LAW LETTER

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This mid-year edition of Law Letter shines our spotlight on recent decisions of our High Courts, Supreme Court of Appeal and Constitutional Court relating to housing, business rescue, defamation, maintenance, surrogate parenthood and legal ethics. We also review an important new book on parole. 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.

JUDGMENT DAYS

Company Law

■ *Pulling the Plug*

BUSINESS FAILURE negatively affects the economy and can leave a lot of people unemployed. The new Companies Act allows "affected persons" (including creditors, employees and shareholders) to apply for a "financially distressed" company to be placed under business rescue. This means that a business rescue practitioner is appointed to manage the company, and to develop and implement a business plan aimed at establishing a sustainable business. If business rescue proceedings are initiated, then creditors are held at bay while the business rescue practitioner performs his or her magic.

Given the impact on creditors, the Companies Act requires that there must be a "reasonable prospect" that the company could in fact be rescued. The Cape Town High Court was recently called upon to determine what the applicant had to prove in order to show reasonable prospects of success.

In 2007 William and Yvonne Koen bought a plot of land from the Wedgewood Village Golf and Country Estate (Pty) Ltd. The company was supposed to develop a golf estate, but by 2009 only 14 of the 18 planned holes were completed, the roads had been abandoned and its bankers had pulled the plug. Instead of applying for the liquidation of the company, the Koens asked the court to approve business rescue proceedings. The application was supported by a local estate agent who told the court of her expectations of a recovery in the property market and who also indicated that a potential investor was interested in the development. The potential investor, however, wished to remain anonymous and the estate agent was also not able to tell the court how much money this investor might make available or on which terms.

Judge Binns-Ward noted that there are two possible purposes for business rescue: firstly, to achieve the continued existence of the company on a solvent basis or, secondly, to allow a temporary improvement in the business of the company so as to achieve a better return for the creditors and shareholders. Any business rescue application must state clearly which purpose the intended business rescue is meant to achieve. The Koen's application was silent regarding the purpose of the application.

More significantly, a party applying for business rescue 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. This meant that the Koens should have provided a detailed, fully motivated and structured plan. Given that the application was based largely on talk of an anonymous investor, the application was doomed to fail. The judge was not convinced that placing the Wedgewood Village Golf and Country Estate under business rescue would be anything more than re-arranging the deck chairs on a sinking ship.

Koen v. Wedgewood Village Golf & Country Estate (Pty) Ltd 2012 (2) SA 378 (WCC).

Law of Property

■ *Going Nowhere Slowly*

"We must rediscover the distinction between hope and expectation."
– Ivan Illich (1926 - 2002)

A LANDLORD PURCHASED and upgraded a building which was occupied by several tenants. Each tenant had an indefinite-term lease which was subject to termination on written notice. The landlord gave all the tenants written notice to terminate and offered to enter into new leases at increased rentals, to match the market rate for the now improved accommodation. The increase was in excess of the amounts permitted by the escalation clauses contained in the lease agreements.

The tenants took their complaint to the Rental Housing Tribunal, a body created by the **Rental Housing Act** to address unfair practices between landlords and tenants. The tenants argued that the landlord's termination of the leases in order to impose the escalated rentals constituted unfair practice.

The dispute was referred for mediation and then arbitration at the Rental Housing Tribunal, but before the matter could be adjudicated the landlord instituted eviction proceedings in the

Book review

Parole in South Africa

By Joey Moses
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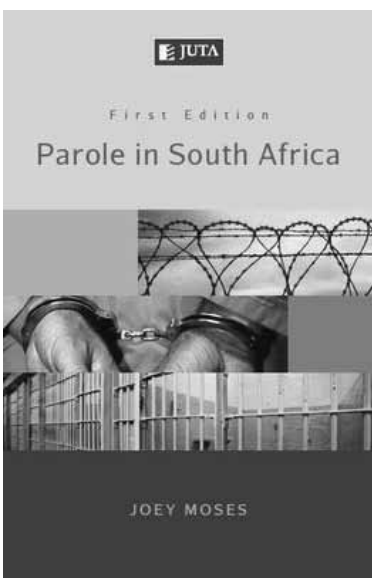
"Stone walls do not a prison make,
Nor iron bars a cage."
– Richard Lovelace (1618-1658)

