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# EASTERN CAPE HIGH COURT

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## THE SEAT OF THE COURT



Grahamstown

A FULL BENCH of three judges of the Eastern Cape Division of the High Court has clarified some confusion over the areas of jurisdiction of the High Courts in the Eastern Cape Province. Of all the nine provinces, it is the only one with High Courts in four cities – Bisho, Mthatha, Port Elizabeth and Grahamstown. Judge Chetty observed:

*“The balkanisation of South Africa by the apartheid regime was pertinently redressed by the founding provisions of the Constitution of the Republic of South Africa, 1996, which proclaimed that the Republic of South Africa is one, sovereign, democratic state. It eradicated the homeland system and ushered in nine provinces.”*



Bisho



Port Elizabeth

The result of this is that the main seat of the Eastern Cape Division is Grahamstown, which has jurisdiction over the entire Eastern Cape Province. The other three are local divisions at Bisho, Mthatha and Port Elizabeth with concurrent jurisdiction over their respective areas. Litigants may choose to proceed in Grahamstown rather than in a local division with jurisdiction, but the judge may order that the matter be removed to the local division on grounds of convenience.

*Them bani Wholesalers (Pty) Ltd v. September and Another 2014 (5) 51 (ECG).*

### ■ *Fly now, Pay later*

*"Gee but it's great after being out late  
Walking my baby back home."*

– Roy Turk

SINCE THE emergence of the democratic era of our country, there have been significant developments around the rights and responsibilities of an unmarried father. The Constitutional Court in the 1997 case of *Fraser v. Children's Court, Pretoria* gave unmarried fathers the right to approach a court to apply for full parental rights and responsibilities. Since this case, South African legislation has developed through the **Children's Act** of 2005. Unmarried fathers may now acquire rights and responsibilities automatically, without having to approach the court, if certain requirements are met.

In this case, the mother fled to the UK with her four month old baby without obtaining the consent of either the father of the child or the South African courts. The UK High Court referred the matter to our courts, posing the question: "In November 2012, was it lawful under South African law, having regard to the circumstances of this case, for the mother to change the place of residence of the child from a place in South Africa to a place in England and Wales without the prior permission or consent of the father or an appropriate South African court?"



The Durban High Court approached this question by referring to Section 21(1)(b) of the Children's Act, which provides that an unmarried father may gain full parental rights and responsibilities if he consents to be identified, or successfully applies to court to be identified, as the child's father; contributes to the child's upbringing for a reasonable period and contributes towards expenses in connection with the maintenance of the child for a reasonable period. If all three of these requirements are met, an unmarried father gains full parental rights and responsibilities. When this happens, any decision to be made regarding the child must be made with the father's prior permission or consent.

The father clearly met all three requirements of Section 21(1)(b) in that he had brought the application to the UK High Court in the first place, demonstrating that he wanted to be identified as the child's father. He had also attempted to spend time with the child – despite his strained relationship with the mother – and had contributed to the expenses of the child, including

pre-natal classes and a pram and car seat. As a result he had automatically acquired parental rights and responsibilities over the child. The mother had acted unlawfully by leaving with the child to the UK, without the permission of the father or the South African courts.

*I v. C and Another (11137/2013) [2014] ZAKZDHC 11.*



### ■ *Out of the Loop*

*"There are no whole truths; all truths are half-truths.  
It is trying to treat them as whole truths that plays the devil."*

– Alfred North Whitehead (1861 - 1947)

A WIFE IN divorce proceedings claimed that a family trust was effectively controlled by her husband and that its assets should be deemed to form part of his assets for the purpose of determining the accrual of his estate. It was not her case that the assets were his property, nor that the trust was a sham. It was simply that he had the power and the ability to use the assets for his sole benefit and they should therefore be taken into account.

Judge Ploos van Amstel in the Pietermaritzburg High Court pointed out that there is a fundamental difference between a redistribution order in terms of Section 7(3) of the **Divorce Act** of 1979, and an accrual claim in terms of Section 3 of the **Matrimonial Property Act** of 1984. An accrual claim is determined on a factual and mathematic basis. It is not a matter of the court's discretion. There is no provision in the Matrimonial Property Act to have regard to assets which do not form part of a husband's estate on the basis that it would be "just" to do so. Nor is there a legal basis for an order that assets which in fact do not form part of his estate, should be "deemed" to form part of it for purposes of determining the accrual.

Section 7(3) of the Divorce Act, on the other hand, provides that the court granting the decree of divorce in respect of a marriage out of community of property entered into before the commencement of the Matrimonial Property Act, in terms of an ante-nuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded, may, on application by one of the parties to the marriage, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the former party. Although the court has a wide discretion in determining what redistribution order should be made, that was not applicable in this case where accrual applied.

If a husband as trustee behaves improperly with regard to trust assets or with impunity treats trust assets as if they belong to him, the law provides a remedy. That however was not the factual basis in this case.

*M M and Others v. JM 2014 (4) SA 384 (KZP).*

## Law of Contract

### ■ Over and Out

*"Since there's no help, come let us kiss and part,  
Nay, I have done: you are no more of me,  
And I am glad, yea glad with all my heart,  
That thus so cleanly, I myself can free,  
Shake hands for ever, cancel all our vows."*

– Michael Drayton (1563 - 1631)

THE SUPREME Court of Appeal in Bloemfontein has dealt in detail with the position where a contract is silent as to its duration. The issue was whether the written contract could be construed as containing a tacit or implied term to the effect that the contract was terminable by either party on reasonable written notice.

Parties cannot be held permanently bound in perpetuity when all they contracted for was a temporary arrangement.

Furthermore, when parties bind themselves to an agreement which requires them to work closely together and to have mutual trust and confidence in each other, it is not reasonable to infer that they did not intend to bind themselves indefinitely, but rather contemplated termination by either party on reasonable notice.

There does not have to be a valid commercial reason for terminating a contract which is terminable on reasonable notice.

*Plaaskem (Pty) Ltd v. Nippon Africa Chemicals (Pty) Ltd 2014 (5) SA 287 (SCA).*



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