LAW LETTER

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MacRobert Attorneys

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Our spotlight in this edition illuminates the variety of issues that come before our courts – banks and their customers, competing brands, neighbours, employers and their workers, criminals and their victims. 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 judgments

Constitutional Law

■ *Family Ties*

"Home is the place, when you have to go there,
they have to take you in."
– Robert Frost (1874 - 1963)

MR JUTA owned a farm in the Stellenbosch area and employed Mrs Hattingh for several years as a domestic worker. Mr and Mrs Hattingh lived on the farm in a worker's house comprising a number of inter-linked units.

During 2002, Mrs Hattingh's two adult sons – Michael and Pieter – were given permission to move in with their parents for a period of three months. The sons never left.

Mrs Hattingh's employment was terminated in 2005, but she was allowed to stay on in the worker's house. When Mr Juta employed another farm worker, Michael and Pieter refused to vacate their unit to make space for the new worker. Mr Juta then brought an application for an eviction order against the sons, which was granted by the Land Claims Court.

Michael and Pieter appealed to the Supreme Court of Appeal, pointing out that Section 6(2)(d) of the **Extension of Security of Tenure Act** gives occupiers "the right to family life in accordance with the culture of that family". They argued that their mother, as an occupier, was entitled to have her sons live with her because extended family life was part of the culture of the Hattingh family. They were a caring family which supported each other, and which had lived together sharing the same accommodation for years. Essentially, they argued for a broad interpretation of "culture", with each family having to be considered individually to determine its culture. This, they said, was the family life – and culture – to which their mother was entitled.

Appeal Judge Eric Leach noted that the right to family life is part of the constitutional right to human dignity. However, the Constitution treats 'culture' as a matter of association between people who share practices as part of a community. The practices of an individual or family do not equate to culture. Culture is, in essence, all about associating with other people (outside the family unit) and with their practices. The law gives protection to an occupier who shares accommodation with his or her family members where they are living together in accordance with their culture. It is not the culture of a particular family which is protected, but the cultural practice of a community.

Pieter and Michael failed to prove that extended family living was a cultural practice and the Supreme Court of Appeal upheld Mr Juta's eviction order.

Hattingh and Others v. Juta 2012 (5) SA 237 (SCA).

Law of Prescription

■ *Check those Beacons*

WE ALL have neighbours and it quite often happens that the fence between two properties deviates from the cadastral boundaries. The result is that a portion of one property is fenced off and a neighbour enjoys the benefits of the excised land. Does that mean that the neighbour now owns the excised land?

The **Prescription Act** of 1969 provides for the concept of 'acquisitive prescription' – a person may, by prescription, become the owner of a thing "if he has possessed it openly, as if he was the owner for an uninterrupted period of thirty years". This also applies if your predecessors in title had enjoyed uninterrupted use as if the owner for a period contributing to the thirty years.

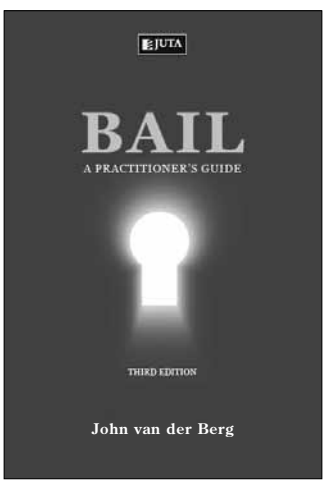
The Morgenster vineyard is next to Waterkloof farm. For reasons which no one could remember, a portion of Morgenster had been fenced off and included in Waterkloof farm. This land was no stranger to litigation and had been the cause of an earlier court application which had, however, not decided

Book review

Bail – A Practitioner's Guide

By John van der Berg (Juta & Co Ltd) www.jutalaw.co.za

"In giving freedom to the slave we assure freedom to the free – honorable alike in what we give and what we preserve."
– Abraham Lincoln (1809 - 1865)



THIS IS the Third Edition of the leading textbook on the law and practice of bail in criminal proceedings. The author, John van der Berg, BA LLB, LLM (*cum laude*), is an experienced advocate practicing at the Cape Bar, and an authority on this aspect of procedural law. He discusses past and current bail law, including the input of the Constitution, and sets out the most important bail procedures step by step in a clear, concise and easily accessible format.