THIS FASCINATING and timely new publication by legal publishers Juta comprehensively addresses the often-contentious subject of the "early release" on parole of convicted criminals serving prison sentences. This process is often bitterly criticised as undermining the entire criminal justice system.



As author, Advocate Joey Moses, BA.LLB (UWC), LLM PhD (UCT), eloquently sets out, parole is a process that is legally and constitutionally recognised and permitted in South African law. It involves the prisoner's contact with other inmates and the correctional officials, as well as the disciplinary codes, rules and other programmes operative in the prison. It includes the prisoner's behaviour and the regular evaluation of the prisoner.

If a prisoner becomes eligible and qualifies for release on parole, the prisoner's progress is monitored. All assessments of the prisoner must comply with the statutory requirements, as well as being lawful, reasonable and fair.

Parole is considered so as to foster rehabilitation by gradually facilitating the move from confinement in prison to social re-integration in the community. It serves the function of deterrence and creates the necessary restraint to keep the parolee away from committing further offences. It also serves as an incentive for prisoners to obey the rules and the parole and correctional service conditions, and to give their co-operation.

This well-organised and meticulously researched work will serve as a welcome guide not only to lawyers, correctional officials, probation officers, social workers, students and judicial officers, but also inmates, their families and potential employers, as well as the victims of their crimes, their families and the public at large. Confidence in the criminal justice system, of which parole is an integral part, is crucial in a country where crime, safety and security are issues which affect all of us. By comparison with the recent Presidential blanket reduction of sentences across the board for certain categories of prisoners, parole takes into account the individual circumstances and conduct of the prisoner in question.

The author and publisher are to be congratulated on this significant contribution to a greater understanding of this important element of penal correction in our constitutional democracy.

Gauteng High Court. The tenants withdrew their complaint from the Tribunal and defended the eviction proceedings. The battle waged from the High Court to the Supreme Court of Appeal and was ultimately heard in the Constitutional Court.

The tenants argued that the escalation in rentals was grossly unfair and that it was unreasonable to terminate the leases for the purpose of increasing the rentals.

Justice Cameron pointed out that the Tribunal's power to make a determination in regards to unfair practice took preference over contractually-negotiated arrangements between parties. The tenants' complaint fell within the jurisdiction of the Tribunal and it would be appropriate for the Tribunal to determine whether or not the landlord's conduct constituted a prohibited unfair practice.

Accordingly, the court gave both parties leave to lodge their complaints with the Tribunal. It further permitted both parties the opportunity to appeal the decision of the Tribunal directly to the Constitutional Court.

Maphango and Others v. Aengus Lifestyle Properties (Pty) Ltd and another CCT 57/11 [2012] ZACC 2.

Family Law

■ *The Gift of Giving*

"Children aren't happy with nothing to ignore,
And that's what parents were created for."
– Ogden Nash (1902 - 1971)

SURROGACY has had a place in society since as early as biblical times.

Recognising that surrogacy is a complex human issue, the **Children's Act** requires that all surrogate agreements (between commissioning parents and a surrogate mother) be confirmed by the High Court. The law recognises that there is a need to balance the yearning of the commissioning parents for a child and the feelings of the surrogate mother. There is also a need to ensure that surrogacy is not commercialised and abused.

The Act provides that a surrogate agreement must meet a number of requirements before it can be confirmed by the court. These requirements include the following:

- The commissioning parents must be unable to give birth to a child due to permanent or irreversible conditions;
- The court must be satisfied that the commissioning parents are suitable to be the parents of the child;
- The surrogate mother must be acting for altruistic reasons (she cannot derive any financial gain from the arrangement); and
- The surrogate mother must previously have had a pregnancy and a viable delivery, and must have a living child of her own.

