LAW LETTER

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MacRobert
Attorneys

Your strategic partner at law

This Summer edition of Law Letter reflects some of the many rights, duties and obligations our busy courts are called upon to interpret and enforce, and the complex disputes they have to resolve. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

RECENT JUDGMENTS

Damages

■ Love, Respect, Duty, Honour

"I shall have more to say when I am dead."
– Edwin Robinson (1869 – 1935)

WHILE IT is accepted in our society that a parent has a legal duty to support his or her child, it sometimes occurs that the metaphorical shoe is placed on the other foot, and this duty of support shifts. The child's duty to assist his parents is also recognised in our law, provided that the child is in a position to provide the support.

Mr Jacobs sued the Road Accident Fund for compensation for losses suffered as a result of the death of his son in a collision between a minibus taxi and a motorcycle. At the time of his death, his son had been contributing R600 per month from his income towards the maintenance of his parents.

It was critical to establish that Jacobs' son had a *duty* to maintain his parents at the time of his death because if no duty could be established, the duty could not be imputed to the Fund. The court had to decide whether Jacobs was so indigent that his son had become liable to support him and whether the son would have had a legal duty to continue maintenance into the future.

Acting Judge Grogan considered some old authorities and found that the test for indigency is not that a parent would be reduced to abject poverty and starvation unless he received maintenance, but rather that regard must be had to the parent's status and what he was used to in the past.

Jacobs and his wife had been married for 40 years and had four children. The deceased was a "laat lammetjie" who had qualified as a toolmaker. Jacobs had fallen on hard times, having been retrenched and then suffering epileptic seizures that rendered him unemployable. He subsequently suffered a series of strokes and became confined to a wheelchair. Mrs Jacobs worked at a pharmacy and received a modest income, which was used to pay for household expenses and medication. Due to the financial difficulties suffered by his parents, the deceased had contributed financially. He told his parents that he felt obliged to assist them and would continue to do so for as long as he was able.

The court was satisfied that Jacobs was indigent and, in giving expression to the moral views of society, found that he had acquired a right to maintenance from his son, even though his son had assumed this obligation voluntarily. As such, the son's duty to maintain his parents was imputed to the Fund and the Fund had to pay damages to Jacobs for the loss of maintenance.

Jacobs v. Road Accident Fund 2010 (3) SA 263 (SECLD).

■ hi.cantcomit.sori:P

MR VAN JAARSVELD and Ms Bridges were engaged and the wedding was set to take place in a year's time. Rather unromantically, Van Jaarsveld informed his fiancée by SMS that he was calling off the wedding. He even apologised to Bridges' mother in the SMS, knowing she would inevitably read the message.

In due course Van Jaarsveld received a letter of demand, claiming R1 million in damages for breach of promise to marry. The High Court awarded R282 413 as damages but Van Jaarsveld took the matter to the Supreme Court of Appeal.

A breach of promise to marry may give rise to two distinct causes of action. Firstly, a claim for damages arising out of a breach of contract. These damages may relate to future prospective losses or actual losses in the form of costs incurred by the injured party in preparing for the wedding. Secondly, a claim for sentimental damages if the engagement was cancelled in a wilfully defiant or wrongful manner. The mere fact that the innocent party's feelings were hurt is not sufficient to succeed under this cause of action.

Bridges claimed damages for financial loss in respect of, amongst other things, pre-wedding expenses. She also asked for sentimental damages, arguing that the termination of the engagement by SMS was defiant and wrongful. The court concluded that Bridges had failed to prove she had suffered any financial loss. The court also dismissed her claim for sentimental damages. The couple's usual method of communication had always been by SMS, said Judge Louis Harms, so terminating the engagement in this manner could not be regarded as wilfully defiant or wrongful.

Van Jaarsveld v. Bridges 2010 (4) SA 558 (SCA).

Estates

■ You Reap what you Sow

IN JANUARY 1987, in the autumn of their lives, 60-year-old Marjorie and 70-year-old Lionel married each other out of community of property. Initially, they were each economically active and financially independent of each other. Marjorie's financial security, however, gradually deteriorated leading to her becoming partially dependant on Lionel.

