LAW LETTER

Civil.Criminal.Constitutional

June 2011

MacRobert
Attorneys

Your strategic partner at law

This Winter edition of Law Letter reflects the wide variety of disputes which come before our courts, from grumpy neighbours to scrap metal, from deformed babies to defamed celebs, from insurance claims to interest claims. 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.

Recent Judgments

Tenders

■ *Scrap in Court*

"Here's the rule for bargains: Do other men, for they would do you. That's the true business precept."
– Charles Dickens (1812 – 1870)

THE CITY of Cape Town periodically needs to dispose of obsolete electrical equipment used in its electrical reticulation system.

Historically, the Municipality warehoused redundant equipment until sufficient quantity had been accumulated for it to be offered to scrap dealers for sale. Given the costs of warehousing, the City adopted an "as and when" disposal method. Essentially, scrap dealers were invited to submit quotations to buy a stockpile of redundant equipment, as well as any other equipment that might become redundant over a period of six months. Dealers had to quote prices in advance for this equipment and would be responsible for the transportation costs of taking delivery from locations across Cape Town.

The invitation to submit quotations recommended that dealers attend a site meeting and included contact details for an official who could provide further information. Dealers were also asked to indicate any qualifications that might apply to their quotations.

SA Metal Machinery made an initial enquiry as to where the stockpile was situated, but failed to attend the site meeting. The dealer failed to submit a quotation, but then approached the court asking that the invitation for quotations be set aside because the redundant equipment had been too vaguely defined.

SA Metal argued that the stockpiled equipment had not been properly identified in the invitation. The invitation did not specify whether the equipment had simply become worn out, or whether damage had been caused by fire or an explosion. It was also not clear, said SA Metal, whether the equipment contained copper or aluminium components. Some of the equipment could also have contained toxic chemicals, requiring specialised disposal procedures. Dealers would have had to reduce their quoted price to take account of the risk created by these uncertainties.

The redundant equipment disposed of on an "as and when" basis was also not identified with sufficient certainty. Dealers would again have to reduce quoted prices because it was uncertain what transport costs would be involved in taking delivery of the equipment from as yet unknown locations. The City of Cape Town, concluded SA Metal Machinery, should have stuck to the historical method of disposing of redundant equipment.

Judge Binns-Ward pointed out that the disposal of assets by a Municipality required the exercise of business judgment. Obtaining the best possible price for the redundant equipment was only one factor. Other issues could legitimately be taken into account, including the need to reduce the municipality's warehousing costs.

The court disagreed that the stockpiled equipment had not been defined with sufficient certainty. SA Metal could have dealt with its unanswered questions by attending the site meeting and by asking questions. It could also have qualified its quote by, for example, quoting different prices for equipment with and without copper components.

The mere fact that dealers did not know the location of units becoming available on an "as and when basis" also did not rob the invitation of certainty. The judge observed that there is nothing in the legislation to prevent municipalities from taking business risks in the discharge of their functions. Both the City and the dealer accepted a measure of risk in the "as and when" disposal method. The successful dealer had the risk of increased transportation costs as a result of the as yet undetermined locations of the equipment. This risk might result in reduced prices for the City, but it also had the advantage of limiting its warehousing costs. The court refused to set aside the invitation for quotations.

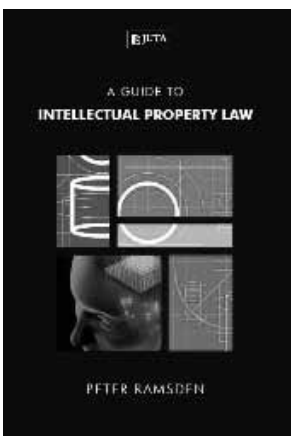
SA Metal Machinery Co (Pty) Ltd v. City Of Cape Town 2011 (1) SA 348 (WCC).

