

LAW LETTER

Linking Attorney & Client

September 2013



MacRobert
Attorneys

Your strategic partner at law



In this edition of Law Letter we illustrate how our courts enforce compliance so as to give effect to service delivery obligations, in cases involving a state attorney, municipal officials, a conveyancing attorney, and government officials. We also examine the law relating to social media. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

FROM OUR COURTS

Social Networks

■ Unfriends

"It takes your enemy and your friend, working together, to hurt you to the heart; the one to slander you and the other to get the news to you."

– Mark Twain (1835 - 1910)

IN ONE of his last judgments in the South Gauteng High Court in Johannesburg before being appointed to the Supreme Court of Appeal, Judge Nigel Willis considered the lawfulness of a posting on Facebook. The respondent had posted a letter to the applicant on the public social networking site. That led to the applicant asking the court for an order preventing such further conduct on the part of the respondent and for an order requiring her to remove the postings already made. The applicant complained that the posting in question made allegations which were defamatory of him, in particular that he does not provide financially for his family, that he would rather go out drinking than caring for his family, and that he had a problem with drugs and alcohol.

The judge observed: "We have ancient, common law rights both to privacy and to freedom of expression. These rights have been enshrined in our Constitution. The social media, of which Facebook is a component, have created tensions for these rights in ways that could not have been foreseen by the 'old authorities' or the founders of our Constitution. It is the duty of the courts harmoniously to develop the common law in accordance with the principles enshrined in our Constitution. The pace of the march of technological progress has quickened to the extent that the social changes that result therefrom require high

levels of skill not only from the courts, which must respond appropriately, but also from the lawyers who prepare cases such as this for adjudication."

The judge pointed out that in our law, it is not good enough, as a defence to or a ground of justification for a defamation, that the published words may be true. It must also be to the public benefit or in the public interest that they be published. A distinction must always be kept between what is "interesting to the public" as opposed to "what it is in the public interest to make known." The judge was satisfied that it was neither to the public benefit nor in the public interest that the words about which the applicant complained be published, even if it were accepted that they are true.

The respondent claimed that the words complained of were "fair comment". Judge Willis disagreed. She had been unable to justify her posting. He pointed out that malice or improper motive by the perpetrator of the comment also acts to defeat

the defence of fair comment. The background to the posting, together with the words themselves, indicated that the respondent had acted out of malice when she posted the offending comments.

The judge ordered the respondent to remove all postings which she had posted on Facebook or any other site in the social media which referred to the applicant.

"Not only can items be posted and travel on the electronic media at a click on a computer in a moment, in an instant, at the twinkling of an eye, but also they can, with similar facility be removed therefrom. This can also be done at minimal cost. The situation is qualitatively different from the scenario when newspapers have been or are about to be printed in hardcopy and distributed. The law has to take into account changing realities not only technologically but also socially or else it will lose credibility in the eyes of the people. Without credibility, law loses legitimacy. If law loses legitimacy, it loses acceptance. If it loses acceptance, it loses obedience. It is imperative that the courts respond appropriately to changing times, acting cautiously and with wisdom."

BOOK REVIEW

THE SURVIVOR'S GUIDE FOR CANDIDATE ATTORNEYS (2nd Ed, 2013)

By Bhauna Hansjee & Fahreen Kader
(226 pages) (Juta & Co. Ltd – www.jutalaw.co.za)

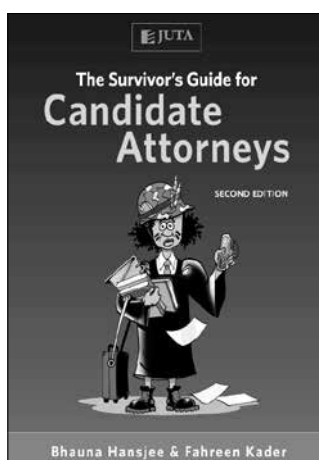
ALL CANDIDATE attorneys are required to serve a period of articles, usually two years, before becoming eligible to be admitted to practice. During that time they must pass the Attorneys' Admission exams. More importantly, they have the opportunity for practical training under a principal attorney. It is a period where the aspirant attorney learns the trade, gains experience, and becomes familiar with the daily demands of a professional career.

