LAW LETTER

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Prisons, policemen, trusts, the media and insolvency all feature in this Autumn edition of Law Letter. We also review a new handbook on an important aspect of employment law. 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 Succession

■ *Trust unto Dust*

"There are times when parenthood seems nothing but feeding the mouth that bites you."
– Peter De Vries (1910 - 1993)

IN 1999 the late Mr Potgieter (the deceased) founded a trust called the Buffelshoek Familie Trust. The capital beneficiaries were his two children of his then marriage which was dissolved by divorce in 2003. He then re-married in the same year but died in 2008. The second Mrs Potgieter (the widow) had children of her own from a previous marriage. In 2006 an agreement to vary the trust deed was entered into between the deceased, as the founder of the trust, and the trustees. The changes brought about by the variation included the following:

- the name of the trust was changed to the VPJ Trust;
- the children of the deceased were no longer the only capital beneficiaries. They were reduced to members of a class of potential capital beneficiaries. Other members of this class were the widow and her children. The trustees were given an absolute discretion to select the capital beneficiaries from among the new class;
- the income beneficiaries were those also selected by the trustees in their absolute discretion from the same class;
- the date on which the rights of capital beneficiaries would vest was in the sole discretion of the trustees.

On the death of the deceased, his two children (the applicants), who by that date had achieved their majority, applied to the Pretoria High Court to declare the variation agreement invalid. The widow and her children (the respondents) opposed the application and counterclaimed. They contended that the agreement was valid; alternatively that, at best for the applicants, their remedy was for damages flowing from a breach of contract by the deceased who had varied the trust deed without their consent.

The presiding judge decided that the variation agreement was invalid. The result of that finding was that the applicants would be entitled to all the trust capital plus a substantial inheritance from the estate of the deceased. Apparently in the belief that the amended provisions of the trust would apply and that the widow and her children would thus benefit, the deceased had left the balance of his estate to the VPJ Trust. In the result, however, the applicants, as the only capital beneficiaries, would receive all the trust assets and the respondents would be entitled to nothing. The judge took the view that this result was unpalatable, contrary to public policy and constitutionally unsound. In an effort to produce a more equitable answer he relied on the **Trust Property Control Act** of 1988, which provides that where a trust deed contains a provision which brings about consequences which in the opinion of the court the founder did not foresee and which hampers the objects of the founder, prejudices the interests of beneficiaries or is in conflict with the public interest, the court may delete or vary any such provision or make an order which the court deems just. He accordingly awarded one fifth of the trust assets to each of the applicants while the remaining three-fifths accrued to the respondents as envisaged in the amended trust deed.

It was an order which satisfied neither side. The applicants appealed to the Supreme Court of Appeal against the order actually granted. The respondents cross-appealed against the finding that the amended trust deed was invalid.

Judge of Appeal Fritz Brand pointed out that a trust deed is a contract for the benefit of a third party. In this case, the contract was between the founder (the deceased) and the trustees for the benefit of the original beneficiaries (the applicants). But for them to become entitled to the benefits under the contract they had to accept the benefits conferred on them. The respondents argued that there had been no such acceptance. Relying on a statement in the preamble to the trust deed that the beneficiaries had accepted the benefits conferred upon them and that their father and natural guardian had accepted the benefits on their behalf, the court was satisfied that acceptance had been proved. It followed that the contract for the benefit of the beneficiaries could not be varied without their consent. The purported agreement of variation was, therefore, invalid.

With regard to the order made by the trial judge in his attempt to find an equitable solution, Judge Brand observed:

BOOK REVIEW

A Practical Guide to Disciplinary Hearings

By Michael Opperman *(Juta & Co Ltd)*
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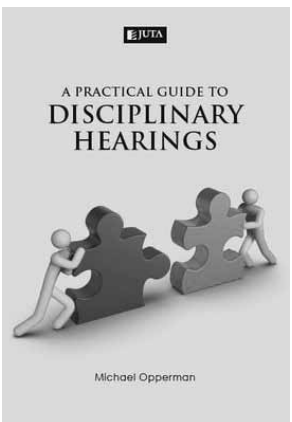
THIS WELCOME new handbook sets out in a clear, logical and accessible format all the practical aspects of a disciplinary hearing. From the perspective of the person chairing the hearing, guidelines on the process, the deliberation, the evidence permitted, as well as advice on the sanction, and the most common anomalies which arise in hearings, make this book a compulsory ally.

