LAW LETTER

Connecting Attorney & Client

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This summer edition of Law Letter introduces our readers to the way our courts have recently dealt with granting access to information in the public interest, and the displeasure of our judges where the court process and the rights of the public are abused. 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 cases

Courts & Costs

■ *Wake Up Call*

"What you do to another human being, you do to yourself."
– Lourens van der Post (1906 - 1996)

THE PLAINTIFF in a claim in the Johannesburg High Court was a 52 year old woman who was employed as a domestic worker when she was involved in a motor vehicle accident from which her claim arose. She sustained bodily and other injuries when a minibus taxi in which she and her minor son were travelling collided with another vehicle on a public road outside Sasolburg. Her son, a student, died on the scene of the accident. She instituted a claim against the Road Accident Fund and eventually the matter came to trial before Acting Judge Bekker.

The Plaintiff was awarded total monetary compensation of R253,691. Her advocate asked for a punitive cost order against the attorneys representing the Road Accident Fund on the basis of their failure to respond to any of the Plaintiff's representatives' questions at the pre-trial conference, their belated concession of liability on the merits at the trial roll call, and their insistence on challenging the Plaintiff's expert evidence on quantum without bringing any countervailing evidence. It also appeared that an offer of settlement made by the Road Accident Fund was never properly communicated by its attorneys to the Plaintiff's representatives. The Road Accident Fund had also not been informed by its attorneys that the trial was proceeding.

Judge Bekker said that the trial should only have lasted one day but lasted three days. This was solely attributable to the conduct of the attorneys of the Road Accident Fund. Their conduct was unauthorised, improper and indeed reprehensible. It amounted to professional misconduct. The judge said in those circumstances it was not fair or proper to order the Road Accident Fund, being a public fund, to pay the costs. The judge ordered the attorneys of the Road Accident Fund to pay the Plaintiff's costs of the second and third days of the trial from their own pockets on the scale as between attorney and client and also to pay the costs of four experts on the same punitive scale.

The Registrar of the High Court was directed to serve a copy of the judgment on the Chairperson of the Board of the Road Accident Fund as well as the President of the Law Society of the Northern Provinces to consider whether further disciplinary or other action should be taken against the practitioners in question.

Louw v. Road Accident Fund 2012 (1) SA 104 (GSJ).

■ *Game Over*

"Law and equity are two things which God hath joined, but which man has put asunder."
– Charles Colton (1780 - 1832)

JUDGE BRIAN Southwood heard a contested application to set aside a sequestration order in the Pretoria High Court. Mr Matlala had been appointed provisional trustee of the insolvent estate. Reviewing the factual background, the judge made the following damning findings against the trustee (the first respondent):

> *"The first respondent has not shown any inclination to engage with the facts alleged by the applicants and has contented himself with raising technical points and bald denials of most of the applicants' factual allegations. He has even denied his own letters and letters clearly emanating from his firm, Maluleke Seriti Makume Matlala Inc. In dealing with the applicants' allegations in this manner, the first respondent has ignored the requirement that a litigant who wishes to deny factual averments in the opposing party's affidavits of which the litigant has personal knowledge must set out the contrary facts. It also appears from these undisputed facts that the first respondent has not been truthful with regard to a material fact on at least two occasions, both relating to the sale of the property."*

BOOK REVIEW

Alcohol, Drugs & Employment

By Mike McCann, Nadine Harker Burnhams, Christopher Albertyn & Urmila Bhoola
(Juta & Co Limited) lawproduction@juta.co.za

THE IMPACT of alcohol and drugs has taken a major toll on almost every aspect of life in South Africa. There is an increasing variety of drugs prevalent in the market and shifts in the demographic profile of drug users internationally.

The workplace has been recognised as an important frontier for addressing substance abuse. Increasing involvement by employers will not only help to meet the requirements of labour laws, but also makes good business sense as they seek to reduce the costs associated with substance-related health problems – including injuries, infectious diseases, liver cirrhosis, and mental health concerns – resulting in absenteeism and loss of productivity.

