LAW LETTER

Judges.Justice.Judgments

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This Autumn edition of Law Letter features recent decisions of our High Courts, the Supreme Court of Appeal and the Constitutional Court on the sale and expropriation of land, personal liability of company directors, damages claims in schools and the obligations of judges. 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

Law of Property

■ *When is a Sale not a Sale*

THE LAW requires that a contract for the sale of immovable property must be in writing and signed by the parties or their agents acting on their written authority. The courts have interpreted this provision to mean that –

- all the material terms of the contract must be in writing;
- the court must be able to ascertain the terms of the contract with reasonable certainty;
- there is no valid contract if a material term has been left open for further negotiations;
- the manner of payment is ordinarily a material term.

The appellants in this case signed an agreement of sale with the defendant. It was in the usual form used by estate agents and set out the purchase price but no provision was made for a deposit, nor for a loan to be obtained by the purchasers. The full price was to be paid in cash in regard to which the agreement provided: *"Refer to details of payment under Special Conditions"*. Clause M(2) of the Special Conditions stated that:

> "The purchaser and seller have mutually agreed that the purchase price payment details will be agreed in writing between the two relevant parties by not later than 30/04/2005. This will be a cash payment."

No such agreement was ever concluded but in July 2005 the purchasers paid the agreed purchase price of R1,3 million to the nominated conveyancing attorney. Before transfer was passed they claimed that the agreement was void from the outset because the method of payment had not been agreed in writing. The seller rejected the claim and made application to the Durban High Court for the enforcement of the sale. She was successful but the purchasers appealed and the Supreme Court of Appeal upheld their appeal. The judges pointed out that it was an express term of the contract that the purchase price had to be paid before the seller was obliged to pass transfer but no agreement had been reached in regard to the time of payment which was a material term. As a result the agreement was unenforceable.

Chretien and Another v. Bell 2011 (1) SA 54 (SCA).

■ *Living with Change*

"That is the land of lost content,
I see it shining plain,
The happy highways where I went
And cannot come again."
– A.E. Housman (1859 – 1936)

IN 1992 the Umhlatuze Municipality expropriated from the owner, Mr Harvey, two lots on which, after he had acquired them in 1978, he had built his home and thereafter resided. The expropriation had been for the purpose of developing the area on which the lots and several other properties were situated for use as a public open space with recreational facilities. Harvey was paid an agreed compensation for the properties expropriated from him. Subsequently, however, the plans for the proposed open space area had turned out not to be feasible and the Municipality decided instead that the area should be used for medium-density residential development. Harvey claimed that because the Municipality had expropriated his property for a specific purpose, it could not then use it for a purpose wholly unrelated to that originally intended. He applied to court for an order that the property be restored to him.

Not so, held the Pietermaritzburg High Court. The expropriation had originally been for a valid purpose, it was not arbitrary and Harvey had been paid an agreed compensation. The property then vested in the Municipality and Harvey no longer had any rights in respect of the property. His application was dismissed.

Harvey v. Umhlatuze Municipality and Others 2011 (1) SA 601 (KZP).

■ *Threatened Expropriation*

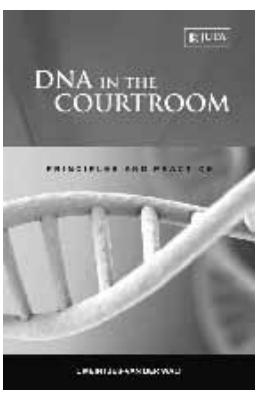
IN TERMS of Section 25(1) of the Constitution, no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Offit Enterprises (Pty) Ltd and another Offit company

BOOK REVIEW

DNA in the Courtroom

By Prof. Lirieka Meintjes-Van der Walt (Juta & Co Limited – 2010)

25 YEARS ago the introduction of DNA profiling techniques revolutionised the investigation and prosecution of crime, especially sexual offences, murders and robberies. Justice demands that DNA evidence used in criminal dispute resolution should be valid for a court to come to a fair judicial finding. For that to happen, the court has to be satisfied that the evidence placed before it can be relied upon.