The well organised chapters include expert analysis on the nature and purpose of bail, the presumption of innocence, the right to bail, the issues in bail hearings, bail conditions, cancellation of bail, alternatives to bail, appeals and reviews. There are extracts from the relevant legislation, extensive excerpts from decided cases, as well as helpful translations into English from some important Afrikaans judgments. The author also deals with bail and the rights of children, bail in extradition proceedings and in military tribunals.

So important for the utility of a tool of trade for practitioners and judicial officers alike, the table of contents, index, bibliography and schedule of case references are all meticulously arranged.

The importance of the effective implementation of a comprehensive system of bail cannot be overemphasised. Balancing the rights of the accused with the interests of the public and the demands of justice is vital to the safety and security of a society grappling with the twin spectres of crime and corruption. The author and publisher Juta are to be commended for this valuable contribution to that challenge.

the question of ownership. An uneasy truce seems to have prevailed until Waterkloof employees began repairing the fence in the disputed area. The owners of Morgenster launched a court application.

Acquisitive prescription has two elements: firstly, actual physical possession of the land and, secondly, the mental state of mind of possessing the property as if you are the owner. It is irrelevant whether you truly believe you own the property or whether you know that the property is not your own. Ownership may pass to you if you act as the owner for thirty years, even if you know that the property does not belong to you.

In this case, while the disputed land had been fenced off in favour of Waterkloof farm for a period of more than thirty years, Judge Owen Rogers concluded that its owners had not performed acts of open possession as required by the **Prescription Act**. They, therefore, did not have the necessary mental state of mind as possessing the property as if they were the owners. The court ordered that the owners of Morgenster remained the true owners of the disputed land.

Morgenster 1711 (Pty) Ltd v. de Kock NO and Others 2012 (3) SA 59 (WCC).

Employment Law

■ *Worker Shirker*

"Work is accomplished by those employees who have not yet reached their level of incompetence."
– Laurence J. Peter (1919 - 1990)

VICARIOUS LIABILITY is a form of strict liability which applies when one person is held liable for a delict committed by another person, because of the relationship between them. A delict is a wrongful act or omission which causes harm to another person.

One of the relationships that give rise to vicarious liability is that of employer and employee. An employer is liable for delicts committed by his or her employee in the course and scope of employment. There are various reasons for holding an employer liable for the employee's delicts. This includes the employer's fault in choosing that particular employee and in failing to properly train or supervise that employee.

What happens, though, when an employee commits a delict while disobeying his employer's instructions? Is the employer still vicariously liable?

A farmer instructed his employee, a farm-labourer, to dispose of plant matter by raking it up, loading it on a trailer and then towing the trailer to a donga where it was to be dumped. Instead of doing this, while the farmer was not on the farm, the farm-labourer decided to short-cut the process by setting fire to the plant matter. The fire spread out of control, causing damage to neighbouring farmland.

When sued for the damage caused by the fire, the farmer argued that his worker had disobeyed his instructions. Judge Pat Gamble held that the farmer was vicariously liable due to the fact that, when his employee burnt the leaves instead of dumping them in the donga, he had not disengaged himself from the duties of his contract of employment. He was indeed attempting to dispose of the plant matter. The manner in which he carried out this task was not relevant in the circumstances.

Kasper v. Andrè Kemp Boerdery CC 2012 (3) SA 20 (WCC).

National Credit Act

■ *Please, Mr Postman!*

MR AND Mrs Sebola entered into a loan agreement with Standard Bank. They nominated a post office in North Riding, Johannesburg to receive post, letters and statements regarding the loan agreement. When the Sebolas fell into arrears, the bank's attorneys sent a notice in terms of Section 129 of the **National Credit Act** of 2005 to the post office, their chosen address. The Act requires that a credit provider cannot start legal proceedings until it has sent a notice to the consumer advising him or her, amongst other things, of their right to refer the matter to a debt counsellor.