When Lionel died 18 years later, Marjorie looked to her late husband's estate for financial support for her remaining years, based on the reciprocal duty of support between spouses. This sparked resentment on the part of the deceased's family, who felt that insufficient respect had been shown to the traditional Jewish mourning period. The relationship between Marjorie and the executors (Lionel's daughter and son-in-law) deteriorated from there, leading to a protracted and costly litigious battle. The litigation was characterised by the executors' hostile and obstructive attitude towards Marjorie.

The primary issues brought before the Durban High Court were whether the estate owed Marjorie a duty of support and if so, whether she could claim a lump sum payment rather than periodical payments.

The High Court held that while Marjorie had established a claim for maintenance from the estate, a lump sum payment was not competent in terms of the **Maintenance of Surviving Spouses Act** of 1990.

Dissatisfied with this decision, and fuelled by almost insurmountable antagonism, the executors appealed to the Supreme Court of Appeal asking that Marjorie not be paid any maintenance at all. The executors contended that after the deceased's death, the obligation to support Marjorie fell on her sons, who had been assisting her since Lionel's death.

Marjorie, in turn, counter-appealed against the ruling that a lump sum payment was not competent. In addition, she requested an order that the costs of the trial and appeal be paid by the executors *de bonis propriis* (out of their own pockets and not from the deceased's estate).

The Supreme Court of Appeal confirmed that Marjorie was entitled to support from the estate. Her son's generosity could not be taken into account when deciding whether or not Marjorie was in need of support.

Judge Navsa also determined that, although the **Maintenance of Surviving Spouses Act** does not make specific reference to lump sum payments, such an award is not expressly excluded. After years of deliberation, Marjorie was finally awarded her lump sum payment.

The court went a step further and observed that the executors' obstructive attitude and personal antagonism towards Marjorie had clouded mature reflection and judgment. They were accordingly ordered to pay all Marjorie's legal costs out of their own pockets. In the words of the court: *". . . often in litigation, common sense, ironically, is a rare commodity"*.

Oshry v. Feldman (401/09) (2010) ZASCA 95 (19 August 2010).

Contracts

■ Last Round

"Take care to get what you like or
you will be forced to like what you get."
– George Bernard Shaw (1856 – 1950)

PARADYSKLOOF GOLF Estate (Pty) Ltd entered into a contract of sale with the Stellenbosch Municipality for the purchase of land situated on the outskirts of Stellenbosch. The contract of sale was subject to the fulfilment of a suspensive condition, namely that Paradyskloof successfully obtain development rights over the property within eighteen months. If development rights were not granted within this period, then either party could cancel the contract.

An extension of time was agreed to, but development rights were not granted within the extended time period. Fourteen months after the expiry of the extended time period, the Municipality cancelled the contract.

Paradyskloof launched an application in the Western Cape High Court for an order declaring that the decision of the Municipality to cancel the contract was unlawful. The application was dismissed with costs. Paradyskloof appealed to the Supreme Court of Appeal.

Paradyskloof argued that the Municipality's decision to cancel the contract of sale was unlawful because it should have exercised this choice within a reasonable time after becoming aware of the circumstances giving rise to the right to cancel. This delay, said Paradyskloof, meant that an inference could be drawn that the Municipality had already elected not to cancel.

Judge Lex Mpati disagreed. The failure to exercise a right to cancel a contract within a reasonable time of the right arising does not necessarily result in the loss of the right. The court drew a subtle distinction; the failure to exercise a right to cancel for a significant period of time may justify the inference that a person has decided not to exercise the right, but it does not in itself bring about the loss of the right. Each case must be assessed on its own circumstances – in this case, the Municipality had used this time period to take advice on its legal position with regard to the contract of sale, and had requested and received representations, including representations from Paradyskloof. In these circumstances, said the court, there was nothing to suggest that the Municipality had already decided not to cancel the contract of sale. The Municipality had acted lawfully in cancelling the contract.

