

# LAW LETTER

*Connecting Attorney & Client*

**February 2012**

*MacRobert*  
Attorneys

Your strategic partner at law



*2012 promises to be a challenging year, not least for lawyers and their clients. This first edition of Law Letter deals with a variety of recent decisions of our courts which we are confident will enable our readers to keep abreast of legal developments in an entertaining and informative way. 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

### The Legal Profession

#### ■ *Rotten Apple*

*"A child becomes an adult when he realises that he has a right not only to be right but also to be wrong."*

– Thomas Szasz

THE LAW Society of the Northern Provinces brought an application in the Mafikeng High Court to remove an attorney Kashan Ramakoko Mbando from the roll of attorneys for his "unprofessional conduct." This application heard by Judge President Leeuw and Judge Landman was dismissed with each party to pay its own costs. The Law Society appealed to the Supreme Court of Appeal.

Appeal Judge Navsa set out the factual background of the complaints brought against Mbando over a long period of time. Section 71 of the **Attorneys Act** of 1979 provides that a council of the law society may enquire into cases of unprofessional, dishonourable or unworthy conduct on the part of any attorney, notary or conveyancer whose name has been placed on the roll of the court within the province of its society, whether or not that practitioner is a member of such society.

The court before which the complaint of misconduct is brought has the ultimate disciplinary power. The courts should be concerned by the professional conduct of those who appear before them or otherwise practice within their areas of jurisdiction.

Judge Navsa and the other Judges of Appeal took the view that the Mafikeng High Court had taken too lenient an approach to the misconduct complained of by Mbando's fellow practitioners, who had either instructed him to act as a correspondent or who did work for him as a correspondent. He had failed to account to one firm of attorneys for a period of more than 8 years after the complaint was lodged and almost

11 years after the account was rendered. In the case of another attorney, the amount due by him was paid approximately 5 years after the complaint was laid and paid in two instalments about 9 months after the Law Society had ordered him to do so following on a disciplinary enquiry. In the ordinary course, the amounts collected by him and due to the instructing attorney of the client would have had to be retained in a trust account. The court drew the inference that the amounts were not so retained, a grave and usually fatal error on the part of any attorney.

The appeal judges took a dim view of the fact that Mbando had "*resisted all attempts*" to get him to address the complaint, and had stubbornly attacked the jurisdiction of the Law Society, rather than dealing with what were clearly legitimate complaints. In his affidavit, he was considered to be "*evasive,*

*argumentative and disingenuous.*" He continued to "*demonstrate a remarkable lack of insight concerning the professional and ethical standards expected of an attorney.*" Even at the time of the hearing he showed "*a remarkable lack of contrition and unaccountability.*"

The Supreme Court of Appeal concluded that Mbando's conduct was "*clearly unprofessional, dishonourable and unworthy and renders him liable to be struck off.*"



Supreme Court of Appeal

*Law Society of the Northern Provinces v. Mbando [2011] 4 All SA 238 (SCA).*

### Law of Succession

#### ■ *Bad Heir Day*

THE TESTATOR, Frederick Jacobus Du Toit, executed a will in November 2006. Approximately six months later, in May 2007, he executed another will. The question which came before the Supreme Court of Appeal for determination was whether the later will impliedly revoked the earlier will, in part.

The earlier 2006 will expressly revoked all previous wills, codicils and other testamentary writings. However, the later 2007 will did not contain such a revocation clause. But it was clear from a reading of the wills that the testator's intention in

each was to dispose of his entire estate. Appeal Judge Theron pointed out that where a testator dies leaving more than one testamentary disposition, the wills must be read together and reconciled and the provisions of the earlier testaments are deemed to be revoked insofar as they are inconsistent with the later one. Where there is a conflict between the provisions of the two wills, the conflicting provisions of the earlier testament are deemed to have been revoked by implication.

***The Golden Rule for the interpretation of wills  
is to ascertain the wishes of the testator  
from the language used.***

The court emphasised that the Golden Rule for the interpretation of wills is to ascertain the wishes of the testator from the language used. Once the wishes of the testator have been ascertained, the court is bound to give effect to them. From the language used in the 2007 will, the court was satisfied that it is clear what the testator intended. The necessary inference was that the testator intended to change his previous will.

This case illustrates how important it is to have professional advice in drafting your will.

