

LAW LETTER

Your Key to the Issues

October 2014

MacRobert
Attorneys

Your strategic partner at law



This edition of Law Letter illuminates what our courts have ruled recently with regard to land rights, evictions, building contracts, business rescue and intellectual property – all part of the disputes and issues with which our judges have to wrestle and resolve on a daily basis. 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

Land Evictions

■ *Shack Attack*

THE CONSTITUTIONAL Court has considered a High Court's refusal to grant various appellants leave to intervene in proceedings in which they had not been cited and where an interim order had been granted, so they claimed, affected their rights in that it related to land on which they had been living. The interim order authorised the South African Police Service (SAPS) and the municipality where the land was situated to "take all reasonable and necessary steps" to "prevent any persons from invading and / or occupying...the immovable properties subsequent to the grant of this order". It interdicted "any person from invading and/or occupying and/or undertaking the construction of any structures and/or placing of any material upon any of the aforementioned properties."

The Member of the Executive Council for Human Settlements and Public Works, KwaZulu-Natal (the MEC) who had initiated the proceedings and the municipality contended that the interim order only related to invasions or attempted invasions that occurred or would occur *after* the grant of that order, so that it did not interfere with the entrenched rights of the appellants who were in occupation of the property prior to the grant of the order.

Notwithstanding this stance, it transpired that the day after the hearing of the matter in court, the municipality relied on the interim order to demolish some of the appellants' shacks.

Justice Zondo pointed out that whether the High Court was correct in refusing the appellants leave to intervene in the case, depended upon whether they had a direct and substantial interest in the proceedings and therefore had legal standing in the matter. This in turn depended on whether the order affected their rights or interests adversely or had the potential to do so.

The authorisation to take all reasonable steps to prevent any persons from occupying the immovable property seemed wide enough to include the prevention of the continuation of such occupation. That meant that in terms of that part of the order, the appellants could be prevented from continuing to occupy the property. To that extent, it amounted to an eviction order.

The interim order was also an eviction order to the extent that its interdicting of any persons from occupying any structures on the immovable property was open to an interpretation that it applied to continuing occupation of structures on the property. The interim order authorised steps which could have the effect of evicting persons who were already living on the property or had completed building their homes on the property when the order was granted.

The appellants therefore had a direct and substantial interest in the interim proceedings and in the discharge of the interim order. The High Court had been incorrect in dismissing the application for leave to intervene. As a result their appeal succeeded.

The Constitutional Court was not impressed by the conduct of the municipality in demolishing structures and the explanations offered to the court "which remain troublingly inconsistent." The Constitution imposes a positive duty on organs of state to assist courts and to ensure their effectiveness.

"Failing to fulfil these obligations falls short of the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not. A court should be able to rely on the submissions of organs of state. Otherwise our very constitutional order would be undermined."

Zulu and Others v. Ethekwini Municipality and Others 2014 (4) SA 590 (CC).



Land Rights

■ *Done and Dusted*

*"Regrets, I've had a few,
But then again, too few to mention."*

– Frank Sinatra (1915 - 1998)

THE RESTITUTION of Land Rights Act of 1994 entitles a person or community dispossessed of a right of land after 19 June 1913 as a result of past racially discriminatory laws and

BOOK REVIEW

UNFAIR DISCRIMINATION IN THE WORKPLACE

By: D'Arcy du Toit & Marleen Potgieter
(193 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

THE EMPLOYMENT Equity Act of 1998 imposes a duty on employers to eliminate unfair discrimination. It also provides a framework for the attraction, development, advancement and retention of an employer's human resource talent. Research has shown that employers can increase productivity, motivation and resourcefulness in the workplace when they invest in their people and treat them with fairness and equity.

The co-authors of this excellent book seek to promote a shared understanding between employers and employees aimed at identifying objectionable practices and designing realistic sustainable alternatives. They offer guidelines to achieve the desired outcomes, set out the legislation and case law, provide commentary and context, and deftly use actual case studies to illustrate commonly encountered discrimination problems and their solutions.