An error by the Post Office resulted in the notice being routed to the wrong post office. As a result, the Sebolas never received the notice or the summons which followed. Unaware of the error, Standard Bank then took default judgment against the Sebolas and attached their house.

The Sebolas asked the High Court to rescind the judgment on the basis that they had never received the notice. The High Court came to the conclusion that the Act did not require actual receipt of the notice. It was enough for the bank to show that it had sent the notice to the consumer's chosen address. The court refused to rescind the judgment.

The dispute reached the Constitutional Court where the question was asked: what does the **National Credit Act** actually require? Must the credit provider prove that the notice was *sent* (from the sending post office), *delivered* (at the debtor's nominated address) or actually *received* by the debtor?

Justice Edwin Cameron ruled that the bank had to prove that the notice was correctly *delivered* to the consumer at his or her chosen address. In this case, Standard Bank could prove this by showing, firstly, that the notice was dispatched by registered post to the correct address and, secondly, that the notice reached the appropriate post office for delivery. It was not enough to show that the notice was sent merely from the sending post office but, at the same time, the bank did not have to prove that the notice actually came to the consumer's attention.

The Bank had not proved that the notice was delivered to the post office chosen by the Sebolas and the Sebola's application to rescind the judgment was granted.

Sebola and Another v. Standard Bank of South Africa Ltd and Another 2012 (5) SA 142 (CC).

■ *Called to Account*

ABSA BANK granted a mortgage loan to Mr Coe. The trustees of the Coe Family Trust stood surety for the loan. Mr Coe was a student at the time, and had no income.

ABSA sued when Mr Coe defaulted and the trustees failed to pay up in terms of the suretyship. ABSA brought a summary judgment application.

When a bank enters into a credit agreement with a consumer it must undertake an assessment to ensure that the consumer understands the risks and costs of the credit agreement and to determine the consumer's ability to repay the loan, as well as the consumer's credit history. In the High Court Mr Coe and the trustees raised the defence that ABSA had not conducted a proper assessment and, therefore, had recklessly lent the money. The **National Credit Act** gives the court wide powers in these circumstances, including the suspension or setting aside of the credit agreement.

The Act allows a bank which faces an allegation of reckless lending to raise in its defence the fact that the consumer failed to provide it with full and truthful information when applying for the credit. Judge Dennis Davis noted, however, that this defence only applies if the bank actually conducted an assessment in the first place. If there was no real assessment, the defence does not come into play.

The Act's main function is to regulate the relationship between lenders and borrowers and to prevent reckless credit agreements being concluded. The court highlighted the fact that there are many illiterate and poorly educated people who do not have access to legal advice. It is, therefore, necessary for the court to exercise judicial oversight in respect of credit lending.

The court was satisfied that the defendant had raised a sufficient defence to warrant a trial. ABSA's summary judgment application was dismissed.

ABSA Bank v. COE Family Trust and Others 2012 (3) SA 184 (WCC).

Insolvency

■ *Friendly Fire*

"The convenience of the business of the day is to furnish the principle for doing it."
– Edmund Burke (1729 - 1797)

A PERSON IS insolvent when his liabilities exceed his assets.

Some debtors use sequestration proceedings to force a discharge of their debts in order to obtain relief from their creditors. It frequently occurs that family members or friends of the debtor are asked to bring an application for the debtor's compulsory sequestration. The situation is basically as follows: the debtor owes the friend or family member some money, and writes a letter confirming that he is unable to pay his debts. This then gives the friend or family member the basis on which to apply for sequestration.

The advantages and disadvantages of friendly sequestrations should, however, be carefully weighed. Sequestration has serious implications which are not widely understood.

The insolvent person is disqualified from membership of statutory boards, committees and commissions. He or she cannot be a member of the National Assembly, the provincial legislature or a municipal council. The insolvent person also cannot, amongst other things, be a director of a company, nor may he or she take part in the management of the business of a close corporation. The insolvent person may also be removed from fiduciary appointments – including that of trustee, liquidator or executor – and may be prohibited from practicing as a professional, such as a quantity surveyor, attorney or an accountant.

It is also an offence for any person to obtain credit of more than R20 during his sequestration without giving prior notice to the credit provider that he is insolvent. The insolvent person's only defence is to prove that the credit provider knew that he was insolvent.