BOOK REVIEW

A Guide to Intellectual Property Law

By Peter Ramsden (Juta & Co Limited – 2011) lawproduction@juta.co.za

THE PUBLICATION of a brand new work on intellectual property is a rare event. Legal publishers Juta & Co are to be congratulated on making available the first edition of *A Guide to Intellectual Property Law*, a comprehensive reference handbook not only useful to lawyers and students, but also a wider commercial audience responsible for the important task of protecting, promoting and creating brands, trade marks, patents and copyright assets.



The book closely highlights the relevant legislation in a well-arranged and accessible way, with illustrations from the leading South African cases. It also introduces the relatively new subjects of the internet, biodiversity and traditional knowledge rights. Other topics crisply covered include unlawful competition, counterfeit goods, domain names, licences, and ambush marketing.

This first edition is particularly well indexed, with local and international case references, pertinent questions posed and answered, and graphic diagrams all assisting in quickly finding solutions. International treaties and conventions and the fields of intellectual property protection recognised by the World Intellectual Property Organisation of the United Nations are also covered.

The author, Advocate Peter Ramsden BSc (Civil Engineering) (UCT), BCom, MBL, LLB (UNISA) is a registered Professional Engineer, a member of the International Bar Association's Energy, Environment, Natural Resources and Infrastructure Law Section, and serves on the panel of arbitrators of the SA Institution of Civil Engineering. He points out in his introduction:

"Creating and maintaining rights in intellectual property and avoiding infringements of the intellectual property rights of others is an important part of doing business. Consumers encounter intellectual property every day of their lives. The music that you listen to, the films that you watch and the books that you read are protected by copyright; the computer that you use and the car that you drive include numerous patented inventions; and the brand of nearly every product that you purchase in the supermarket is protected by a trade mark. A well managed intellectual property portfolio . . . should be a source of competitive advantage for a business."

This welcome publication is likely to become a valuable addition to the reference resources of all who have an interest in any aspect of intellectual property.

Law of Nuisance

■ *Silent Night*

"People must not do things for fun. We are not here for fun. There is no reference to fun in any Act of Parliament."
– A.P. Herbert (1890 – 1971)

MOST OF us have, on occasion, had to tolerate a neighbour who causes a disturbance through excessive noise or inappropriate conduct. The question is: when does a neighbour's conduct become a 'nuisance' in terms of the law?

In a recent case, Mrs Wingaardt complained that her neighbour's excessive display of Christmas lights and decorations constituted a nuisance. Mr and Mrs Grobler had decorated their Jeffreys Bay home every Christmas since 2004. Visitors wanting to view the Groblers' lavish lighting and decorations were asked for donations, which were then given to two charities. The Groblers' home had become something of an institution, attracting both tourists and locals.

Mrs Wingaardt applied for an interdict against the Groblers, arguing that the decorations and lighting drew visitors at all hours of the day and night over the festive period. She argued that the stopping and starting of cars, as well as noise generated by people viewing this spectacle, caused an unreasonable nuisance. This, she said, infringed on her right to undisturbed use of her property.

Judge Alkema disagreed. He concluded that the Groblers' actions were not unlawful and did not constitute the sort of nuisance that warranted an interdict. The enjoyment derived by the Groblers and their visitors – as well as the benefit received by the charities – outweighed any prejudice and inconvenience caused to Mrs Wingaardt.

Although the judge ruled that Mrs Wingaardt would have to tolerate the higher noise levels during the festive season, the Groblers were ordered to limit the time and period during which Christmas lights and decorations were displayed.

Wingaardt and Others v. Grobler and Another 2010 (6) SA 148 (ECG).

Law of Contract

■ *Grave Error*

"It is a fact that a man's dying is more the survivor's affair than his own."
– Thomas Mann (1875 – 1955)

YOU MIGHT be forgiven for thinking that death is a pretty good excuse for failing to perform your obligations. But a recent judgment held the estate of a deceased person liable to pay interest to a creditor as a result of late payment.

Mr Till agreed to buy an antique gold coin from Scoin Trading (Pty) Ltd, a dealer in rare coins. The price was R 1 950 000. A deposit was paid and it was agreed that the balance of the price would be due on or before 31 December 2007. Mr Till died in November 2007, before paying the outstanding balance.

