LAW LETTER

Attorneys.Advocates.Appellants

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Your strategic partner at law

In this edition of Law Letter we turn our spotlight onto trusts, product liability, mining rights, suretyships, and the approach of our courts to evidence, fairness, equality, freedom and justice. 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 THE COURTS

Suretyships

▪ *No Way Out*

"Unhappiness is best defined as the difference between our talents and our expectations."
– Edward de Bono

AN IMPORTANT decision of the Supreme Court of Appeal on liability under a suretyship has been handed down. In this case the surety Du Toit, although admitting that he signed the deed of suretyship, denied that he was liable and averred that he signed by mistake and without the intention to incur contractual liability.

It was not the creditor however who induced Du Toit to sign the suretyship with a misrepresentation. It did not negotiate with him nor did it have any contact with him prior to his signing the suretyship. What happened is that Du Toit was a trustee of a trust along with his brother and his nephew. The creditor advanced the sum of R6 million to the trust. Du Toit, his brother and nephew signed the suretyship in favour of the creditor. Judgment was obtained against the trust and the sureties after the trust had failed to adhere to the terms of a settlement agreement. The sequestration of the trust and the estate of Du Toit's brother followed.

When Du Toit found out about this he brought an application to have the judgment taken against him rescinded. This was granted but the matter was taken on appeal.

The evidence revealed that on the day in question Du Toit's nephew had phoned to say that certain documents had to be signed urgently by him. He was given a bundle of documents comprising about 75 pages that had already been signed by his brother and nephew. He was prepared to sign the documents without reading them because he thought that he was not personally affected and because the other two trustees had already signed.

The problem for Du Toit was that the creditor relied on the suretyship. The court concluded that there was nothing misleading in the bundle of documents and that the suretyship among the documents was not unexpected. Du Toit was a trustee of the trust. He had his own trusts and managed them. He must have known what a trust was, and what the duties and responsibilities of a trustee were. The creditor was entitled to rely on Du Toit's signature as a surety, just as it was entitled to rely on his signature as a trustee. Du Toit might have had recourse against his nephew who had not alerted him to the suretyship but that did not affect his liability to the creditor. The appeal of the creditor succeeded and Du Toit was held liable on the suretyship.

Slip Knot Investments 777 (Pty) Ltd v. Du Toit 2011 (4) SA 72 (SCA).

Product Liability

▪ *Hot Chix*

"I might have been a farmyard hen,
Scratchin' in the sun,
There might have been a crowd of chicks,
After me to run,
There might have been a cockerel fine,
To pay us his respects,
Instead of sittin' here,
Till someone comes and wrings our necks."
– Pam Ayres

IN 1991 Nando's the branded fast food franchise chain was established and rapidly expanded within South Africa, into neighbouring countries, and some 30 countries internationally. Chickenland (Pty) Ltd is a wholly owned subsidiary of Nando's Group Holdings Limited and is the primary operating entity within the Nando's Group.

Spices and condiments are important ingredients of Nando's sauces and marinades. When Chickenland experienced problems with its supplier of spices, it turned to Freddy Hirsch Group (Pty) Ltd, whose primary business is the manufacture of spices. An agreement was entered into between these two companies.

Editorial

Social Media: Blogged Down

WHILE THE phenomenon of social media has swept across the world, pitfalls and potholes for the unwary have appeared. Robert Thompson, professor of popular culture at Syracuse University, USA, says: "Twitter was especially designed to be the world's most promiscuous communication medium. Forget the editorial process, forget a second draft, and forget simply a second thought. It just comes out."

Many popular sport stars and celebrities with fans following their every word, have stumbled and fallen with ill-considered remarks about referees, managers, fellow-players, selectors, you name it, they have expressed their feelings. This can create a nightmare for sponsors, public relations agencies, and administrators anxious to build a brand.

"The misuse of Twitter is due to a lack of understanding of the power of social media", says Gil de Zuniga, assistant professor at the University of Texas school of journalism. "If you were in the middle of a public square, you wouldn't yell something you might post on Twitter. But in reality, when you tweet that's what you're doing. That's hard to understand when it's you and a keyboard. There's a sense of intimacy and to some degree anonymity. It doesn't feel like you're talking to 2 million people."

Professionals have been cautious about Twitter and social media in general. Law firms are generally wary of appearing to be superficial or trivial. Partly this is due to natural conservatism, partly due to the fact that in most firms the older generation largely still makes the decisions. But there are issues of confidentiality, privacy, and the best interests and wishes of clients which play a role, as well as quality control and ethical aspects which come into consideration. Damage control is not a profitable use of valuable time, and many lawyers currently take the view that social media works best – socially.

