LAW LETTER

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This Winter edition of Law Letter brings to our readers recent cases on corporate business rescue, the consequences of death on wills and life policies, the importance of complying with the terms of a contract and the evidence of self-confessed criminals. We also include another of our popular book reviews. 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 THE COURTS

Company Law

■ *Sink or Swim*

"People must help one another, it is nature's law."
– Jean de la Fontaine (1621 - 1695)

IN THE June 2012 edition of Law Letter we reported a judgment in the Western Cape High Court handed down by Judge Binns-Ward in the case of *Koen v. Wedgewood Village Golf and Country Estate (Pty) Ltd* where the judge took the view that a party applying for business rescue of a company must provide convincing and clearly stated reasons as to why business rescue will achieve the intended purpose. There must be a reasonable prospect that a company can, in fact, be rescued.

Judge CJ Claassen in the South Gauteng High Court in Johannesburg has now also delivered a judgment dealing with the powers of the court to make an order for business rescue in terms of Section 131(4) of the **Companies Act** of 2008 where "it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company."

The judge pointed out that this sub-section grants a court a discretionary power to issue or refuse an order for the business rescue of a company. The judge observed that the phrase "otherwise just and equitable to do so for financial reasons" is extremely vague. He posed the question whether this is the financial reasons of the company, the creditors, shareholders or the employees? The logical conclusion is that the court must consider the financial reasons of all the stakeholders (except that of the business rescue practitioner) contemplated in the business rescue provisions.

Dealing with the meaning of the phrase that there should be "a reasonable prospect for rescuing the company", the judge took the view that this indicates that something less is required than that the recovery should be a reasonable probability. If the facts indicate a reasonable possibility of a company being rescued, a court may exercise its discretion in favour of granting an order for business rescue. He explained:

> *"The philosophy underlying the grant of the business rescue order contemplates that the court cannot 'second guess' the rescue plan which will ultimately be approved by the creditors' meeting. It would seem to me that this conclusion is in line with the intention of the legislature to prevent the negative impact on economic and social affairs by rescuing companies rather than liquidating companies… the intention was to legislate for business rescue as a 'preferred' solution to companies in distress. Each case will, however, have to be adjudicated on its own facts."*

Oakdene Square Properties v. Farm Bothasfontein (Kyalami) 2012 (3) SA 273 (GSJ).

Insurance

■ *The Die is Cast*

"Lawyers are the only persons in whom ignorance of the law is not punished."
– Jeremy Bentham (1748 - 1832)

MMATISHIBE LOUISA Magdeline Sebata was the owner of a life policy which PPS Insurance had issued to her. She had nominated her mother, Helen Mmapule Mkhabela as the beneficiary of the policy in the event of her death, but reserved the right to change or cancel the nomination "at any time". Her mother passed away on 26 May 2007. Her daughter died afterwards, on 12 August 2007, as a result of which the proceeds of the policy fell due, but without her having nominated another beneficiary.

The executor of the mother's deceased estate then claimed the proceeds of the policy in the High Court. Judge Coetzee dismissed this claim on the basis that when the mother died, her daughter's nomination of her as the beneficiary of the policy ceased to exist. The policy therefore vested in the daughter's estate when she died and not her mother's. This judgment was taken on appeal. A full bench of the South

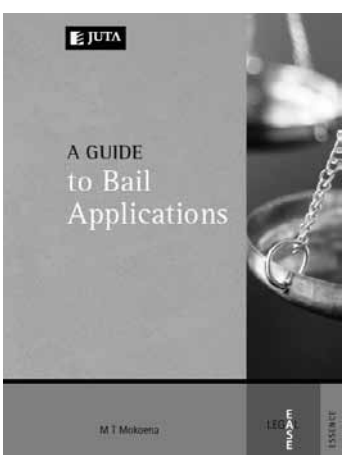
Book review

A Guide to Bail Applications

By M.T. Mokoena
(Juta & Co Ltd) www.jutalaw.co.za

"Individual freedom is a precious commodity which should be sacrificed by the authorities only in the direst of circumstances. Almost every arrested person wishes to be released from custody as soon as reasonably possible once the demands of the law and justice have been satisfied. It is equally important that the different law-enforcement functionaries who are charged with the administration and adjudication of the detention and release of suspected and accused persons should apply the necessary care in the exercise of their duties."

THIS IS how Advocate Mabowa Thomas Mokoena, B Iuris, LLB, LLM, of the UNISA School of Law introduces his excellent handbook on bail applications.



With the fight against crime and issues of safety and security taking high priority in our society, there is huge public interest in the methods, policies, principles and process whereby we seek to combat crime effectively. Central to this is the granting of bail, which has been described as the conditional release of someone who has been suspected or accused of a crime.