Included among the topics covered are the law of harassment and medical, HIV and psychological testing. Employer liability

for employee discrimination is analysed. Chapters deal with dispute resolution, the legal defences to claims of unfair discrimination and codes of good practice.



D'Arcy du Toit BA LLB (UCT) LLD (Leiden) is a former professor of labour law at UWC, and Marleen Potgieter BA BProc HDip Labour Law (Wits) an attorney and consultant on labour issues who participated in the drafting of South Africa's employment legislation. Their pooled expertise, insight and experience make this book an invaluable resource not only for labour lawyers and human resource practitioners, but all businesses and organisations involved in any aspect of employment. This handbook is exceptionally user friendly, well-indexed, with a handy flow chart for

processing discrimination complaints and catchy icons to identify case studies, examples, extracts, key points and other highlighted aspects. Congratulations are due to the co-authors and Legal Publishers Jutas for publishing this essential navigational guide.

practices, to restoration of that right. A claim for restitution is directed to the Commission of Restitution of Land Rights which is required to investigate its merits and make a determination. Where it is satisfied that the claim has been lodged in the prescribed manner, the Commission, through the Regional Land Claims Commissioner having jurisdiction, will cause the claim to be published and investigated with a view to reaching a settlement or refer it to the Land Claims Court for adjudication.

The Supreme Court of Appeal recently had to consider whether a Regional Commissioner, having determined that a claim for restitution was precluded by the provisions of Section 2 because there had been no dispossession of the land in issue, may subsequently reconsider that decision and re-open the investigation into the claim.

Judge President Lex Mpati, with a full bench of four other judges agreeing, confirmed that the exercise of all public power must comply with the Constitution and the doctrine of legality. As the Act does not make any provision for the reversal by the Regional Commissioner of a decision already made, by attempting to reverse the initial decision and deciding

to re-open investigation into the land claim, the Regional Commissioner acted in a manner which was inconsistent with the Constitution and was invalid. The decision to preclude the land claim was final. After that the Commissioner had fulfilled his function, and he could not reverse or ignore the decision he had already made. It could not simply be overlooked or reversed. As a result the Commissioner's decision to re-open the claim was set aside.

The court referred to an earlier judgment of the Constitutional Court where former Chief Justice Sandile Ngcobo explained:

"The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense, the Constitution entrenches the principle of legality and foundation for control of public power."

The Manok Family Trust v. Blue Horizon Investment 10 (Pty) Ltd and Others [2014] 3 All SA 443 (SCA).

Business Rescue

■ Tie it up Tightly

"Education is what survives when what has been learned has been forgotten."

– B F Skinner (1904 - 1990)

TUNING FORK (Pty) Ltd sold audio-visual equipment to a company on the strength of two sureties for the company's debts. The company was ultimately placed in business rescue in terms of Chapter 6 of the **Companies Act** of 2008. The business rescue practitioners prepared a business rescue plan which was considered and adopted by a meeting of the relevant stakeholders. The plan provided that creditors such as Tuning Fork were to receive a dividend of 28.2 cents in the rand in full and final settlement of the claim.

Tuning Fork then instituted action against the sureties for payment of the debt. The sureties opposed this claim on the basis that the compromise between the company and its creditors released them from liability.

The compromise provisions of the Companies Act in Section 115 expressly provide that a compromise does not affect the liability of a surety of the company. But the business rescue provisions, Sections 128 to 154, include no such express stipulation. Nor do they contain an implied term preserving the rights of creditors against sureties where the company has been released from its debts pursuant to a business rescue plan.

The effect of this was that it was for the stakeholders to regulate the position of sureties in the business rescue plan. Creditors can safeguard themselves against the effects of a compromise or a release by including appropriate terms in their suretyships. Because the legislature had not dealt with the claims of sureties in the business rescue provisions in the Act, it meant that regard had to be had to the common law to assess the liability of the sureties.