This updated second edition (392 pages) contains a wealth of valuable information on how to identify and address alcohol and drug problems in the workplace.

- *"This book will no doubt prove to be an important tool for human resource managers, labour lawyers, trade unions, occupational health providers and academics. It provides valuable assistance in the form of both scientific facts and practical tools for addressing the issues of substance abuse in the workplace in a compassionate, legal and fair manner through balancing employee and employer interests."*

  – Dunstan Mlambo,
  Judge President of the Labour Court and
  Labour Appeal Court of South Africa

- *"**Alcohol, Drugs & Employment** should be compulsory reading for labour lawyers, human resource managers, occupational health practitioners, persons involved in running employee assistance programmes, trade union leaders, academics working in the substance abuse and labour fields and policymakers."*

  – Professor Charles Parry,
  Director: Alcohol & Drugs Abuse Research Unit,
  South African Medical Research Council (Cape Town)

With 20 well organised chapters and 11 appendices, this comprehensive publication is not only a quick reference source, but also a practical search tool for management to identify significant risks in their own organisation and to implement protocols, procedures and policies to deal with problems and also educate and support their employees.

The authors and publishers Juta are to be congratulated on this exceptional contribution to an area which directly and indirectly affects us all.

The judge observed that there was good reason to order the trustee to pay the costs in his personal capacity on the scale as between attorney and client. He had opposed the application without a genuine defence. His decision to persist in opposing the application was "*inexplicable*". He did not dispute that he had told deliberate untruths. He did not reply to numerous letters which substantially protracted the dispute. Not only did this cause prejudice but was a contravention of the attorneys' rules. His opposition had been vexatious. There was also no evidence that he had been authorised to oppose the application. Furthermore, the insolvent estate had no funds or other assets with which to pay the costs of the application.

The result of this was that Judge Southwood expressed the court's displeasure and ordered that the trustee in his personal capacity had to pay the costs of the application on the scale as between attorney and client. The Registrar was also requested

and directed to send a copy of the judgment together with the record and the Heads of Argument to the President of the Law Society of the Northern Provinces to investigate the conduct of the trustee and his firm *"in the light of this judgment and to take whatever action against him which the Law Society considers appropriate."*

Naidoo v. Matlala NO 2012 (1) SA 143 (GNP).

■ *Cracking the Whip*

"By our errors we see deeper into life. They help us."
– Olive Schreiner (1855 - 1920)

TWO JUDGES of the Eastern Cape High Court ordered an attorney Mr Matolwandile Bonga Mda to make the accounting records of his attorney's practice available for inspection by the Cape Law Society. He appealed against this ruling and five judges of appeal in Bloemfontein considered the matter.

Mr Mda had not had *"a happy relationship with the Law Society"*. He had on 15 occasions been found guilty of unprofessional conduct after internal disciplinary proceedings had been conducted. The Law Society was considering instituting further disciplinary proceedings against him for five other complaints. One of these related to a complaint by Mr Dlokweni who instructed Mr Mda to pursue a claim on his behalf against the Road Accident Fund in about 1996. In 2005 Mr Dlokweni lodged a complaint with the Law Society against Mr Mda regarding this claim. This was after Mr Dlokweni had learned

that the Road Accident Fund had paid his claim to Mr Mda three years earlier in 2002, but Mr Mda could not account for the money. The Law Society wrote to Mr Mda to establish what had happened but received no satisfactory response. Later Mr Mda informed the Law Society that he could not locate Mr Dlokweni's file.

Judge of Appeal Cachalia pointed out in the judgment:

> *"Law societies have, among their objects, the responsibility to uphold the integrity of practitioners and ensure that the standards and control of their professional conduct are maintained. This task falls to the council, which runs the affairs and exercises the powers of the society. Among the powers given to a council to achieve these objects is Section 71, which sanctions an enquiry into allegations of 'unprofessional or dishonourable or unworthy conduct' on the part of a practitioner."*

Mr Mda objected to the Law Society investigating the documents in his office but the court overruled this objection. One of the allegations against Mr Mda was that he may have misappropriated monies that were due to Mr Dlokweni. If that allegation were proved it would amount to a failure to keep proper accounts and would also be a criminal offence. The court noted that Mr Mda had *"a dubious disciplinary record."* His appeal was dismissed with costs.