This completely revised and updated second edition of the popular handbook for candidate attorneys effectively bridges the gap between the university campus, with its emphasis on theoretical knowledge, and the working environment, which requires hands-on application of that knowledge. Written in a user-friendly style, there are handy checklists, helpful hints and

plenty of sensible advice on just about everything the young candidate should know. From time management to office behaviour, from conducting consultations to court appearances, from time-keeping to billing procedures, dealing with sheriffs and briefing advocates, this guide spells out common sense on every page.

A directory of courts and other bodies such as Bargaining Councils, the Public Protector, Family Advocates, Deeds Offices and the National Consumer Tribunal are included, as well as useful websites.

Continuous legal education and lifelong learning is an inherent part of a career in the law. This excellent book is the ideal companion to instil that in fledgling practitioners from the outset.



Judge Willis quoted an article published in 1890 in the *Harvard Law Review*:

"Political, social and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society."

Former Chief Justice Michael Corbett was also quoted as an authority in a judgment which he handed down twenty years ago in 1993 in the Supreme Court of Appeal, where he said: *"In a case of publication in the press of private facts about a person, the person's interest in preventing the public disclosure of such facts must be weighed against the interest of the public, if any, to be informed about such facts."*

Finally, Judge Willis had this advice: *"Those who make postings about others on the social media would be well advised to remove such postings immediately upon the request of an offended party. It will seldom be worth contesting one's obligation to do so. After all, the social media is about building friendships around the world, rather than offending fellow human beings. Affirming bonds of affinity is what being 'social' is all about."*

H v. W [2013] 2 All SA 218 (GSJ).

Law of Succession

■ Confirmative Action

"Most usually our virtues are only vices in disguise."
– Francois, Duc de La Rochefoucauld (1613 - 1680)

THE SUPREME Court of Appeal in Bloemfontein has heard a case where in terms of a will money had been left to a trust with the sole purpose of providing bursaries to assist white students completing a Master's Degree in Organic Chemistry at four South African Universities. It was further provided in the will that if the trustees were unable to carry out the terms of the trust, the trust income had to be distributed to certain named charities.

When all of the four South African universities declined to participate in the racially discriminatory nature of the bequest, the trustees approached the Western Cape High Court in Cape Town for an order that the discriminatory word "white" be deleted from the bequest in order to make it acceptable to the universities, thereby allowing the purpose of the bursaries to be achieved.

Acting Judge Derek Mitchell in the Cape Town High Court decided that the trust income should go to the charities as set out in the will. The trustees appealed this decision.

The five judges hearing the appeal observed that although the attitude of the trustees and the purpose of the bursaries were commendable, this could not be decisive in giving effect to the terms of the will. Because the will had expressly provided that should it prove impossible to give effect to the provisions of the bursary bequest, the money had to go to the charitable organisations. There was accordingly provision for the eventuality which transpired when the universities refused to accept bequests because of the discriminatory conditions. Giving the trust income to the charities named in those circumstances was to give effect to the wishes of the deceased as set out in her will.

In Re BOE Trust Ltd & Others NNO 2013 (3) SA 236 (SCA).

Professional Negligence

■ Red Card

*"I slept, and dreamed that life was Beauty;
I woke, and found that life was Duty."*

– Ellen Hooper (1816 - 1841)

THE SUPREME Court of Appeal recently had to evaluate the conduct of the conveyancing attorney of a seller of immovable property. There had been certain errors and mistakes which resulted in a considerable delay for bonds to be cancelled, as a result of which claims for damages were instituted.

Appeal Judge Eric Leach who delivered the judgment pointed out that not every act which causes harm to another gives rise to an action for damages. The act complained of must be wrongful. That was conceded, so the court simply had to look at whether the conveyancing attorney had been negligent. The judge observed: *"Like any other professional, a conveyancer may make mistakes. But not every mistake is to be equated with negligence, and if a claim against a conveyancer is based on negligence, it must be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been expected by a reasonable conveyancer in the same position."*