Paradyskloof Golf Estate (Pty) Ltd v. Municipality of Stellenbosch (547/08) [2010] ZASCA 92 (2 July).

■ Taking the Gap

VIV'S TIPPERS (Pty) Ltd, a truck hire company, leased a truck to the Lone Rock Construction Company. Lone Rock contracted with Pha Phama Staff Services (Pty) Ltd to provide security for the construction site at which the truck was kept. The security services contract included an exclusion of liability providing that Pha Phama did not guarantee that losses would be prevented or minimized, and that it would not be liable should any losses occur.

A group of thieves used an ingenious method to relieve Viv's Tippers of its truck. The thieves arrived on site over the weekend armed with a letter indicating that they were authorized to service the truck. They would not be removing the vehicle from site, the letter said, but they would need to take the vehicle for a short test drive. The so-called mechanics never returned from their test drive.

Viv's Tippers brought a claim against Pha Phama for damages suffered as a result of the loss of the truck. There was of course no contract between Viv's Tippers and Pha Phama. Viv's Tippers argued that Pha Phama was vicariously liable for the failure of its security guard to prevent the theft of the truck.

The High Court dismissed the claim. Viv's Tippers appealed.

The Supreme Court of Appeal asked the question: why should a third party, such as Viv's Tippers, have a claim against a security company where loss occurs on premises being guarded by the company?

Judge Carole Lewis observed that the fundamental difficulty with allowing the claim against Pha Phama to succeed is that this would render the security company more extensively liable to a third party than it was to Lone Rock, the party with whom it had contracted in the first place. Pha Phama's liability to Lone Rock was limited by the exclusion clause, but if Viv's Tippers claim was allowed, it would be placed in a much better position than Lone Rock. In addition, if a claim was allowed in these circumstances then security companies in Pha Phama's position would face the possibility of unlimited liability to unknown plaintiffs. When contracting to secure any premises, security companies would not be able to quantify their possible liability towards third parties of whom they are not even aware at the time of contracting. For these and other reasons, the court concluded that Pha Phama was not liable to Viv's Tippers for the loss occasioned by the theft of its vehicle.

Viv's Tippers v. Pha Phama Staff Services 2010 (4) SA 455 (SCA).

Municipal Law

■ Ray of Hope

"Rage, rage against the dying of the light."
– Dylan Thomas (1914 – 1953)

IT'S 18:30 and you are sitting around the dinner table with your family, when all of a sudden the lights go out! An unpleasant moment, but your irritation turns to panic when you step outside and find that its not load-shedding – your electricity has been cut off by the supplier apparently without notice.

On the morning of 8 July 2008 the residents of Ennerdale Mansions fell victim to 'the cut', as their Municipality disconnected their electricity supply. Upon investigation, the residents found out that the supply had been disconnected because their landlord had fallen into arrears with payments due to the Municipality in the sum of R400 000; this despite the fact that most of the residents had consistently kept up with their payments to the landlord.

After several fruitless attempts to resolve the issue, the residents eventually approached the Constitutional Court. Here they claimed that their constitutional rights to human dignity, of access to adequate housing, and their contractual right to electricity in terms of their contract of lease were materially and adversely affected by the termination of the electricity supply. They were therefore entitled to procedural fairness in terms of Section 3 of the **Promotion of Administrative Justice Act**. The residents claimed that they had the right to be notified by the Municipality of its decision to terminate the electrical supply, and that they ought to have been given an opportunity to make representations.

The Municipality accepted that there was an obligation to give notice of the intention to cut the electricity supply, but argued that the corresponding right to receive such notice belonged to the landlord, and not the residents. As there

was no contractual connection between the municipality and the residents, the termination of supply could not be said to affect the legal rights of the residents. Any harm that the residents suffered was as a result of the landlord's default and they should take up the matter with him.