*Pienaar & Another v. Master of the Free State High Court Bloemfontein & Others 2011 (6) SA 338 (SCA).*

## Law of Property

### ■ Estate Agent's Commission

*"The only place where success comes before work is a dictionary."*  
– Vidal Sassoon (born 1928)

PHOULLA WALKER, an estate agent employed by Wakefields Real Estate, introduced a house in Durban North, KwaZulu-Natal, belonging to Mr and Mrs Attree to Mrs Howard. Previously in 2001 the Attrees had bought the house through Wakefields. Mrs Howard "loved" the house but she told Walker that the price was beyond her reach. Despite that, she visited the house again with her husband and they spent some time there.

Subsequently, another estate agent persuaded the Attrees to lower their price and they did so. Negotiations followed and ultimately Mr and Mrs Howard bought the property. Wakefields then claimed its estate agent's commission on the basis that it had been the effective cause of the sale in introducing the purchaser to the property and was thus entitled to commission. The Attrees had in fact subsequently paid commission to another estate agency, Pam Golding Properties, which in turn shared it with a third agency, Remax Estate Agents. Remax had held the sole mandate to sell the house at the time the sale was concluded.

***A commission agent is paid by results and  
not by good intentions or even hard work.***



This dispute eventually reached the Supreme Court of Appeal in Bloemfontein. Judge of Appeal Carole Lewis observed:

*"It is notoriously difficult, when there are competing estate agents, to determine who is the effective cause of the sale that eventuates. It may be that more than one agent is entitled to commission."*

The judge referred to a 1948 Appeal Court decision where Judge of Appeal Van Den Heever had said:

*"Situations are conceivable in which it is impossible to distinguish between the efforts of one agent and another in terms of causality or degrees of causation. In such a situation it may well be that the principal may owe commission to both agents and that he has only himself to blame for his predicament, for he should protect himself against that risk."*

After carefully considering the evidence, the appeal judges concluded that had Wakefields not shown Mrs Howard the house first, the initial introduction, the property would not have been sold to Mr and Mrs Howard through the agency of Pam Golding. Mrs Howard had "absolutely loved the house" and had persuaded her husband to view it with her. He also liked it but was concerned about finances. But for that introduction, subsequent agents would not have known that the Howards were interested in the property. The subsequent agent "reaped where she had not sown." In the court's view,

Walker's introduction was the effective cause of the sale. As a result, Wakefields was entitled to commission and the fact that the Attrees found themselves liable to pay more than one agent was "of their own making."

*Wakefields Real Estate (Pty) Ltd v. Attree & Others 2011 (6) SA 557 (SCA).*

### ■ Sold Down the River

*"Order is heaven's first law."*  
– Alexander Pope (1688 - 1744)

A LOCAL authority sold land to Sam Lubbe Investments in June 2005. Two months later in August 2005 Lubbe sold the land on to Cosira Developments. However, the land was never transferred and remained registered in the name of the local authority.

Over an extended period of time Cosira tried unsuccessfully to obtain implementation of the sale agreements and have the land transferred into its own name. Cosira then applied to the Johannesburg High Court for what amounted to an order for specific performance against the local authority and against Lubbe to compel them to give effect to the sale agreements and effect registration of the land in Cosira's name.

The matter was heard by Judge Van Oosten. It seemed that the sale from the local authority to Lubbe had been in accordance with the local authority's Black Economic Empowerment policy. The June 2005 agreement selling the land to Lubbe obliged Lubbe to develop the land according to a specified timetable. Both the June 2005 sale to Lubbe and the August 2005 sale from Lubbe to Cosira were identical except for the names of the purchasers.

The judge observed that the June 2005 and August 2005 sale agreements were entirely distinct. There was not a tripartite agreement between the three parties. As a result, there was no contractual link between the local authority and Cosira. This meant that Cosira did not have the necessary direct legal interest and therefore legal standing required to bring its application against the local authority. In addition, the granting of an order of specific performance against the local authority would have frustrated the local authority's Black Economic Empowerment policy as well as its plans for the development of the property, and this would be against public policy. Furthermore, the local authority, in awarding the tender to sell the land to Lubbe had exercised a choice of a particular person and that in itself would prevent a sale onwards by that person, namely Lubbe to Cosira, without a resolution of the local authority's council.

As a result, Cosira could not compel the local authority to give transfer and its application was dismissed with costs.

*Cosira Developments (Pty) Ltd v. Sam Lubbe Investments CC t/a Lubbe Construction & Others 2011 (6) SA 331 (GSJ).*



## ■ Go Forth

*"Facts do not cease to exist because they are ignored."*

– Aldous Huxley (1894 - 1963)

THE UNITED Apostolic Faith Church approached the Johannesburg High Court for an order evicting a school from its property in Boksburg. The property was registered in the name of the parent body of the Church in England in 1945. In 1951 the Church in Southern Africa gained administrative autonomy from this body incorporated in England in 1927.