Science and technology have long been essential elements of criminal investigations. This includes the identification of fingerprints, analysis of blood and semen samples, measuring of blood-alcohol levels, and the use of ballistics to identify firearms. But the forensic value of DNA matching has proved to be of immeasurable value in the criminal justice process, where often there is no other direct or corroborating evidence available, not only to secure a conviction, but also to establish innocence where there may otherwise have been suspicion and compelling circumstantial evidence of motive and opportunity.

This fascinating and well-organised publication by South Africa's foremost researcher in the expert evidence science-law field, provides a welcome and invaluable resource to prosecutors, defence counsel and presiding judicial officers alike. No doubt it will also be welcomed by family law practitioners involved in paternity disputes, although not necessarily by both parties to such disputes.

The scientific DNA principles, terminology and definitions are seamlessly integrated into the procedural requirements and practice of the courtroom. South African case law precedents and international authorities are well indexed. Technical guidelines for DNA Testing Laboratories are included, with full colour reproduction of explanatory figures adding clarity.

The author and publishers are to be congratulated on a fine and ground-breaking publication. And in case you were wondering, DNA is Deoxyribonucleic Acid – "a double-stranded molecule that contains the genetic code; composed of 46 rod-shaped chromosomes; 23 of which are inherited from the mother and 23 of which are inherited from the father".

owned a substantial tract of land within the Coega Industrial Development Zone. Relying upon Section 25(1), they sought redress against the Coega Development Corporation (CDC). They complained that by continued threats of expropriation of their land and other forms of conduct over a period of approximately nine years, beginning in 2000, Coega had deprived them of their entitlement to the full use, enjoyment and exploitation of their land. In 2005, and again in 2007, the Premier of the Province attempted to expropriate Offit's land for the purpose of transferring it to CDC but both attempts were set aside. In August 2007, however, CDC received its final operator permit which afforded it more leeway than when it was operating under its provisional permit. The result of this was that it was no longer a necessary requirement for CDC to have control over Offit's land and no further steps were taken by CDC to expropriate.

Offit then brought an application before the High Court against CDC for a declaratory order that any expropriation of their property for the benefit of CDC was neither permissible nor lawful. The High Court accepted that CDC's conduct amounted to an unlawful deprivation of Offit's property but held that this did not entitle them to the relief claimed. An appeal to the Supreme Court of Appeal was unsuccessful and the dispute ended up in the Constitutional Court. In order to determine whether there had been an infringement of Section 25(1) of the Constitution, the court had to determine whether there had in fact been a "deprivation" of property. Judge Skweyiya pointed out that deprivation requires at the very least substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society. Although the attempted expropriations and other instances of attempted interference with Offit's enjoyment of its property, coupled with ongoing threats of expropriation made by CDC, had been of some annoyance to Offit, they did not amount to a substantial interference or limitation going beyond the normal restrictions on property use or enjoyment. There could be instances where the effect of threats of expropriation is so outrageous as to amount to a deprivation of property, but that was not so in the present case. Offit's appeal was dismissed.

Offit Enterprises (Pty) Ltd and Another v. Coega Development Corporation (Pty) Ltd and Others 2011 (1) SA 293 (CC).

Judges

■ *Conflict of Interest*

AN ATTORNEY, who presided as an acting judge in the Labour Court, upheld a finding against Mr Ndimeni that he had been properly dismissed from his position as manager of the Lusikisiki branch of Meeg Bank. Ndimeni ascertained that in the course of his practice as an attorney, the acting judge had executed mortgage bonds for the bank and that his firm was listed by the bank as one to which such work was to be given. Ndimeni appealed against the finding and applied for leave to present evidence on why the acting judge should have recused himself. The Labour Appeal Court dismissed the appeal but in a further appeal to the Supreme Court of Appeal it was held that the acting judge ought, at his hearing of the matter, to have disclosed his relationship with the bank and thus given Ndimeni the opportunity to decide whether to ask the acting judge to recuse himself. The appeal was upheld, the decision of the Labour Appeal Court was set aside and the matter was remitted to the Labour Court for trial before another judge.

Ndimeni v. Meeg Bank Ltd (Bank of Transkei) 2011 (1) SA 560 (SCA).

