LAW LETTER

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This edition of Law Letter highlights how our courts deal with changes in society – bringing outdated practices and views in line with the principles and values of our constitutional democracy. 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

Trusts

■ *Setting Things Right*

THE ADMINISTRATOR of three separate charitable trusts made application to the Western Cape High Court to vary the terms of the trust deeds concerned so as to delete discriminatory provisions in them. In the first, the late B G Heydenrych provided in his last will and testament in 1943 for portion of his estate to be invested for the purpose of –

> "providing for the education of European boys of good character of the Protestant faith to enable them to qualify for the civil service of the Union or as a Pharmaceutical Chemist. I do specially stipulate that at least one half of the boys so assisted shall be of British descent."

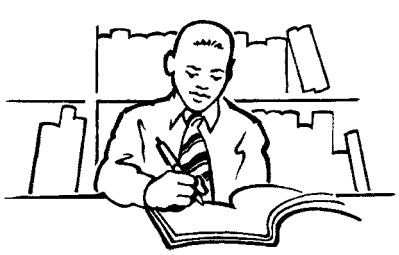
The late George King executed his last will in 1987 in terms of which he established a trust and the "George King bursary". The bursary was to provide financial assistance to promising musical students of good character in needy circumstances. The beneficiaries were required to be "members of the white group of Protestant Faith".

In a more complicated arrangement, the will of the late D H Houghton, executed in 1989, established the Cyril Houghton Bursary Trust. It was to provide bursaries for two or more South African boys to be educated at Oundle School or Rugby School, both in Britain, and thereafter to study at Oxford or Cambridge Universities. If it were not possible for the boys to study at Oundle or Rugby, the trust deed allowed the bursaries to be made available for use at a local school such as St Andrews College in Grahamstown. At the time of the application to court, the scholarship had in fact been awarded to a boy attending that school.

In each case the administrator applied to delete those provisions of the trusts which discriminated directly on the grounds of race or colour but did not seek to delete the provisions which discriminated on grounds of sex or gender, arguing that such discrimination should be treated "more circumspectly" by our courts. The Women's Legal Centre intervened in the application as friend of the court in order to address this aspect. The Centre pointed out that St Andrews College admits only boys and although the overseas schools nominated by D H Houghton were single-sex schools, Oundle had been changed into a gender-inclusive school only six months after the will was executed.

Judge Goliath referred to constitutional provisions which prohibit discrimination and to earlier decisions in which discriminatory provisions have been deleted from trust deeds. The terms "white", "European" and "British descent" disqualified black South Africans from benefitting from the scholarships. This constituted unfair discrimination which was contrary to public policy. In the case of conditions that restricted the benefits to boys, the court found that the change in circumstances were not foreseen by the testators who did not, therefore, contemplate the transformation relating to gender discrimination. They did not foresee that the charitable intentions of the trusts would be hampered by the discriminatory provisions. The judge therefore made an order in which all references to "European Boys", "of British descent", "members of the white group" and "members of the white population group" were deleted from the three trust deeds. References to "boys" were to be replaced by "persons" and any references to the male gender were to be read to incorporate the female gender.

In re Heydenrych Testamentary Trust and Others 2012 (4) SA 103 (WCC).



Lotteries

■ *A Friend in Need*

"THE FUNDS do not belong to the board to be distributed as its largesse". So said Appeal Court Judge Cachalia in a case involving the National Lotteries Board.

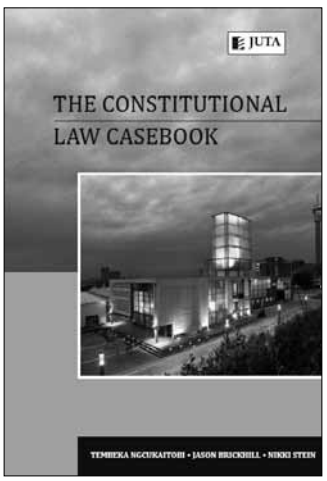
Two charitable organisations, the South African Education and Environment Project (SAEP) and the Claremont Methodist Church Social Impact Ministry (Sikhula Sonke) had successfully

Book review

The Constitutional Law Casebook

By Tembeka Ngcukaitobi, Jason Brickhill & Nikki Stein
(Juta & Co Ltd) www.jutalaw.co.za

"A CONSTITUTION does not take root simply because it is adopted. A Constitution takes root because citizens, and lawyers, assert its principles and values." – from the foreword by former Justice of the Constitutional Court, Kate O'Regan.



Since our Constitutional Court delivered its first judgment *(S v. Zuma 1995 (2) SA 642 (CC))*, it has produced more than 400 decided cases. The authors of this casebook have selected some 50 of the most important of those judgments for discussion and analysis. They are considered under separate themes drawn from the Bill of Rights including Equality, Religion, Property, Socio-Economic rights, Land and Freedom of Expression.

The development of the principles applicable to these rights emerges from the well-composed case extracts. The factual background and legal history in each case are carefully summarised. The pertinent issues are then identified.

This book (437 pages) is a welcome addition to the resources not only of practicing lawyers but also students and teachers. In addition, those working in or dealing with all spheres of government will find this an extremely useful guide. Included are cases dealing with the principles and structures of the Legislature, the Executive and the Judiciary, as well as institutions supporting constitutional democracy such as the Public Protector.