Since then the South African Church's Constitution was revised in 1983 and again in 1993.

Mr Barry Hill and his wife Brenda had operated a school known as the "Boksburg Christian Academy" on the premises since 1999. In 2000 Mr and Mrs Hill were ordained as elders of the church but since then had left its membership to worship elsewhere.

Judge Willis had to deal with the contention of the school that the Church had failed to prove its ownership of the property and had failed to establish its legal standing for the order which it sought. The school argued that the Church would have to go back to the highest governing body in England to obtain approval for the eviction order, alternatively to seek its approval for the transfer from the English Church into the name of the South African Church.

The judge concluded that upon a proper understanding of the facts and the law in this situation, the highest governing body of the Church in South Africa at any particular time had always had authority to exercise the rights and duties relating to ownership of the property. The Church had been properly cited as the Plaintiff. It was the owner of the property in question and had the necessary legal standing to apply for the eviction of the school.

Furthermore, even if it were accepted that the ownership of the property still remained vested in the English Church or its governing body, a person in good faith possession of immovable property acquires a right in that property which gives rise to the right to apply for an eviction order. The Church was clearly the good faith possessor of the property and, as such, was entitled to apply for the ejection of others occupying it.

In addition, if transfer or cession were indeed a necessary requirement for a person to seek the ejection of persons occupying immovable property, then it was clear, on a balance of probabilities, that the Church in South Africa must by necessary implication have taken cession from the Church in England of all rights in respect of immovable properties owned in South Africa.

Various technical arguments were raised by the school but Judge Willis remarked: *"the law does not readily countenance facile evasions of justice."* He did point out that the question of eviction is a sensitive issue in prevailing South African law. The parties were however in agreement that the provisions of the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act** of 1998 (commonly known as PIE) do not apply by reason of the fact that PIE applies only to the eviction of persons from their home. The school did not function as a residence or dwelling for persons and as a result did not fall under PIE.

The eviction order was granted.

*United Apostolic Faith Church v. Boksburg Christian Academy 2011 (6) SA 156 (GSJ).*

## ■ Payback Time

*"Most people sell their souls and live with a good conscience on the proceeds."*

– Logan Pearsall Smith (1865 - 1946)

DORBYL LTD, a listed company on the Johannesburg Stock Exchange, brought a claim against its former employee, EJ Vorster, previously Group Executive Director, for repayment of alleged secret profits made by Vorster in breach of his fiduciary duty to Dorbyl and amounts paid by Dorbyl in alleged breach of Vorster's duty of good faith, and contract of employment. In addition, it was alleged that Vorster had forfeited the right to benefit under a management participation scheme, for which a further amount was claimed by Dorbyl.

It was common cause that by the nature of his employment, Vorster owed Dorbyl a duty of good faith which included a duty to serve Dorbyl faithfully and honestly. It was also not in dispute that he owed the duty to avoid a conflict of duty and self-interest as well as a duty to avoid obtaining for himself either secretly or without approval of Dorbyl any benefit arising out of his employment.

Vorster did not testify. As a consequence, most of the issues of fact were not disputed. Vorster had failed to disclose his interest in various transactions for the disposal of entities by Dorbyl. He contended that the benefits which he received were remuneration for consultancy services rendered by him to the purchasers of the disposed entities. However, he did not contend that he in fact received written permission from Dorbyl to perform work for reward outside the services of the Dorbyl Group as envisaged in Dorbyl's General Conditions of Employment.

Judge Moshidi in the Johannesburg High Court referred to a 1921 Appeal Court judgment in which the then Chief Justice James Rose-Innes said:

*"When one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position."*

The court pointed out that an agent who accepts or agrees to accept a secret commission forfeits the right to remuneration and is liable in damages for any loss sustained by the principal and is, furthermore, liable to account for any profits.

As a result, Vorster was ordered to repay secret profits of over R36 million, to repay a further amount of R316,000 and to forfeit benefits of R4.5 million. He was also ordered to pay

interest and the costs incurred by Dorbyl including the costs of two advocates.

South Africans have often been left reeling by exposure of greed and corruption in the public sector as well as the private sector on a scale unimaginable to ordinary wage-earning citizens. This case is a welcome reminder of the importance which the law attaches to trust, good faith, honesty, transparency and accountability.