Fast food may be part of a nutritional diet but it is no substitute for a nutritional diet. Just so, Twitter can certainly be a useful and effective means of communication, but it is no substitute for all the other useful and effective means of communication.

In 2004 the United Kingdom Health Authority in Manchester tested Nando's extra-hot peri-peri sauce and found it to be positive for Sudan 1 dye. This is a red dye used in colouring solvents, oils, waxes and shoe and floor polishes. It is considered to be a genotoxic carcinogen rendering it unfit for human consumption. It has been banned by the World Health Organisation, and its presence is not permitted in foodstuff for any purpose in South Africa and most other countries internationally.

As a result Chickenland was obliged by the Foods Standard Agency of the UK to cause newspaper advertisements to be placed in the media informing consumers of the agency's finding, and given 48 hours to withdraw any contaminated products from all supermarket shelves in the UK. Subsequent investigations identified cayenne pepper that had been sourced in India by Freddy Hirsch and supplied to Chickenland in certain of the spice packs as the contaminant. A worldwide recall of Chickenland's peri-peri sauces followed.

In the end Chickenland refused to pay Freddy Hirsch an amount of R1,3 million and Freddy Hirsch instituted summons. Chickenland claimed it had a counterclaim and alleged that one of the terms of the agreement was that the spice packs provided by Freddy Hirsch to Chickenland would be free of any banned substance.

Freddy Hirsch countered that it was exempt from liability in terms of the agreement. Judge Ponnan in the Supreme Court of Appeal, sitting with four other judges of appeal who agreed with him, said that a supplier of goods cannot rely on a liability-exemption clause excluding liability for defects in the goods supplied where the goods delivered are entirely different to that which was bargained for. So when a supplier supplies a foodstuff that contains a banned contaminant, rendering it unfit for human consumption, it fails to perform in terms of the contract because what was delivered was different in substance to what was purchased. Since one is dealing with non-performance rather than failed performance, the exemption does not help the supplier.

Furthermore, as far as the exemption clause in addition purported to exclude all terms, warranties or representations as to the quality or fitness of the foodstuff, that is contrary to public policy and unenforceable. As a result the appeal by Freddy Hirsch Group was dismissed with costs including the cost of two advocates.

Freddy Hirsch Group (Pty) Ltd v. Chickenland (Pty) Ltd 2011 (4) SA 276 (SCA).

Trusts

■ *Declare your Interest*

JUDGE ERIC Leach in the Supreme Court of Appeal has had to consider who is entitled to apply for the removal of a trustee of a trust. Nicoline van der Meulen claimed that she was a beneficiary of the trust and had the right to apply for the removal of the trustee, but in any event even if she were not a beneficiary, she had sufficient interest in the trust to apply for the removal of a trustee.

The evidence was not clear as to whether she was a beneficiary or not and that aspect was referred back to the trial court for the hearing of evidence to establish the facts. Judge Leach however confirmed the law that a person can apply for the removal of a trustee only if he or she is a beneficiary of the trust. It would be wrong for a court to find that, short of being a beneficiary, a person would have an interest in the trust justifying him or her seeking the removal of trustees.

Ras NNO v. Van Der Meulen & Another 2011 (4) SA 17 (SCA).

Employment Law

■ *Horse Divorce*

GARY ALLPASS was interviewed by an equestrian centre for a position as a stable-yard manager and horse-riding instructor, a physically demanding job. His employer, Mooikloof Equestrian Centre, became aware of his HIV status after he submitted a personal-particulars form. He was dismissed on the grounds that he was severely ill and that he had been dishonest in the interview.

Allpass had been living with HIV for 18 years, was in good health, and adhered to a treatment regime such that his viral load was very low.

Section 187(1)(f) of the **Labour Relations Act** of 1995 provides:

> "Automatically Unfair Dismissals
>
> A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to Section 5, or if the reason for the dismissal is –
>
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility . . . "

Judge Bhoola in the Labour Court, having comprehensively considered all the evidence and law, came to the assistance of Allpass and found that he was entitled to relief arising from his unfair dismissal for a discriminatory reason. The judge declared his dismissal to be automatically unfair under Section 187. Mooikloof Equestrian Centre was ordered to pay Allpass compensation in the sum of 12 months' remuneration reflecting both restitution as well as a punitive element for unfair discrimination on the grounds of HIV status. He was also entitled to payment of his costs.

Allpass v. Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre 2011 (2) SA 638 (LC).

Criminal Law

■ *Fact or Fiction*

> *"How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth."*
>
> – Sir Arthur Conan Doyle (1859 - 1930)

JUDGE NAVSA in the Supreme Court of Appeal recently set out the approach which a court in a criminal matter takes to hold up the scales of justice and weigh the evidence. He said that the proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt. The logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent.