This valuable guide sets out all the practical steps of a bail application, and explains its consequences and implications. Useful case studies illustrate the points made. All the relevant forms are included, and the case references, legislation and authorities are handily listed and indexed.

There are chapters dealing logically with the procedure after arrest, the factors to be taken into account when granting bail, bail conditions, the position of juveniles, appeals, amendments to bail conditions, cancellation of bail, urgency, and every other aspect of this very important process.

Not only legal practitioners, but also members of the public who may have to interact with the criminal justice system, will welcome this very well organised resource. It is the latest in the Legal Essence category of the *Juta Legal-Ease* series, intended to make the law easier to understand without losing the context in which it operates. All books in the series shed light, in an accessible way, on the legal issues encountered in practice. Clear frameworks, practical tips and helpful hints equip the reader with knowledge that can be applied in practice.

The author Advocate Mokoena and publisher Juta are to be congratulated on what is no doubt already an indispensible tool for judicial, police and correctional officers, prosecutors, legal practitioners, students and all who have to deal with the criminal justice system.

Gauteng High Court in Johannesburg heard the appeal. Judges Tsoka, Victor and Mayat took a different view. They said that once the mother accepted her nomination as beneficiary, and the insurance company recorded this, a binding agreement between her and the insurance company came into effect. On the daughter's death, the executor of the mother's estate was entitled to accept the benefit of the policy. This judgment was also taken on appeal.

Appeal Judge Cachalia of the Supreme Court of Appeal with four other judges concurring pointed out that it is well established that a nominated beneficiary under a policy of life assurance does not acquire any rights to the proceeds of that policy during the lifetime of the policy owner. It is only on the policy-owner's death that the nominated beneficiary is entitled to accept the benefit and the insurer is obliged to pay the proceeds of the policy to the beneficiary. Until the death of the policy-owner, the nominated beneficiary only has a hope or expectation of claiming the benefit of the policy. The nominated beneficiary has no vested right to the benefit.

The result is that if the nominated beneficiary dies before the policy-owner, she would have no right to any benefit of the policy at the time of her death. When the nominated beneficiary dies, her expectation falls away and is extinguished. The fact that a nominated beneficiary has accepted the nomination does not change this.

As a result the appeal succeeded with costs and the claim of the executor of the mother's estate was dismissed.

PPS Insurance v. Mkhabela 2012 (3) SA 292 (SCA).

Law of Succession

■ *Will & Grace*

"Who controls the past controls the future.
Who controls the present controls the past."
– George Orwell (1903 - 1950)

IN ABOUT 2005 Patrick James Taylor learned that he had terminal lung cancer. In March 2006 he drafted and formally executed a will. In it he bequeathed his house to his three children and his personal effects and the residue of his estate to his wife. In September 2006 he drafted a document in which he set out his "wishes" with respect to his property. He expressed in the document that it was his wish that his wife be allowed to remain living in the house, that his household effects be used in the house until their replacement, and that his more specialised possessions like his stamp collection be given to his family or sold, and that any cash, shares or overseas investments should go to his children.

In October 2006 the deceased died and a dispute arose between his wife and his children as to the distribution of his estate. The children contended that the wishes document was intended by the deceased to be an amendment of his will. His wife did not agree.

The issue that came before Judges Griffiths and Zilwa in the Eastern Cape High Court in Port Elizabeth was whether the deceased had intended the wishes document to be an amendment of his will in terms of Section 2 (3) of the **Wills Act** of 1953. This provides:

> "If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act 1965 … as a will, although it does not comply with all the formalities for the execution or amendment of wills …"

After considering the language of the document in question and the circumstances preceding its drafting, the judges decided that it had not been intended to be an amendment of the will. The discretionary language such as "it is my wish", "it is suggested that", and "in the distribution … please be as fair as possible", was against such a finding as were the circumstances. Just a few months before writing the document the deceased had formally executed the will, and so must have been aware that an amending document would require the same formality. That he had this knowledge, and yet did not formally execute the document indicated that he did not intend to amend his will. Moreover, there was no evidence before the court that, in the period between the making of the will and the wishes document, his life circumstances had changed to such an extent as to persuade him to change his will.

Taylor v. Taylor 2012 (3) SA 219 (ECP).