He went on to point out that of course the gravity and likelihood of potential harm will determine the steps, if any, which a reasonable person should take to prevent such harm occurring. Moreover, the more likely the harm the greater is the obligation to take such steps. No hard and fast rules can be prescribed. Each case is to be determined in the light of its particular facts and circumstances. *"But in the case of a conveyancer, it is necessary to remember that any mistakes which may lead to a transaction in the Deeds Office being delayed will almost inevitably cause adverse financial consequences for one or other of the parties to the transaction. ... To avoid causing such*

harm, conveyancers should therefore be fastidious in their work and take great care in the preparation of their documents. Not only is that no more than common sense, but it is the inevitable consequence of the obligations imposed (by the Deeds Registries Act of 1937 and its Regulations) which oblige conveyancers to accept responsibility for the correctness of the facts stated in the deeds or documents prepared by them in connection with any application they file in the deeds office."

Judge Leach concluded that the conveyancer had acted negligently. The potential of harm caused by a delay in the event of the application for cancellation of the bonds being defective was "obvious". That harm could have been simply averted. The standard of care exercised *"fell well short of what is expected of a reasonable conveyancer."* The judge expressed a critical view of this conduct. He said that *"... the inference is irresistible"* that the conveyancer failed to check the documents. This evidenced *"a slothful approach to the important task of ensuring that documents accord with the deeds office's current practices and requirements."* He said that the excuse offered *"is lame in the extreme."*

Margalit v. Standard Bank of South Africa Ltd & Another [2013] 2 All SA 377 (SCA).



Administrative Law

■ Failure To Function

*"The world is disgracefully managed,
one hardly knows to whom to complain."*

– Ronald Firbank (1886 - 1926)

A High Court order which evicted a number of men, women and children from a certain block of flats in Jeppe Street, Johannesburg which they unlawfully occupied, gave the City of Johannesburg six months to make suitable arrangements to provide them with temporary shelter. Eight months later, the court suspended the first order to allow the City more time to make the required arrangements. When neither order was complied with, an application was made for a further order that would hold the Executive Mayor, City Manager and Director of Housing of Johannesburg personally responsible for ensuring that the City adhered to the earlier order.

Judge Kathy Satchwell set out the position:

"The obligation to shelter the occupiers has not been suddenly sprung upon the City of Johannesburg. Nothing has leapt out of the blue. There has been a gradual process of

enlightenment. There has been opportunity to absorb both the general and specific import of the court decision. There has been opportunity to understand and appreciate the role which the City is required to play in sheltering these occupiers. There has been opportunity to prepare the appropriate response to the obligations which the Constitution and our courts have placed upon the City."

The City had to act in a constitutional and professional manner and could not simply throw up its hands and cry "impossible task". Judge Satchwell ordered that the City and its officials were obliged to comply with the earlier court orders, directed them to take the required administrative steps, suspended the eviction order of the occupiers pending compliance by the officials with the judge's directions and ordered the City of Johannesburg to pay the costs of the application on the punitive scale as between attorney and client.

This case is a good example of the Judicial arm of government exercising its powers to compel the Executive arm of government, in this case at Municipal level, to meet its constitutional and legal obligations not only in the interests of those it is required to serve, but also to ensure compliance with the rule of law. The judge went further and said that if the City officials failed again to comply with her orders, the occupiers were given leave to enrol the application again on five days' notice for a hearing on and determination of any complaint for contempt of court or claims for constitutional damages.

Hlope & Others v. City of Johannesburg & Others 2013 (4) SA 212 (GJ).

Constitutional Law

■ Do Your Homework

*"There are three ingredients in the good life:
learning, earning and yearning."*

– Christopher Morley (1890 - 1957)

JUDGE PLASKET sitting in the Eastern Cape High Court in Grahamstown has given an important judgment concerning the fundamental right of children attending public schools to a basic education. This is enshrined, without qualification, in Section 29(1)(a) of the Constitution, which states that everyone has the right "to a basic education, including adult basic education."