The courts look very carefully at friendly sequestrations and will only sequestrate a debtor if this is to the advantage of the creditors. In a recent case the debtor's brother applied for sequestration. Judge Lee Bozalek compared the debtor's few assets to the high value of his liabilities, and estimated that sequestration would result in a dividend to creditors of only 10 cents in the rand. The court concluded that the prospects of a reasonable dividend was remote and did not present an advantage to creditors which would justify sequestration.

Franken v. Franken (24870/11) [2012] ZAWCHC 113.

Criminal Law

■ *Hat Trick*

Three lady friends decided to go out together. The plan was to meet at one of their houses and then travel together in one car to their destination.

Three men appeared while the women were in the driveway, preparing to leave. One of the men pulled out a firearm and threatened the ladies, while the others robbed them of their personal belongings and two vehicles.

Mr Dlamini was charged, amongst other things, with three counts of robbery. He was sentenced to 15 years imprisonment for the two vehicles, and 10 years for the personal possessions.

Mr Dlamini appealed his sentence to the Supreme Court of Appeal, arguing that the charges against him had been duplicated. Duplication of charges involves charging, convicting and sentencing an accused person more than once for what is, in substance, a single offence. The accused then receives multiple prison sentences for what is, in effect, one offence. Duplication of charges is prohibited in our law on the basis of the constitutional right to a fair trial.

Our courts have applied different tests to decide whether duplication has occurred. One test, for example, involves asking whether two or more acts were done with a single intent, thereby constituting one continuous criminal transaction. Another test requires the court to ask whether the same evidence necessary to prove one charge could be used to prove any of the other charges.

Robbery comprises two unlawful acts: firstly, theft or taking of property of another person and, secondly, violent conduct or violent threats towards the victim. In Mr Dlamini's case, theft had to be proved first before the crime of robbery could be established.

The Supreme Court of Appeal found that there had been no duplication of charges against Mr Dlamini. He took property from three separate women using threats of violence. Mr Dlamini committed separate robberies against each of the three women, legitimately giving rise to three separate charges of robbery.

Dlamini v. S 2012 (2) SACR 1 (SCA).

Trade Marks

■ *Brands and Sense*

"And through the heat of conflict keeps the law
In calmness made, and see what he foresaw."
– William Wordsworth (1770 - 1850)

THE DOCTOR-PATIENT relationship is not what it used to be. In the past, patients treated doctors with deference and seldom questioned their judgment. Doctors held exclusive knowledge on medical matters. With increasing consumer confidence and search engines, patient autonomy is on the rise. This social phenomenon recently impacted on the law of trade marks.

The law protects trade mark holders by providing that no one else can register a trade mark which is 'confusingly similar' to an existing trade mark. The trade marks need not be identical; they just need to be sufficiently similar that consumers could be deceived into buying Product B when they really mean to buy Product A.

The case involved two competing drugs used in the treatment of hypertension. Adcock Ingram owned the ZETOMAX trade mark, while Cipla held a trade mark for ZEMAX.

The historical test for determining whether brands for prescription medication are too similar, and likely to cause confusion, was whether the pharmacist or prescribing doctor would be confused. This was based on the traditional doctor-client relationship in which it is the doctor or pharmacist who decides what medication the patient needs.

The North Gauteng High Court determined that medical professionals could easily differentiate between ZEMAX and ZETOMAX but Adcock Ingram appealed.

The Supreme Court of Appeal determined that the traditional test has become outdated. The court recognised that patient knowledge of the medical field has become increasingly sophisticated. Even when it comes to prescription medication, the patient now plays an active role in deciding which product he or she prefers.

The proper test now is not whether medical professionals would be confused by Cipla's trade mark, but whether patients would be deceived. With this test in mind, Appeal Judge Malan was satisfied that the marks were so similar that the patient could well be deceived or confused. It ordered that Cipla's ZEMAX trade mark be expunged from the trade marks register.

Adcock Ingram Intellectual Property (Pty) Ltd and Another v. Cipla Medpro (Pty) Ltd and Another 2012 (4) SA 238 (SCA).

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