Human Resource managers are assisted in drafting charge sheets, the presentation of the facts, examination of witnesses, cross-examination and the leading of evidence. For defendant employees and those representing them, the logical layout allows for easy use during the hearing.



Extracts from the relevant legislation are provided with commentary as well as a table of cases, but it is essentially a "how to" guide, with useful templates for hearings on different types of offence.

The author, Michael Opperman, a former trade union representative, is a labour consultant and negotiator whose wealth of hands-on experience and expertise resonates throughout this 274 page "toolkit".

Once again, leading legal publishers Juta have recognised and ably met a need in the market, in this case to assist employers and employees in dealing properly and appropriately with their legal and contractual obligations in the workplace.

This guide is highly recommended to all employers, HR managers, labour law practitioners and trade union representatives.

". . . the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome of any particular case will thus depend upon the personal idiosyncrasies of the individual judge. . . . if judges are allowed to decide cases on what they regard as reasonable and fair, the criterion will no longer be the law but the judge."

The appeal by the applicants was upheld; the cross-appeal by the respondents was dismissed and the purported variation of the Buffelshoek Familie Trust was declared to be invalid and set aside.

Potgieter and Another v. Potgieter NO and Others 2012 (1) SA 637 (SCA).

Defamation

■ *A Tale of Two Cities*

THE PLAINTIFF, Mr Mthimunye, who was the municipal manager of the Dr JS Moroka Municipality claimed that he had been defamed by *City Press*. In 2003, a certain Mrs Mathibela, an employee of the municipality, had brought proceedings against him claiming that he had sexually harassed her. In 2005, *City Press* published a report concerning the sexual harassment allegations. It was garnished with additional comments about the plaintiff namely, that he had been found guilty of harassing Mrs Mathibela, that he was lecherous, was implicated in the improper or injudicious use of taxpayers' money and was party to the failure by the municipality to take complaints seriously. Judge Du Plessis, in the Pretoria High Court, found all these allegations to be defamatory.

In its defence, *City Press* pleaded that it had published a correction and an apology which had vindicated and restored the reputation of the plaintiff. He was accordingly not entitled to claim damages. The judge disagreed. He pointed out that the apology related only to the incorrect statement that the plaintiff had been found guilty of the sexual harassment charge. It did not address the full width of the defamation.

As a result the plaintiff was entitled to damages. But, as the judge emphasised, awards in defamation cases do not serve a punitive function and are, generally, not generous. *City Press* was ordered to pay the plaintiff R35 000.

Mthimunye v. RCP Media and Another 2012 (1) SA 199 (TPD).

Damages

■ *Behind the Badge*

"The terrorist and the policeman both come from the same basket."
– Joseph Conrad (1857 - 1924)

In 2005 Ms K successfully sued the Minister of Law and Order for damages after she had been raped by two policemen while they were on duty. The Minister defended the action upon the basis that in committing the offence the policemen were not engaged in the business or affairs of their employer, which is a test that is applied to determine whether an employer is liable for the wrongful acts of his employee. The test for liability is traditionally expressed as being on the basis that the employee was, at the time in question, acting within the course and scope of his employment. In K's case the Minister was found to be liable. The Supreme Court of Appeal held that the policemen had failed in their duty to provide the protection to K to which she was entitled.

Constitutional Court

In this more recent case, Ms F sued the Minister of Safety and Security for damages following a rape on her by a policeman named van Wyk who had been on "stand-by duty". Following K's case, the Western Cape High Court had little difficulty in holding the Minister responsible for the damages she had suffered. But van Wyk appealed to the Supreme Court of Appeal which upheld his appeal. It did so because it said that the decision in K's case was based upon the wrongful omission of the on-duty policemen in failing to protect her. In this case van Wyk was not on duty and it was held that an off-duty policeman had no duty to protect members of the public.