Mda v. Law Society of the Cape of Good Hope 2012 (1) SA 15 (SCA).

Constitutional Law

■ *Shape up or Cough up*

"The truth is rarely pure, and never simple."
– Oscar Wilde (1854 - 1900)

ACTING JUDGE Du Plessis has delivered an important judgment in the High Court in Pretoria where he made it clear that government officials can be ordered to pay the costs of litigation from their own pockets where their actions have been unlawful, indiscriminate and illegal. There is no reason for the taxpayer to have to bear those costs. This judgment is significant because it clearly spells out the important role which the courts play in the public interest in holding public officials to account. The judge said:

> *"It is important that those who act with impunity, and who think that they can do as they please, simply because they have the force of the whole law-enforcement system behind them, should be brought to book and restrained. The whole wrath of the legal system, the rule of law, the courts and the public should be brought upon such officials.*
>
> *"South Africa is facing a tsunami of corruption, bribery, State intervention in all spheres of the economy, unlawful, incompetent and malicious execution by public officials of the exercise of their duties, in breach of the Constitution, and in breach of virtually every other obligation that exists. The only bulwark against this threat to the public, innocent citizens and the poor, the frail and the needy, are the courts and the rule of law. The courts and the independence of the courts, and the willingness of the judiciary to stand up against intimidation and* mala fide *actions of State officials, must be utilised in its full force.*

> *"The public and innocent citizens should be vindicated, and a deterrence should be available to force public officials to comply with their duties and obligations, to act constitutionally and to act within their authority, and without trampling upon the rights of citizens, who are free men and women in a modern, democratic society, and who are entitled to demand of public officials that they act in such a fashion.*
>
> *"Citizens and free men should not be subjected to force, intimidation, unlawful detention and similar behaviour perpetrated upon them by government officials who view themselves as above the law, not having to adhere to their constitutional obligations, and who think that they can do as they please, when they please and how they please.*

"It is the right of citizens and free men to insist upon the courts creating a deterrent, and providing within the confines of the law the necessary and appropriate relief to enforce our progressive, admired and wonderful Constitution, that has brought freedom and human rights to millions of previously disenfranchised and disregarded citizens. The rights created in the Constitution must be safeguarded, and protected, and any infringement thereof should be deterred through whatever lawful mechanisms possible, including appropriate relief which could and should function as a deterrent for public officials who infringe the principles enshrined in the Constitution, who act outside the scope of their constitutional duties, and who infringe upon the rights of normal, free and law abiding citizens.

"Unlawful detention has an infamous history in our law. It was utilised during the apartheid era to force persons into submission, where they were locked up in solitary confinement for days on end, and it was utilised in a brutal and unacceptable fashion. Its utilisation for political reasons was criticised worldwide, it was not justified, and has caused severe human-rights infringements and violations. This should not be allowed to happen again in a free, democratic society such as the one created by our Constitution. It should not be tolerated by any law-abiding citizen, and it cannot be justified on any basis whatsoever."

In this case where there had been unlawful detention, the judge ordered the costs to be paid on a punitive scale in their personal capacities by five police officers including a station commander, superintendent, captain, inspector and constable.

Coetzee v. National Commissioner of Police & Others 2011 (2) SA 227 (GNP).

Administrative Law

■ *Publish or Perish*

AVUSA PUBLISHING sought access under the **Promotion of Access to Information Act** of 2000 (known as PAIA) to a forensic investigation report on certain acts of maladministration that had occurred in a municipality. It lodged the request with the Department of Local Government and Traditional Affairs, Eastern Cape, for access to the report. However, the information officer refused access under Section 44(1) of PAIA on the ground that it contained privileged information.