The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be remembered is that the conclusion which is reached, whether to convict or to acquit, must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

It is important not to separate evidence into compartments and to examine either the case of the defence or of the State in isolation. The court must consider the totality of the evidence and leave none of the material evidence out of account.

In this case the judge also heavily criticised the lawyers as well as the police. This is what he said:

The Lawyers: *"We were required to read almost all of the record comprising 28 volumes and more than 2,500 pages. There were substantial parts of the record that were wholly irrelevant and unnecessary to read. The legal representatives conceded as much. It is unfair to the court and unacceptable that this occurs. Regrettably, this is a recurring trend. Practitioners are reminded once again to be careful in their practice notes and to ensure that judges are advised to read only such parts of the record on appeal as are necessary. In the event that this trend continues, serious thought will have to be given to engage professional associations to consider appropriate sanctions. Consideration will also have to be given to court imposed sanctions."*

The Police: *"The final issue that calls for comment is the extremely sloppy nature of the police investigation in this matter. In the main, this relates to forensic tests that were either badly conducted or not conducted at all. Counsel for the State rightly conceded that there was no excuse for the shoddy police work in this case. Whilst one appreciates the pressure the police are under and that they have limited resources there really is no excuse for not collecting vital items and not sending those that they have in their possession for proper testing which would result in more efficient prosecution."*

Naude & Another v. S [2011] 2 All SA 517 (SCA).

Jurisprudence

■ *The Spirit and Purpose of the Law*

"I would remind you that extremism in the defence of liberty is no vice. And let me remind you also that moderation in the pursuit of justice is no virtue."
– Barry Goldwater (1909 - 1998)

JUDGE CACHALIA of the Supreme Court of Appeal made the following observations when hearing an appeal.

Fairness and justice are underlying aims of our constitutional order. Most legal systems would subscribe to those values. Central to the idea of fairness is a demand to avoid bias in evaluating any case, taking note of the interests and concerns of others and in particular the need to avoid being influenced by one's own vested interests or by personal priorities or eccentricities or prejudices. Fairness can broadly be seen as a demand for impartiality.

"In a similar vein, 'justice' according to Plato, requires us to treat equals equally and unequals unequally. There are, however, many theories and conceptions of justice, and the search for an exact idea of justice has escaped philosophers as it has judges. It often boils down to . . . one's personal sense of justice.

"But fairness and justice are inherently malleable concepts and cannot be freestanding requirements against which to test the constitutionality of a statute, its interpretation or its applicability to the facts of a particular case. Because, if they were, statutes would be declared unconstitutional or applied differently, depending on an individual judge's perception of what is fair or just in a particular case. Obviously, when interpreting laws, judges are assisted by the presumption that the legislature does not intend to enact laws that produce unfair, unjust or unreasonable results. But laws are of general application and the meaning cannot change to accommodate individuals. A statute, just like the constitution, does not mean whatever we wish it to mean. Cases must be decided on a principled basis."

Law Society of the Northern Provinces v. Mahon 2011 (2) SA 441 (SCA).

Land & Mining Rights

■ *Ground Zero*

NINE JUSTICES of the Constitutional Court delivered judgment in a case concerning the lawfulness of a decision of the Department of Mineral Resources to grant Genorah Resources (Pty) Ltd prospecting mineral rights on the land of a community that had been dispossessed of its land during apartheid, but had won it back in a land claim.

In terms of the **Mineral and Petroleum Resources Development Act** of 2008, an applicant for a prospecting right is required to notify and consult with landowners and lawful occupiers, and to engage in good faith with such owners in order to reach accommodation in respect of the impact of the intended prospecting activities on the owners' right to use their land. The applicant must provide the owners with sufficient information on such activities to enable the owners to make an informed decision.

The court considered all aspects of what had happened and observed:

"Equality, together with dignity and freedom, lie at the heart of the Constitution. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination.

The Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the mineral resources of the country."

In view of the many complaints one hears regarding inefficiency and corruption in the public service, it is instructive that the court emphasised that Section 195 of the Constitution provides as follows:

"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) a high standard of professional ethics must be promoted and maintained.

(b) efficient, economic and effective use of resources must be promoted.

(c) public administration must be development-oriented.

(d) services must be provided impartially, fairly, equitably and without bias.

(e) people's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) public administration must be accountable.

(g) transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) good human resource management and career-development practices, to maximise human potential, must be cultivated.

(i) public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to –

(a) administration in every sphere of government;

(b) organs of State; and

(c) public enterprises."

The appeal of the community was upheld and the decision to grant a prospecting right to Genorah Resources was set aside.

Bengwenyama Minerals (Pty) Ltd and Others v. Genorah Resources (Pty) Ltd and Others 2011 (4) SA 113 (CC).

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