F appealed to the Constitutional Court. It in turn disagreed with the finding by the Supreme Court of Appeal.

The facts of this case were that F, when she was a girl aged 13, had been to a nightclub. In the early hours of the morning she had been offered a lift home by van Wyk which she accepted. There were two other passengers in the vehicle, one of whom she knew. Although on stand-by duty only, van Wyk was driving a police vehicle in which F saw a pile of police dockets. In response to her question to him regarding these, van Wyk replied that he was a private detective. Having dropped the other two passengers, van Wyk failed to drive F home and stopped the vehicle in a very dark spot. F immediately alighted from the vehicle, ran away and hid. Van Wyk drove off. F emerged from her hiding place, went to the nearby road to hitch-hike and a vehicle stopped for her. The driver was van Wyk who again offered to take her home. Being in a desperate situation, she accepted. On the way to her home, van Wyk turned off the road, took F to a place where, having prevented her on this occasion from escaping, he assaulted and raped her. He then took her home.

Noting that in so-called deviation cases, namely those where an employee acts, not on behalf of his employer or in his employer's interest, but deviates from his duty and acts in his own interests, the test is whether there is a sufficiently close connection between the wrongful conduct and the wrongdoer's employment. If there is, the employer can be held liable and the test is one of mixed fact and law. The on-duty/off-duty aspect was a relevant factor but was rendered less significant by the fact that a vulnerable young girl was led to believe that a policeman, whether on or off-duty, had assumed the responsibility to protect her or secure her safety. She let her guard down and placed herself in his hands and that weighed in favour of rendering the State liable because the trust was betrayed.

The appeal was upheld and the Minister of Safety and Security was adjudged liable for the damages F suffered as a result of van Wyk's conduct.

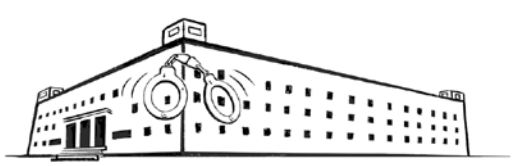
F v. Minister of Safety and Security and Others 2012 (1) SA 536 (CC).

■ *Blame it on the Boss*

IN ANOTHER case involving illegal police activity the Minister of Safety and Security was again held vicariously liable for the actions of his employees. In September 2004 an armed robbery took place at Monte Casino. An amount of R24 million was stolen from the secure cash centre operated by the plaintiff in this case. In its main claim, the plaintiff alleged that the robbery had been perpetrated with the active assistance of a policeman, Inspector Kgathi. The plaintiff was unable to prove that allegation but was more successful in its alternative claim for amounts totalling R4.2 million which Kgathi and two other policeman had recovered from the robbers but had appropriated for themselves instead of paying it over to the police services for the benefit of the plaintiff.

The Supreme Court of Appeal ruled that the plaintiff was entitled to judgment in the amount of R4.2 million. In coming to that decision, the Appeal Court was satisfied that the policemen had acted in the course and scope of their employment. They were doing what they were employed to do, that is to investigate the robbery, and to recover the money, but they did so in a dishonest way. The Minister was accordingly liable for their acts.

Giesecke & Devrient Southern Africa (Pty) Ltd v. Minister of Safety and Security 2012 (2) SA 137 (SCA).



Income Tax

■ *Jailhouse Block*

"Prisons are built with stones of law."
– William Blake (1757 – 1827)

THE SUPREME Court of Appeal recently gave judgment in a dispute about the tax deductibility of certain costs relating to a prison constructed and operated as part of a public private partnership.

The prison was constructed on land in Louis Trichardt owned by the State. South African Custodial Services (Pty) Ltd (SACS) was responsible for the construction of the prison and its operation for a 25 year period. It engaged various subcontractors in order to fulfill its obligations, including those involved in the actual construction.