AVUSA approached the Eastern Cape High Court and the matter was heard before Acting Judge Dukada. He ruled that in interpreting Section 44(1) it was essential to take into account Section 32 of the Constitution dealing with access to information and Section 195 dealing with basic values and principles governing public administration. Where a public body tries to rely upon the grounds of refusal contained in PAIA, the onus rested on it to establish that its refusal of access to the record was justified. Section 44(1) did not provide for a refusal of access to a record of a public body on the ground that "it contains privileged information."

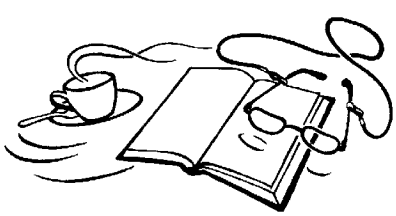
Furthermore, in the spirit of the culture of justification that was central to PAIA the Department was obliged to give adequate reasons for its refusal. Merely repeating the wording of Section 44(1) did not constitute adequate reasons.

Section 195(1)(g) of the Constitution provides that: "Transparency must be fostered by providing the public with timely, accessible and accurate information."

Acting Judge Dukada said that withholding of the report would also be against the public interest, which would be served by revealing information that evidenced a substantial contravention of the law. In such circumstances, the public interest clearly outweighed the harm to any interest protected by Section 44(1).

As a result, the Department was ordered to deliver to AVUSA a copy of the complete report within five days.

AVUSA Publishing EC v. Qoboshiyane NO 2012 (1) SA 158 (ECP).



■ *Let there be Light*

"Nor is the people's judgment always true;
The most may err as grossly as the few."
– John Dryden (1631 - 1700)

THE APPLICANTS, a financial journalist and his employer, requested Eskom to furnish them with documentation relating to the pricing formulas contained in long-term bulk purchase agreements concluded between Eskom and Billiton for the supply of electricity to two smelters operated by Billiton. The applicants also wanted access to documents revealing the identities of the signatories to the relevant agreement. These requests were made under the **Promotion of Access to Information Act** of 2000 (PAIA). However, Eskom and the other respondent parties opposed the application and referred to Sections 36 and 37 of PAIA which provides for the mandatory protection of commercial or confidential information of a third party.

The applicants in turn relied on Section 46, which contains a public-interest override where a disclosure, otherwise prohibited under Section 36 or Section 37 would, amongst other things reveal an imminent threat to public safety or the environment.

Judge Kgomo who heard the application decided that although it was clear that Billiton had established reasonable grounds to show the probability that disclosure of its production costs as required by the applicants would cause it commercial harm, and entail revealing of trade secrets, it was nevertheless equally clear that the application concerned issues of considerable public interest. Eskom bore the burden of proving that secrecy was justified.

Since the Billiton smelters consumed more than 5.5% of Eskom's total base-load capacity at a time when the general public was being exposed to persistent tariff increases, as well as to electricity blackouts and the related public-safety and environmental risks, there was the required public interest in the disclosure of the records in question.

The judge concluded that the applicants had made out a case for access to the information as well as the documents sought. Eskom was ordered to provide all the information and records as requested.

De Lange & Another v. Eskom Holdings Ltd & Others 2012 (1) SA 280 (GSJ).

■ *Comment*

"NO LONGER is it necessary for attorneys to haul reams of paperwork and legal texts to the courtroom, as those can be accessed on a laptop or tablet device with ease. Research can be done quicker and more efficiently electronically, as case law, legislation and other legal resources can be found online, and Wi-Fi facilities are now available in some of the country's courts. And it is not only wealthy attorneys that stand to benefit from these new technologies, as millions of South Africans are able to access the internet via their mobile phones, often at affordable prices, and many of the legal sources available on the internet are free.

When contemplating the technologies available, attorneys must ensure that their professional obligations, especially in terms of client confidentiality, independence, integrity, providing quality legal services and reputational protection, continue to be met."

– from editorial in De Rebus*, the SA Attorneys' Journal (516), January/February 2012.*

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