■ *Rubber Stamp*

"What is written without effort is in general read without pleasure."
– Samuel Johnson (1709 – 1784)

IN OPPOSED matters before the High Court, parties are usually required to file "heads of argument" prior to the hearing. These should not be written arguments, substituting for the oral presentation of the parties' cases, but "heads" setting out the main points of contention and the legal authorities which will be relied upon in relation to points of law. There are two principal reasons why heads are required. One is to ensure that no party is taken by surprise by an argument raised unexpectedly by the other. If a court is to give a well-reasoned judgment it needs to have a full debate by both sides on all the issues in the case before it. Secondly, the filing of heads ensures that the judge is made aware in advance of all that is to be argued. This both enables the judge better to understand and to prepare for the case without having to make extensive notes while argument is proceeding. The judge is able, when reserving judgment to be given later, to use the heads as a reminder of the arguments that were presented.

It was this benefit, taken too far, that resulted in the Constitutional Court chiding the actions of a High Court judge who, in formulating his judgment, had essentially copied the written heads of argument submitted by one of the parties to the dispute before him. Of approximately 1 890 lines of typing in the judgment only 32 were the judge's original writing. The rest were copied exactly from the heads of argument. The court referred to a statement it had made in an earlier case that in providing reasons in a judgment it –

> *"explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions."*

Adding that some reliance on counsel's heads of argument may not be improper, the court explained that it would have been better if the judgment had been in the judge's own words:

> *"The very act of having to summarise in one's own words what a witness has said, or what is stated in an affidavit or what a document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case."*

Because of the circumstances of the case the Constitutional Court did not have to decide whether the extensive use of the heads of argument could actually lead to a perception of bias entitling an aggrieved party to seek the judge's recusal. That was an issue that should be left for decision for another day in an appropriate case.

Stuttafords Stores (Pty) Ltd and Others v. Salt of the Earth Creations (Pty) Ltd 2011 (1) 267 (CC).

Companies

■ *No Place to Hide*

"THIS CASE", said Judge Blieden of the Johannesburg High Court, *"is a classic example of a party who owns all the shares and is in control of a company attempting to use its formal identity to avoid it paying a debt due by it to a creditor, where he on behalf of that company caused it to incur that debt at a time when he knew it could not pay it without his financial assistance. Section 424 of the Act was passed to avoid the injustice of such conduct."*

Section 424 of the **Companies Act** of 1973 provided that when it appears that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company, the person who was knowingly a party to the carrying of the business in that manner is personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.

The plaintiff in this case invoked the section when he sued the defendant, who was the sole director and shareholder of a company, Dansk Design (Pty) Ltd. In order to settle a dispute between the plaintiff and Dansk, the company – represented by the defendant – had undertaken to pay an amount of R530 675 to the plaintiff. The defendant, on behalf of Dansk, then repudiated the undertaking to pay and applied to court to wind up the company. His application was granted and the company was found to be hopelessly insolvent. Having failed to recover the debt from Dansk, the plaintiff proceeded against the defendant personally. Judge Blieden concluded that, at the time the defendant repudiated the undertaking on behalf of Dansk, he was well aware that the company had no chance of being able to perform its obligations without his financial input. Despite this he wound up the company, knowing that there was no chance of the plaintiff receiving any dividend in respect of the repudiated settlement. This was *"reckless conduct"* for which he was liable under Section 424 of the Act. Judgment for the full amount was granted against him.

McLuckie v. Sullivan 2011 (1) SA 365 (GSJ).

Damages

■ *Class Action*

"I forget what I was taught. I only remember what I've learnt."
– Patrick White

THE HEAD-NOTE to this case in the Law Reports reads simply: "A school principal has a duty to ensure the safety of a teacher at the hands of a learner". This brief statement gives no indication of the disturbing facts of a case which occupied 39 court days. Judgment was delivered in November 2010. It commences:

> *"The incident which formed the basis of the cause of action in this matter had tragic, devastating and unfortunate consequences for the learner, the educator, the school principal and the school as a whole. On the fateful day of the incident, the learner bludgeoned the educator with a hammer in the class in the presence of other learners."*

This had come about after the teacher, Ms Jacobs, had seen the learner drawing in his "journal" instead of writing the test she had set. She noticed that the journal had contained a "death certificate" made out to her. She reported the incident to Ms Hutchings, the Head of Department, who called the learner, K, out of the class. He came with his journal and Hutchings took him to the principal's office. The principal told Hutchings that he would deal with the matter and to leave K with him. While he was trying to telephone K's mother and the police, the boy returned to his class and attacked Jacobs with a hammer which he had in his satchel. She was severely injured and traumatized by the episode and, in addition to the physical injuries she had sustained, suffered personality changes and was obliged to give up teaching. She sued the governing body of the school and the headmaster for damages.