SACS contended that the materials used to construct the prison constituted its trading stock so that, when built into the prison, they became the property of the State. If this contention were accepted, the materials would be considered as trading stock held and not disposed of by SACS. The **Income Tax Act** deems that to be the case where a person effects improvements to someone else's property, until the contract for such improvements has been completed. The Tax Court decided in SACS' favour but South African Revenue Services (SARS) appealed to the Supreme Court of Appeal.

On appeal, SACS relied on case law dealing with taxpayers acting through agents and argued that the subcontractor had been its agent. On that basis, SACS could be said to itself have held trading stock and built it into the prison, thereby losing ownership to the State. The court did not accept SACS' argument. It concluded that the relationship between SACS and the subcontractor was not one of agency. The warranties given by the subcontractor as to the quality of its work and the materials to be used, were regarded as incompatible with a relationship of principal and agent. The subcontractor was on the facts an independent contractor. Acting Judge of Appeal Plasket therefore concluded that SACS had not provided the materials that were built into the prison. Those materials were provided and owned by the subcontractor. SACS therefore could not treat those materials as its trading stock and claim a deduction.

Commissioner, South African Revenue Service v. South African Custodial Services (Pty) Ltd 2012 (1) SA 522 (SCA).

Insolvency

■ *As you were*

ACCORDING TO our law a trust is not recognised as a juristic person. Before the commencement of the new **Companies Act** of 2008, a trust could not be liquidated in the same manner as a company. A trust does, however, fall within the definition of a "debtor" in terms of the **Insolvency Act** and can be sequestrated under that Act. In the new Companies Act a "juristic person" is defined as including a trust. An application to liquidate a business trust was accordingly brought before the Eastern Cape High Court in Port Elizabeth. But the definition of a company does not include a trust. In terms of Schedule 5 of the new Act it is provided that Chapter 14 of the previous Companies Act continues to apply with respect to the winding up and liquidation of companies under the new Act. As a trust is not a company as defined it cannot, therefore, be wound up as if it were a company. It can only be sequestrated, as before.

Melville v. Busane and Another 2012 (1) SA 233 (ECP).

■ *Tried and Trusted*

"Time present and time past
Are both perhaps present in time future,
And time future contained in time past."
– T.S. Eliot (1888 - 1965)

THE GROUNDS upon which a solvent company can be wound up are set out in Section 81(1) of the new **Companies Act** of 2008. They are more extensive than those which applied under Section 344 of the old **Companies Act** of 1973. One provision which is common to both sections is where it is just and equitable that the company should be wound up. The company in question here was one of various "special purpose corporate vehicles" utilised by the opposing parties through which they had acquired and developed immovable properties to carry out the partnership business which they conducted. When serious differences had arisen between them in regard to the implementation of the partnership they had concluded its written dissolution.

One of the ex-partners then applied to wind up the company concerned upon the basis that it was just and equitable to do so. The other contended that Section 81(1) of the new Companies Act, which allows for the winding up on that basis must be restrictively interpreted and limited to the circumstances set out in the section. These circumstances are, in summary, that one or more of the company's creditors have applied to court for its winding up, that the directors are dead-locked in the management of the company and the shareholders are unable to break the dead-lock or the shareholders are dead-locked in voting power.

It was argued that the rule should apply, that in interpreting words of a general nature, in this case "just and equitable", which are associated with more specific words, such as those prescribed in the section, the general words should be construed as being limited by the specific words to matters of the same nature. Judge Meyer did not accept this argument. He held that there has been a long history of the just and equitable ground for winding up. Five broad categories of cases that would fall within the ambit of the term have been developed under the old Companies Act and its predecessors. On the facts, the court ordered that the company, and a close corporation which was also one of the special purpose corporate vehicles used by the ex-partners to carry on the partnership business, should be wound up on the basis that it was just and equitable to do so.

Budge and Others NNO v. Midnight Storm Investments 256 (Pty) Ltd and Another 2012 (2) SA 28 (GSJ).

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