The North Gauteng High Court recently made some interesting observations when confirming a surrogate agreement.

The commissioning parents were a same-sex married couple who are Danish and Dutch but live in South Africa. The couple married in 2010 and presented evidence that they were economically and emotionally stable enough to raise a child.

Judges Tolmay and Kollapen noted that our constitution guarantees the rights of gays and lesbians to marry and to participate in family life. An application for the confirmation of a surrogacy agreement by a same-sex couple should not be subject to different tests than those applied to heterosexual couples. In particular, same-sex couples should not be asked to defend how the child would be "mothered" because, in the court's view, mothering was not so much about gender as it was a function which could be carried out by persons of either gender. A mother is simply the parent – of either gender – who forms a sensitive attachment to the child flowing from day to day devotion to the child's needs.

The presiding judges also highlighted the need for protection against commercial surrogacy, which can lead to abuse. The Act generally prohibits payment to the surrogate mother, allowing only compensation for expenses, loss of earnings and genuine professional, legal and medical services. Where expenses are paid by the commissioning parents, a detailed list of expenses must be provided. Also, where the parties are introduced by an agency, the court will require proof that payment has not been made via the agency, as well as details regarding the method of operation of the agency, the relationship between the agency and the commissioning parents and the relationship between the agency and the surrogate mother.

Satisfied that all the requirements had been met, the court confirmed the surrogate agreement.

Ex Parte WH and others 2011 (6) SA 514 (GNP).

Matrimonial Law

■ *Till Death us do Part*

YOU GET divorced and you agree to provide maintenance to your former spouse. He or she starts a new relationship and moves in with someone else, but does not marry. What happens about maintenance? Are you released from your obligations?

Mr and Mrs H were divorced, and Mr H left the family home. A while later, Mrs H meets Mr S and moves in with him.

Mr H had previously undertaken to pay maintenance to Mrs H and also to support their son. But Mr H was sequestrated and the payment of maintenance largely came to an end. Mr S stepped in and supported Mrs H. Mrs H then developed serious health problems. Unable to work, she brought an application compelling Mr H to pay maintenance.

In the past, our courts have typically said that maintenance is not awarded to an ex-wife living with and being supported by another man. This was felt to be against public policy, as the woman was effectively supported by two men.

Judge Schoeman pointed out that the **Divorce Act** actually provides that the obligation to pay maintenance ends when a former spouse gets married. The Act does not go further to provide that the obligation ends when the former spouse merely sets up house with another person.

Mr H had a legal duty to support his former wife, while Mr S's support of Mrs H was not a duty imposed by law, but was

based on generosity. While marriage creates a reciprocal duty of support, a man and a woman who merely live together as a couple do not share the same reciprocal duty towards each other. Mrs H argued that she did not want to marry Mr S because of her age and health, and this was accepted by the judge.

The court went further and decided that it would be against public policy not to award maintenance to Mrs H. There is no statute, general public policy or moral prohibition against awarding an ex-wife maintenance in these circumstances.

SH v. EH 2011 (5) SA 496 (ECP).

Defamation

■ *The Good, the Bad, and the Ugly*

"I hold it as certain, that no man was ever written out of reputation but by himself."
– Richard Bentley (1662 - 1742)

A PERSON IS defamed when his or her reputation is brought into disrepute because of a negative or offensive comment made as to that person's character. The comment must be made known to others through some form of publication.

On 3 March 2004, the *Daily Sun* newspaper published an article under the title 'Mangaung Crime Crackdown'. The article quoted a senior police officer as saying that the police suspected Mr Modiri, a businessman, of involvement in drug-dealing, cash-in-transit heists and car theft in the Bloemfontein area and that the police had not caught him because "he uses other people to do his dirty work for him". The police officer was also quoted as having said that Mr Modiri was unlikely to be brought to justice unless the public came forward with information. It turned out that the senior policeman named in the article never made these statements, although the article correctly recorded the police's suspicions.