K had been guilty of previous breaches of discipline and contraventions of the school's code of conduct. Jacobs had ascertained that he was a troubled boy, unhappy at home and with a wish to be a gangster like his father who was serving a prison sentence. Hutchings had previously met with K's mother and grandmother regarding his having left the school premises without permission. A formal contract was concluded between Hutchings for the school on the one hand and K and his family on the other, setting out a plan of action for K. It involved daily reporting by him, and counselling by Ms Turner, the school counsellor. She thereafter met with K on at least five occasions. Matters appeared to have improved and the counselling stopped.

The court's finding against the school and its principal was based on the legal duty of the school and its servants to act positively in order to ensure the security and safety of Jacobs at the hands of K and the culpable breach of that duty which amounted to negligence. On the facts it was held that Hutchings, from her dealings with K, was aware that he had a serious social problem and she should have realised that urgent intervention was required. She had referred him to Turner for counselling but did not instruct Turner to counsel for a specific purpose. Turner, in hindsight, after reading K's journal, realised that he was a disturbed boy and had she been made aware of that fact earlier would have arranged for him to be psychologically evaluated. Hutchings was the one who was aware of the problems involving K but failed to take the necessary action to deal with them. The principal was also found to be at fault in that having been apprised of K's behaviour on the day of the incident and of the death threats in K's journal, he had allowed the boy to sit unsupervised outside his office while he made telephone calls to his mother and to the police. The court found that he should have foreseen the reasonable possibility of K slipping away to his class and attacking Jacobs. He was also found to have been negligent.

But there was another finding by the court in regard to the facts with which it was faced. Jacobs herself was found to have been guilty of contributory negligence in that she failed to refer K directly to Turner when she was the first member of staff to become aware of his personal problems and because she failed also to advise anyone immediately of the death threats she had seen in the boy's journal. She was found to be 20% at fault and her proved claim of R1 393 356 was reduced to R1 114 685.

Jacobs v. Chairman, Governing Body, Rhodes High School, and Others 2011 (1) SA 160 (WCC).

INCOME TAX

■ *Counting the Change*

THE SOUTH African Revenue Service (SARS) has recently released for public comment a draft interpretation note on rules for the translation of amounts denominated in foreign currencies. The note sets out SARS' views on how these rules should be applied. The rules are essentially those contained in Section 25D of the **Income Tax Act** and accordingly those applicable to capital gains tax, which are in paragraph 43 of the Eighth Schedule to the Act, do not fall within the ambit of the note.

The note deals with two broad situations in which the rules may become relevant. The first is when a taxpayer directly enters into transactions denominated in a foreign currency. The second is when a taxpayer carries on operations through a foreign subsidiary (a controlled foreign company, CFC) or a foreign branch (a permanent establishment, PE).

The starting point in Section 25D is that amounts denominated in foreign currencies must be translated into Rand at the applicable spot rate. It goes on, however, to provide that, in the case of a PE, the average exchange rate for the relevant year of assessment becomes applicable. SARS envisages a separate tax calculation being performed in a PE's reporting currency. The resulting taxable income can then be translated into Rand at the relevant average rate. A similar approach is set out for CFCs in Section 9D of the Income Tax Act. There are also specific rules for PEs and CFCs operating in hyperinflationary environments.

There are no legislative provisions to deal with the situation where a PE or a CFC concludes transactions in a foreign currency other than its reporting currency (a third currency, other than Rand or its reporting currency). The draft interpretation note sets out SARS' view that taxpayers should then follow generally accepted accounting practice, as set out in International Accounting Standards 21 (a spot rate approach).

A taxpayer who is an individual or a non-trading trust may elect to use average exchange rates, rather than spot rates, for a year of assessment. That election will then apply to all foreign currency denominated transactions during that year of assessment. This is considered a simpler approach for such taxpayers. SARS quotes a range of average exchange rates on its website. Taxpayers may use those rates or may calculate their own rates.

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