*Dorbyl Ltd v. Vorster [2011] 4 All SA 387 (GSJ).*



## ■ Holy Orders

SENIOR COMMISSIONER Byrne in the Commission for Conciliation Mediation and Arbitration (CCMA) recently conducted an arbitration between the Diocese of Pretoria (Anglican Church of Southern Africa) and Nkosinami Nkomande who claimed that he had been unfairly dismissed as a Priest both procedurally and substantively. The Church raised the point that the CCMA had no jurisdiction to hear the matter as there was no employment relationship between the parties.

Various arguments were raised, including:

- Although the Church does have employees, the Clergy do not have employment relationships as they have a calling to serve God.
- There is no contract of employment between the Anglican Church and its Priests. There may be features of the relationship that resemble a secular employment relationship, but the Church's power derives from Ecclesiastical and Canonical rules, and not from an employment relationship.
- A priest does not place his labour potential at the disposal of the Church and there are no rights and obligations enforceable in a civil or labour tribunal.
- Although there is an offer and acceptance for a Priest to be deployed at a particular Diocese, there is no intention by the two parties to enter into a legally enforceable contract where rights and obligations are justiciable in forums outside of the Church.
- Where a person is ordained as a Priest and/or issued a license, that person goes through a religious ceremony where certain undertakings are made, including obedience to the Bishop.

- The deployment at a parish in the Diocese and payment of a stipend is simply the means or platform which the Church gives the Priest in order to fill his calling to serve God.

The commissioner pointed out that the issue whether or not priests, elders, ministers, pastors and others are employees of their respective churches, or whether they are in fact employed by a higher body, "God", has come before various labour tribunals many times. Many have grappled with this issue, not surprisingly, as most of the practical features of the relationship between a Priest and the Church resemble those of an employment relationship and legislation has not specifically ruled on the matter.

The conclusion reached was that the point of departure in the Priest and Church relationship as compared to an employee and employer relationship occurs where one defines the objective of the relationship. Was there a meeting of the minds between the two contracting parties to enter into an employment relationship, or was the intention to enter into a religious arrangement whereby the Priest is given the ability and platform to exercise his calling whilst at the same time subjecting himself to the ecclesiastical rules of the Church in his capacity as God's representative on earth. Whatever the viewpoints of other parties may be, whether they be non-religious or belong to other religions, are largely irrelevant. What is important is the contracting parties themselves.

The commissioner observed that a fundamental concept of a Christian Church is that all structures below God derive their

authority, power, wisdom and decision-making ability from God. It is not contemplated that the Church, which believes that it is imbued with God's power, will agree to allow the State to dictate to it who it can appoint as a Priest and who it should or should not dismiss as a Priest. That is a power that the Church jealously guards, as it is essential to the existence of the Church. As a result the commissioner concluded that it was not in any way probable that the Church would intend to create an employment situation between itself and the Priest which would allow for a secular authority possibly without any religious training or godly delegation to apply its mind on irrelevant factors and overturn a decision of God.

The conclusion was that the commissioner had no jurisdiction to rule on the fairness or otherwise of the Bishop's decision to dismiss the Priest. As a result, the point raised by the Church was upheld.

*Nkomande v. Diocese of Pretoria (Anglican Church of Southern Africa) CCMA case no. GATW3121-11 (16 July 2011).*

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

© Copyright 2012  
Faithful reproduction with acknowledgement welcomed.

**NOTARIES  
CONVEYANCERS  
TRADE MARK AGENTS**

**MacRobert  
Attorneys**

Your strategic partner at law

**HEAD OFFICE: PRETORIA**

MacRobert Building  
1062 Duncan Street cnr Charles and Duncan Streets  
Brooklyn Pretoria 0181  
Private Bag X18 Brooklyn Square 0075 RSA  
Docex: 43 Pretoria  
E-mail: law@macrobert.co.za  
Tel: +27 12 425 3400  
Fax +27 12 425 3600

**CAPE TOWN**

3rd Floor Wembley Square  
Solon Street Gardens Cape Town 8001  
PO Box 21731 Kloof Street 8008 RSA  
Docex: 25 Cape Town  
E-mail: law@ct.macrobert.co.za  
Tel: +27 21 464 2400  
Fax: +27 21 461 2840

**DURBAN**

7th Floor Corporate Place 9 Gardiner Street  
Durban 4001  
PO Box 4118 Durban 4000 RSA  
Docex: 185 Durban  
E-mail: law@dbn.macrobert.co.za  
Tel: +27 31 304 7185/6/7/8  
Fax: +27 31 304 2799

Visit our website: [www.macrobert.co.za](http://www.macrobert.co.za)