Asked to compel the South African Minister of Basic Education, her Director-General, the MEC for Basic Education and the head of his department in the Eastern Cape Province not only to declare that posts had been established for both teaching staff and non-teaching staff for public schools in the province, but to fill those posts, Judge Plasket pointed out:

"At the heart of the problem lies the long-standing failure of the Provincial Department of Basic Education to attend to post

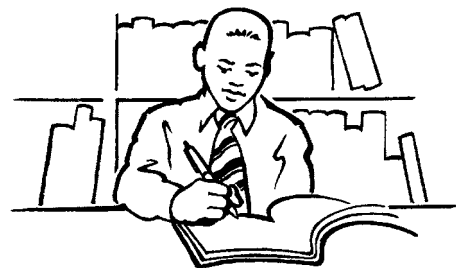
provisioning. This failure has endured for over a decade. The result is that some schools have more teachers than necessary, while others have too few teachers, with consequent prejudicial effects on teaching and learning. As the Provincial Department failed to take steps to transfer surplus teachers to where they were required, the budget spiralled out of control because teachers at under-resourced schools were appointed to fill vacant posts on a temporary basis.

"This created its own set of problems when, in order to cut costs, the Provincial Department dismissed some 4000 temporary teachers, only to be compelled by the court to reinstate them. Other casualties of this abject lack of management were the school nutrition programme, which provided a meal a day for schoolchildren, and the school transport scheme, which allowed for scholars to be conveyed to and from school instead of having to walk long distances."

The judge said that it was no exaggeration to say that this was "a crisis of immense and worrying proportions."

If the administration and support functions of a school cannot perform properly because of staff shortages, it has a knock-on effect threatening the right to basic education enshrined in Section 29(1)(a) of the Constitution. The judge referred to the **Public Service Act** of 1994 which governs the appointment of non-teaching staff and to the **Employment of Educators Act** of 1998, as well as the **South African Schools Act** of 1996. The result of this legislation is that the Provincial MEC is empowered and obliged to determine the establishment requirements for both teaching staff and non-teaching staff at public schools in the province. The judge ordered that those posts be declared and be filled by specified dates.

Centre for Child Law & Others v. Minister of Basic Education & Others 2013 (3) SA 183 (ECG).



The State Attorney

■ Dereliction of Duty

*"Nothing in all the world is more dangerous than sincere
ignorance and conscientious stupidity."*

– Martin Luther King (1929 - 1968)

AN IMPORTANT function of our courts was illustrated in a recent full bench decision of three judges in the North

Gauteng High Court in Pretoria. An application for committal for contempt of court had been brought against the National Department of Transport, the Director-General of Transport, and the Minister of Transport. The judges called it "exceptionally unwise" that neither the Department of Transport nor its Director-General had delivered any answering affidavits. "This appears to be a startling dereliction of duty."

But the greatest criticism was reserved for Ms Lithole of the office of the State Attorney in Pretoria. The court described her replying affidavit as "disgraceful". They observed that in "a ludicrous attempt to justify her conduct" Ms Lithole had disclosed in her affidavit that the office of the State Attorney in Pretoria was, to use her own word, "dysfunctional". The court called this a "shocking state of affairs." She offered only "a cursory apology." Judge Tuchten said: "The explanation, if it may so be described, that Ms Lithole does not read the emails addressed to her by other attorneys relative to the matters which she is handling, is most disturbing. It appears to us, moreover, to constitute unprofessional conduct on her part... I deprecate strongly the conduct of Ms Lithole as disclosed in her own affidavits before us and the correspondence admittedly sent and received. Her conduct seriously prejudices the administration of justice. Even more importantly, the dysfunctionality to which she refers demonstrates that the office of the state attorney, Pretoria, an important organ of state, is presently unable to comply with its constitutional and statutory obligations."

The judge concluded: "The ultimate responsibility in law to put matters right and ensure that the Office of the State Attorney,

Pretoria, complies with its constitutional and statutory obligations, rests on the Minister of Justice."

In the order which it made, the court referred the judgment not only to the Minister of Justice and Constitutional Development and the Parliamentary Portfolio Committee on Justice and Constitutional Development, but also to the Law Society of the Northern Provinces "with the request that the Law Society investigate the conduct of Ms Constant Litholi as appears from this judgment with a view to taking such action as the Law Society may consider appropriate."

It is clearly a matter of great public concern that our courts are compelled to go to such lengths. On the other hand, it demonstrates again how important it is for our courts to fearlessly exercise their role in our constitutional democracy.

Tasima (Pty) Ltd v. Department of Transport & Others 2013 (4) SA 134 (GNP).

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