In dismissing this argument, Justice Skweyiya noted that

> *"the provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant service provider."*

When the Municipality supplied electricity to Ennerdale Mansions, it did so in fulfilment of its constitutional and statutory duties to provide basic municipal services to all persons. When the residents received electricity, they did so by virtue of their corresponding right to receive this basic municipal service, regardless of whether or not there was a contractual connection. In depriving them of a service, which they were already receiving as a matter of right, the Municipality was obliged to give at least 14 days' notice of the decision to terminate the electricity, and to grant an opportunity to make representations. The court confirmed that both the landlord and the residents had the right to receive notice and to make recommendations.

Joseph and Others v. City of Johannesburg and Others 2010 (4) SA 55 (CC).

Banking Law

■ Cheque Out Counter

MR LEEUW, the owner of the Love and Happiness Tavern, sold liquor to Thabo Mofokeng. Mofokeng paid by a way of a cheque in the amount of R48 598 apparently drawn by General Food Industries Ltd in favour of Mofokeng.

Leeuw went to his bank, FNB, and asked a clerk if the cheque was "good". The clerk verified that the cheque was not post-dated, that the figures corresponded with the figures in words and that no stop payment order had been loaded on the system. The clerk confirmed that the cheque was genuine and that Leeuw could deposit the cheque. The clerk was not asked to confirm if there were funds in the payer's account and he did not do so.

Leeuw deposited the cheque into his account and, as an exception, FNB allowed Leeuw to utilize R48 000 of the proceeds of this cheque before the usual clearance period had expired. FNB subsequently discovered that each of the two signatures on the cheque was forged. FNB reversed the credit and passed the required debit. FNB then sued Leeuw for the recovery of R48 000.

The claim by FNB was dismissed with cost in the magistrates court. FNB appealed the judgment successfully in the High Court but Leeuw took the dispute to the Supreme Court of Appeal.

Leeuw argued that FNB has negligently misrepresented that the cheque was good for money and that he had relied on this misrepresentation when he accepted the cheque as payment for goods. As a result, said Leeuw, FNB should not be permitted to rely on the fact that the cheque was forged – any loss should sit with FNB.

Judge Snyders decided that a reasonable person in Leeuw's position would not have understood that FNB was guaranteeing the funds represented by the cheque. Leeuw's actions in asking for the clearance period to be

waived clearly shows that he had not understood the bank to have represented that the cheque was as good as cash.

The appeal was dismissed and Leeuw had to repay R48 000 to FNB.

Leeuw v. First National Bank Ltd 2010 (3) SA 410 (SCA).

Insolvency

■ Credit Collapse

ABSA BANK Ltd launched sequestration proceedings against Mr Naidoo for failing to keep up with payments on a large number of credit agreements, namely six motor vehicle instalment sale agreements and two home loan agreements. The Durban High Court granted an order sequestrating Naidoo's estate and he appealed.

Sections 129 and 130 of the **National Credit Act** provide that a credit provider may not commence "any legal proceedings to enforce (a credit) agreement" before giving the consumer notice in writing and informing the consumer of his or her right to refer the matter to, amongst others, a debt counsellor. Absa had not complied with these preliminary steps.

Naidoo contended that the procedures set out in the **National Credit Act** should have been followed before Absa launched the sequestration proceedings. The wording of sections 129 and 130, he said, was wide – the reference to "any legal proceedings" encompassed ordinary actions to enforce a credit agreement as well as sequestration applications where the underlying claim is based on a credit agreement.

The Supreme Court of Appeal disagreed. It dismissed Naidoo's appeal. The court ruled that the preliminary procedures applied to legal proceedings aimed at enforcing a credit agreement, but not to every proceeding where the claim happens to be based on a credit agreement. The preliminary procedures do not apply to sequestration proceedings, said the court, because the purpose of sequestration is not for a credit provider to obtain an order to enforce a credit agreement, but to enable the beneficial distribution of the insolvent's estate to various creditors. The preliminary procedures prescribed by Sections 129 and 130 of the **National Credit Act** do not apply to sequestration proceedings.

Naidoo v. ABSA Bank Ltd 2010 (4) SA 597 (SCA).

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