Law of Contract

■ *Terms of Engagement*

THE STANDARD Bank made application to the South Gauteng High Court in Johannesburg for an order confirming the cancellation of a credit agreement entered into between the bank and Elsje Hand for the financing of a vehicle. The bank relied on a clause in the agreement which provided that in the event of default, the bank was entitled "after due demand" to cancel the agreement. Acting Judge Halgryn concluded that on a proper construction of the clause, the parties to the agreement intended that in the event of default, the bank would give "due demand", and only thereafter could the bank earn the right to cancel, by giving clear, unequivocal and unambiguous notice of cancellation to Ms Hand. By expressly providing for "due demand" in the agreement, the parties intended:

- a notice by the bank to Ms Hand,
- in terms of which the bank would notify Ms Hand to perform and/or rectify the breach,
- before or on a specific date.

The parties clearly intended that "due demand" and clear unequivocal and unambiguous notice of cancellation should occur prior to the institution of judicial proceedings; or at the very least that "due demand" ought to have occurred prior to the institution of judicial proceedings, and if the applicant thereafter intended the application to court to constitute "clear, unequivocal and unambiguous notice of cancellation", it ought to have alleged that in its papers.

What emerged from the application before Judge Halgryn was that the bank did not allege that it had, as a fact, cancelled the agreement, nor how it did so or how the cancellation notice was conveyed to Ms Hand, in clear, unequivocal and unambiguous terms.

The judge said that the high-water mark of what the bank did in respect of the cancellation of the agreement was its allegation that it "had elected to cancel the agreement". As a result, the bank had failed to allege and prove that it had earned the right to cancel the agreement, and that it had, as a fact, lawfully cancelled the agreement. As a result its application was dismissed with costs.

Standard Bank of SA v. Hand 2012 (3) SA 319 (GSJ).

Law of Evidence

■ *Scratching for Truth*

"Crime, like virtue, has its degrees."
– Jean Racine (1639 - 1699)

THREE JUDGES of the Supreme Court of Appeal heard an appeal which they remarked *"has had a long and somewhat unfortunate history in traversing what appears to have been a tortuous road to this court."*

It arose from the death of the mother-in-law of the Appellant Ms Rooksana Karrim on 01 August 2000 which resulted in Ms Karrim being convicted of murder on 05 June 2002. Various appeals and applications resulted and ultimately in 2011 the matter came before the Supreme Court of Appeal. Acting Judge of Appeal Petse made the point that the Appeal Court must defer to the trial court's credibility findings, more particularly given the care with which they appeared to have been arrived at. This is particularly so having regard to the advantages enjoyed by the trial court which was steeped in the atmosphere of the trial and had the opportunity of observing the demeanour of the witnesses. The trial court hears the actual evidence and has the opportunity of observing witnesses being cross-examined, whereas the Appeal Court decides the matter only on the written record and the arguments before it.

The judge also dealt with the evidence of two accomplices. Charges against them were withdrawn before the commencement of the trial and although they were warned by the trial court, their evidence should be approached with caution for a variety of reasons. The cautionary rule to be applied to accomplice evidence which requires particular scrutiny arises from the cumulative effect of a number of factors. Firstly, the accomplice is a self-confessed criminal. Secondly, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. These dangers have been recognised by our courts and require the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of contrary evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him. Satisfaction that the cautionary rule has been applied does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard mentioned.

The Appeal Court was satisfied that the trial judge was acutely alive to the need to approach the evidence of the accomplices with the requisite caution that the circumstances of the case demanded. She took cognisance of the shortcomings in their evidence and weighed the State's evidence against that of the accused in reaching the conclusion she did. That conclusion could not be faulted by the Appeal Judges. As a result the appeal was dismissed.

Karrim v. S 2012 [2] All SA 125 (SCA).

Interpretation

■ *Words, Language & Meaning*

"When I use a word, it means just what I choose it to mean – neither more nor less."
– Humpty Dumpty, in *Through the Looking Glass* by Lewis Carroll (1832 - 1898)

OUR COURTS often have to interpret legislation, regulations and contracts to ascertain their meaning so that effect may be given to them. This has led to numerous disputes over the years because of ambiguities, lack of clarity, contradictions and often poor use of language.

> *"A lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge."*
>
> – Samuel Johnson (1709 - 1784)

The Supreme Court of Appeal recently reviewed the proper approach to interpretation. Appeal Judge Wallis observed that over the last century there have been significant developments in the law relating to the interpretation of documents, both in South Africa and abroad. He said that the present state of the law can be expressed as follows:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context, provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence."

The judge said that whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

"Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made."

The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision, and the background to the preparation and production of the documents.

Judge Wallis noted that sometimes the language of a provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However that approach is not strictly correct. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics has shown to be mistaken.

"Most words can bear several different meanings or shades of meaning and to try to ascertain the meaning in the abstract, divorced from the broad context of the use, is an unhelpful exercise."

Natal Joint Municipal Pension Fund v. Endumeni Municipality [2012] 2 All SA 262 (SCA).

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