Judge Owen Rogers pointed out that the common law principle is that extinction of the principal debtor's obligation extinguishes the surety's obligation. This applies where discharge of the principal debt is by a release or compromise which is voluntary or statutory. This principle has to be applied to the terms of the business rescue plan.

The correct interpretation of the plan was that the company's payment of the dividend to the affected creditors discharged its debts to them. The plan contained no provisions preserving the creditors' rights against sureties. Accordingly, applying

the common law, the sureties debts had been discharged. The application by Tuning Fork for summary judgment was dismissed with costs.

Tuning Fork (Pty) Ltd t/a Balanced Audio v. Greeff and Another 2014 (4) SA 521 (WCC).

Legal Professional Privilege

■ Just the Two of Us

"I'll tell you a great secret, my friend. Don't wait for the last judgment. It happens every day."

– Albert Camus (1913 - 1960)

JUDGE ASHLEY Binns-Ward in the Cape Town High Court has set out the principles relating to legal professional privilege and

legal advice privilege in particular. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given. It is a general rule of our common law which provides that communications between a legal advisor and his or her client are protected from disclosure provided that certain requirements are met.

The requirements are that:

- The legal advisor must have been acting in a professional capacity at the time;
- The advisor must have been consulted in confidence;
- The communication must have been made for the purpose of obtaining legal advice;
- The advice must not facilitate the commission of a crime or fraud;
- The privilege must be claimed.

The judge quoted an Australian judgment which has been accepted in our courts as well:

"Legal professional privilege extends beyond communications made for the purpose of litigation to all communications made for the purposes of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation."

The judge pointed out that at one stage the privilege was even considered to be that of the lawyer rather than of the client. He referred to a decision of the English courts, which set out the position:



Western Cape High Court

"Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and, if proceedings begin, for representation; it springs no less from the advantages to a society which involves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks."

A Company and Others v. Commissioner, South African Revenue Service 2014 (4) SA 549 (WCC).

Law of Contract

■ Obey the Law

"Several excuses are always less convincing than one."
– Aldous Huxley (1894 - 1963)

JUDGES DO not always agree with each other. All eleven constitutional judges recently heard a case. Five judges decided one way; four judges decided another way and the remaining two judges came to a different decision. That meant that the majority judgment of the five judges prevailed. All provided written and reasoned judgments setting out their views and opinions. Of course there is no appeal from the Constitutional Court as it is the ultimate apex court in South Africa. As reported in Law Letter in November 2013, four judges in the Supreme Court of Appeal, with another judge in disagreement, had overturned the original High Court decision of a single judge.

Ms Hubbard appointed Cool Ideas to build a house for R2,695,600. Cool Ideas was not registered as a home builder under the **Housing Consumers Protection Measures Act** of 1998. That provides that only registered builders are entitled to payment. Hubbard discovered structural defects, refused to make final payment, and instituted arbitration proceedings for the costs of remedial work. Cool Ideas counterclaimed for the

balance of the contract price, approximately R550,000.

The arbitrator found in favour of Cool Ideas, but Hubbard refused to comply with his award. Cool Ideas asked the High Court for an order enforcing the award. Hubbard opposed the application on the ground that Cool Ideas was unregistered, and therefore barred from receiving payment. Cool Ideas argued that this would be unfair, that the actual construction was in any event done by a registered sub-contractor and that it had itself since registered. The High Court granted the application, but Hubbard's appeal to the Supreme Court of Appeal was upheld.

This dispute then went to the Constitutional Court. It ruled that:

- The Act does not allow registration to take place during or at the end of construction. It is required at the beginning. Nor was Cool Ideas' non-registration cured by the fact that a sub-contractor did the actual work.
- This provision is aimed at a legitimate statutory purpose, namely the protection of home consumers against unscrupulous or unskilled builders. There is a rational, proportional connection between the penalty and the purpose. It is not arbitrary.
- A distinction had to be drawn between the arbitration agreement and the original building contract. That remained valid in order to protect the consumer in respect of what was already erected and the home builder for what it had already received.
- Fairness could not be invoked to circumvent the plain meaning of the provision of the Act, regardless of how much work had been done.