Scion Trading sued the executor of Mr Till's estate for the balance of the price, plus interest. The executor acknowledged that the estate was liable for the balance of the price, but refused to pay interest.

Our law provides that if a seller and buyer agree on a payment date, and the buyer defaults, the seller is entitled to claim interest from the agreed payment date. If the parties did not agree on an interest rate that would apply, then interest is payable at the prescribed interest rate set from time to time in terms of the **Prescribed Rate of Interest Act**. The prescribed interest rate is currently 15.5% per year.

The High Court ordered the executor to pay over the balance of the price for the gold coin, but refused to order the executor to also pay the interest claimed by Scoin Trading. It then appealed to the Supreme Court of Appeal.

The executor argued that liability for interest requires some kind of negligence or unlawfulness – and because Mr Till had died, his failure to pay on due date was neither! The executor also claimed that, because Mr Till died before the balance of the price was payable, the performance by him of his obligations became impossible so no obligation to pay interest could accrue.

The Supreme Court of Appeal did not agree. Acting Judge of Appeal Pillay pointed out that liability to pay interest was a form of damages payable to the seller, and did not require negligent or unlawful conduct on the part of the buyer. All the seller had to do was prove that the buyer did not pay on time. Secondly, the fact that the late Mr Till was himself unable to pay on the agreed date did not mean that his obligations became impossible to perform – the executor of his estate should have paid over the balance of the price on the due date.

The court ordered the executor to pay interest on the outstanding balance of the price of the gold coin to Scoin Trading.

Scoin Trading (Pty) Ltd v. Bernstein N.O. 2011 (2) SA 118 (SCA).

■ *Stop the Clock*

DORMELL PROPERTIES 282 CC appointed a building contractor to construct a regional shopping centre. It is common practice in large building contracts for the contractor to provide a guarantee from a financial institution in favour of the employer, in this case Dormell. The guarantee is intended to help the employer if the construction contract is cancelled as a result of the contractor's breach. The employer then has cash available to appoint another contractor to get the job finished.

In this case, Renasa Insurance undertook to pay Dormell an amount of R6,6 million if the construction contract was cancelled. The guarantee document provided that the guarantee expired on 28 February 2008.

Dormell cancelled the construction contract on 28 February 2008 and claimed the guarantee amount from Renasa Insurance. But it refused to pay out, claiming that the guarantee expired at midnight on 27 February 2008.

The dispute was heard in the High Court, which determined that the guarantee period should be calculated using what is known as the civil method. This method provides that the guarantee period is calculated by including the day on which the guarantee was issued but excluding the last day of the guarantee period. According to this calculation method, the guarantee did expire at midnight on 27 February 2008 and Dormell could not claim cover under the guarantee.

Dormell appealed to the Supreme Court of Appeal. Acting Judge of Appeal Bertelsmann confirmed a long-established principle when it comes to calculating time periods in contracts: the civil method of calculating time is only applied if the parties do not expressly specify an end date and there is a period of time that needs to be calculated. The method is relevant when the guarantee is valid for, say, 90 days, 12 weeks or 3 months so that the exact end date needs to be calculated.

Where the parties, however, have included the end date in their agreement, the civil method should never even come into play. No calculation is needed and the end date, as agreed between the parties, applies. The court decided that Dormell had lodged its demand in time; the guarantee period ended at midnight on 28 February 2008.

Dormell Properties 282 CC v. Renasa Insurance Co Ltd and Others NNO 2011 (1) SA 70 (SCA).

Damages

■ *Sad and Sorry Saga*

THE PRICE of fame is that it can be difficult to keep people from exposing the skeletons in your closet … or from fabricating scandals about what might be rattling around in there.

In February 2008, singer Jurie Els brought an urgent application to interdict *You* and *Huisgenoot* magazines from publishing an article alleging that Els had sexually molested his protégé, Robbie Klay, when Klay was a child. The High Court granted an interdict and the magazines were prohibited from publishing the article.