Modiri sued the police and the newspaper. His defamation action was dismissed in the Free State High Court but he took the matter to the Supreme Court of Appeal. The newspaper did not dispute that the statements were defamatory, but instead raised two defences. Firstly, the newspaper argued that the statements were true. This defence is based on the idea that the law should not allow persons to claim damages in respect of injury to their good reputation, where they in fact do not or should not possess a good reputation. Secondly, the newspaper claimed that it was in the public benefit to know about the police's suspicions regarding Mr Modiri. The article served a public benefit, said the newspaper, by making the community aware of Mr Modiri's alleged criminal activities.

Modiri argued that the defence of truth should not be allowed, because the newspaper had falsely attributed the statements to a senior police officer. Judge Fritz Brand noted that the newspaper was not required to prove that the defamatory statement was true in every detail. All that was needed was proof that "the sting of the statement" was true. The judge was satisfied that the gist of the article was true, regardless of inaccuracies in "peripheral detail".

The court then looked at the second defence, that of public interest or public benefit in publishing the statements. As a general rule it is not in the public interest to publish the identity of suspects unless and until they have been charged in open court. There are cases, however, where the police's suspicions are backed substantially by evidence. Publication in these cases could benefit the public in that members of the community could come forward with further information, resulting in an arrest. The article also made it clear that Modiri was alleged to be involved in the crimes and this was different from saying that he was in fact guilty of the crimes.

Judge Brand observed that defamation cases always involve a balancing act and that the outcome will depend on the facts of the case. In this case, the publication of the information was justified because it was objectively true and its publication was in the public interest.

Modiri v. The Minister of Safety and Security 2011 (6) SA 370 (SCA).

The Legal Profession

■ *Ambulance Chaser*

BEING ADMITTED as an attorney is a big day in any lawyer's life. The process involves taking an oath to serve the country as best as one can and, in so doing, to uphold the virtues of honesty and integrity. The attorney's name is then entered on the roll of practising attorneys.

If an attorney is found guilty of unprofessional, dishonourable or unworthy conduct, the attorney can be suspended or even

removed from the roll of attorneys. This means that the person cannot practise as an attorney during the suspension period or permanently, as the case may be.

The Law Society of the Northern Provinces investigated charges of unprofessional conduct against an attorney, Ms Sonntag. She was, amongst other things, charged with paying touts to bring personal injury claims to her practice. Effectively, she used agents to seek out people who might have personal injury claims and paid them for introducing those people to her practice. Touting is regarded as unprofessional conduct and warrants immediate suspension or removal from the roll.

Ms Sonntag was found guilty at an internal disciplinary hearing of paying more than R800 000 to touts in 300 different cases. The Law Society applied to the High Court to have her name removed from the roll of attorneys. The two presiding judges were lenient and merely suspended her for a year, with the suspension itself suspended for a three year period.

Dissatisfied with the High Court's decision, the Law Society appealed to the Supreme Court of Appeal. Judge of Appeal Malan emphasised that the attorney's profession is an honourable one that demands honesty and integrity from its members. This goes so far as to require an attorney facing striking-off proceedings to assist the court by placing the full facts before the court. Ms Sonntag, the court found, had continuously denied misconduct and had raised defences in a manner which was not completely honest.

The judges also noted that Ms Sonntag's continued denials revealed that she actually lacked an understanding of her own conduct. All this suggested that it could not be assumed that after a period of suspension, she would be a fit and proper person to resume practising as an attorney.

The court concluded that the only suitable sanction was removal from the roll.

Law Society of the Northern Provinces v. Sonntag 2012 (1) SA 372 (SCA).

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