Constitutional Court

"Arbitration awards that sanction illegalities or subvert the purpose of statutes are unenforceable."

- Arbitration awards that sanction illegalities or subvert the purpose of statutes are unenforceable. In this case the arbitration award in favour of Cool Ideas violated a statutory prohibition backed by a criminal sanction. It was therefore contrary to public policy and unenforceable.

The appeal of Cool Ideas was dismissed with costs.

Cool Ideas 1186 CC v. Hubbard and Another 2014 (4) SA 474 (CC).

Intellectual Property

■ *Only a draught, brew*

"Unfortunately none of the sound ideas is original, and none of the original ideas is sound."

– Harold Macmillan (1894 - 1986)

ACTING JUDGE Hassim in the North Gauteng High Court in Pretoria heard an application arising from a claim by Boost Sports Africa against South African Breweries for payment of R12 million. Boost had pitched a proposal to SAB for an interactive advertising concept and claimed that the concept, known as the "Fans' Challenge Sport", vested in it as owner. It claimed that the concept was unique and constituted confidential information. It made disclosures to SAB and said that these were made in confidence with the intention that the parties would form a commercial relationship to utilise the concept to their mutual benefit.

The concept was basically that because every fan believes that he could be a coach and has an opinion as to the way his team is managed, this would enable fans to combine sport with interactive media and give them the opportunity to have a say and vote on team selection as well as player substitutions through using their cellular telephones. Boost claimed that this concept, in breach of the alleged agreement, was copied by SAB.

SAB in turn argued that the concept was in the public domain and did not qualify for protection. It denied an undertaking to maintain confidentiality and insisted that its own initiative was independently developed.

The judge pointed out that no liability is incurred by the use of information that has lost the characteristic of confidentiality:

"It goes without saying that once information loses the element or characteristic of confidentiality, it cannot be regained. Confidentiality cannot be restored even if a person promises not to divulge it: a secret once out, is no longer a secret. If information is not confidential, it does not deserve protection."

As a result, if Boost wished to continue with its claim, it was obliged to provide security for costs in the event that it was unsuccessful.

Boost Sports Africa (Pty) Ltd v. South African Breweries Ltd 2014 (4) SA 343 (GP).

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

© Copyright 2014
Faithful reproduction with acknowledgement welcomed.

MacRobert Attorneys

Your strategic partner at law
www.macrobert.co.za

PRACTICE AREAS:

- CORPORATE AND COMMERCIAL LAW
- ENVIRONMENTAL & MINING LAW
- FINANCIAL RECOVERY LAW
- INTELLECTUAL PROPERTY LAW
- MEDICO-LEGAL WORK - PROFESSIONAL INDEMNITY LAW
- PERSONAL INJURY & INSURANCE LAW
- PROPERTY LAW & CONVEYANCING

PRETORIA

MacRobert Building
cnr Justice Mohamed & Jan Shoba Streets
Brooklyn Pretoria 0181
Private Bag X18 Brooklyn Square 0075
Docex: 43 Pretoria
Tel: +27 12 425 3400
Fax: +27 12 425 3600

CAPE TOWN

3rd Floor Wembley Square
Solan Street
Gardens Cape Town 8001
PO Box 21731 Kloof Street 8008
Docex: 25 Cape Town
Tel: +27 21 464 2400
Fax: +27 21 461 2840

DURBAN

7th Floor Corporate Place
9 Dorothy Nyembe Street
Durban 4001
PO Box 4118 Durban 4000
Docex: 185 Durban
Tel: +27 31 304 7185/6/7/8
Fax: +27 31 304 2799