The editor of *You* and *Huisgenoot* then ran mildly edited versions of the article that referred to the allegations, but did not name Els. A photograph of the alleged molester was published, but with the face obscured. The photograph was easily identifiable as having been taken from the cover of one of Els' CDs. An editorial was published in the same magazines, saying that Els had sought an interdict against the magazines. It was not difficult for readers to conclude that the alleged molester and Els were one and the same.

Els brought contempt of court proceedings against the editor of the magazines and publisher Media 24 Ltd. This clash came before the Supreme Court of Appeal, which had to decide whether there had been a breach of the interdict order.

The editor argued that the published article fell outside the scope of the order, as it was not the exact article that had been interdicted. The published article had been edited and shortened, and the name of Els omitted.

Judge of Appeal Heher made it clear that the intention of the interdict order was to prevent damage to Els' reputation. The question was whether the substance of the prohibited article had been reproduced in the published article. The length of the published article was not a consideration, as the thrust of the prohibited article could be conveyed in a few well-chosen sentences.

The Appeal Court concluded that the editor and publisher were in contempt of court, and referred the case back to the High Court for an appropriate order.

Els has subsequently been acquitted of the molestation charges that Klay brought against him. He is suing the editor and publisher for damages.

Els v. Weideman and Others 2011 (2) SA 126 (SCA).

■ *Baby Blues*

ONE OF the biggest fears faced by parents must be the possibility that their child may be born with serious defects. Technology allows for the testing of the foetus for the risk of abnormalities like Down's Syndrome. If parents are timeously informed of the risk, they then have the option of terminating the pregnancy in terms of the **Choice on Termination of Pregnancy Act** of 1996.

Mrs Sonny went to the Clare Estate Clinic, a primary health care clinic. She was 37 years old, had high blood pressure and was a diabetic. The nurses assessed Mrs Sonny as a high-risk patient and referred her to Addington Hospital.

A doctor examined Mrs Sonny and sent her for an ultrasound. She was given an ultrasound report and was told to take it to the doctor and return in 2 weeks for another scan.

When Mrs Sonny asked the doctor for an appointment she was told that she had to arrange one through the clinic. She was not told that she was a high-risk patient. On the same day Mrs Sonny went to the clinic and asked a nurse for a letter of referral. The nurse read the ultrasound report and told her that it showed nothing troublesome. Based on that information Mrs Sonny did not go back to the hospital.

Mrs Sonny returned to the clinic five times for check ups. The nurses were aware of the first ultrasound report, but failed to alert her to her high-risk status at any of these check ups.

Mrs Sonny gave birth to a baby girl who was diagnosed with Down's Syndrome. It turned out that the ultrasound scan showed 'borderline ventriculomegaly', an indicator for Down's syndrome. If Mrs Sonny had been alerted to the risk, further tests could have been completed within the time permitted for terminating the pregnancy.

Mr and Mrs Sonny sued the Premier of the Province of KwaZulu-Natal for damages based on medical negligence. The damages were claimed on the basis of the cost of maintaining their daughter for 55 years (R66 million), and secondly for the incorrect performance of the sterilization procedure (R50 000).

Mr and Mrs Sonny argued that the nursing staff at the Clare Estate Clinic and the medical personnel at Addington had failed to exercise professional skill and diligence. They should have taken reasonable steps during the second trimester to establish conclusively whether there was a risk of mental or physical deformity. The parents argued that they would have terminated the pregnancy if they had been informed of the risk.

The Premier of the Province was held liable for damages, but appealed.

The Supreme Court of Appeal agreed that the staff at Clare Estate Clinic and Addington Hospital had been guilty of medical negligence. There was a failure in performing the chromosomal testing timeously. Judge of Appeal Navsa held that the doctors should have involved Mrs Sonny totally in her treatment as well as in the diagnosis of the foetus's condition.

Premier of the Province of KwaZulu-Natal v. Sonny (047/10) [2011] ZASCA 6 (4 March 2011).

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