A compact disc (CD) containing the full text of each case referred to accompanies the book which further enhances its utility.

The authors and publisher have received well-deserved praise for this valuable text book:

"It is well set out, with easily accessible summaries, well-crafted case extracts, and thought-provoking questions for each case."

– Michael Bishop,
co-editor of *Constitutional Law of South Africa.*

sued the National Lotteries Board in the Western Cape High Court for an order reviewing and setting aside certain decisions of the Board. The respective applications had been made in terms of Section 6 of the **Promotion of Administrative Justice Act** of 2000 (PAJA), and were founded upon the refusal of the Board, over a number of years, to consider the many applications made by SAEP and Sikhula Sonke for funding. The Board contended that it was justified in declining the applications because they did not comply with the guidelines for the distribution of monies from the fund.

The disputes between the applicants and the Board centred on how the Distribution Agencies, on behalf of the Board, applied the guidelines laid down by the Board when declining the applications. Such agencies (DAs) are appointed by the Minister of Trade and Industry and are required to facilitate the adjudication of funding applications and the distribution of funds to charities whose applications are approved.

The Board submitted that its guidelines were clear, not unduly burdensome and had to be complied with to the letter. It also pointed out that because it processes large numbers of applications, it could not be expected to investigate every application that did not adhere strictly to the guidelines. In refusing to consider the applications under review, the Board was merely applying the guidelines as it was entitled to do.

Appeal Judge Cachalia agreed that the guidelines served a useful purpose. Their object was to ensure that monies were disbursed only to grantees capable of administering them for their intended purpose and also to ensure that all applicants for funding were treated equally. But the Board was not entitled to treat every departure from the literal prescriptions of the guidelines as fatal. The real question which the DAs should ask themselves is whether the object of the guidelines has been achieved. In summing up, Judge Cachalia held that the Board had adopted a rigidly formulaic approach to the application of the guidelines, treating them as peremptory requirements,

without exception. By applying the guidelines in this manner, the Board had elevated the guidelines to an immutable rule and by so doing had fettered its discretion, which it was not entitled to do. Furthermore, the Board did not appear to properly understand its mandate. The chairman of the Board seemed to hold the view that the grants given by the Board were "gratuities", allocated at the Board's discretion. That is wrong. The Board holds public funds in trust for the purpose of allocating them to deserving projects. The funds do not belong to the Board to be disbursed as its largesse.

National Lotteries Board and Others v. South African Education and Environment Project 2012 (4) SA 504 (SCA).

Motor Vehicles

■ *Hit and Run*

"And without fear the lawless roads
ran wrong through all the land.
– Edwin Muir (1887 - 1959)

WHILE WALKING along a foot-path in Lenasia, the plaintiff was knocked down and injured by a four-wheeled motor cycle, commonly known as a quad-bike. The driver of the quad-bike did not remain at the scene of the collision but drove away. In due course the plaintiff, who spent three months in hospital recovering from his injuries, sued the Road Accident Fund for compensation. Although he could give a clear description of the vehicle involved, the plaintiff could not identify the actual quad-bike which had collided with him, and accordingly called an expert witness (a mechanical engineer) to describe the nature of the vehicle. This was necessary because the Fund defended the claim on the basis that a quad-bike was not a vehicle as defined in the **Road Accident Fund Act** of 1996. That definition reads:

> *"Motor vehicle means any vehicle designed or adapted for propulsion or hauling on a road by means of fuel, gas or electricity and includes a trailer, a caravan, an agricultural or any other implement designed or adapted to be drawn by such motor vehicle."*

Judge Mokgoatlheng in the Johannesburg High Court referred to previous cases in which the question had also arisen whether the "vehicle" in question fell within the terms of the definition and pointed out that in one of these cases in 2004 *(Road Accident Fund v. Vogel)* the Supreme Court of Appeal had dealt with the apparent conflict between the "subjective" test and the "objective" test on the point. The former required the purpose for which the vehicle was conceived and constructed to be determined while the latter depended upon the reasonable person's perception of the vehicle.

South Gauteng High Court, Johannesburg

The plaintiff's expert witness testified that a quad-bike is designed primarily for off-road use (hence its balloon tyres with spaced tread patterns and high central ground clearance with large wheel-travel suspense system) but, if fitted with all the requisite parts as required by law, it can be considered to be a motor vehicle as defined. He also stated that quad-bikes often do travel on the road. The plaintiff's description of the vehicle which collided with him coincided with the explanation tendered by expert witness and applying the "objective, common-sense approach" the court held that the quad-bike which collided with the plaintiff could properly be defined as a motor vehicle in terms of the Act.

Jeffrey v. Road Accident Fund 2012 (4) SA 475 (GSJ).

Facebook

■ *The Bell Tolls*

"Private faces in public places
Are wiser and nicer
Than public faces in private places".
– W.H. Auden (1907 - 1973)

FACEBOOK FEATURED in an application before the Johannesburg High Court in a dispute between two religious bodies. The Dutch Reformed Church of the Vergesig Johannesburg Congregation (the DRC) owned a church in Langlaagte. It had, for many years allowed Rayan Sooknunan, trading as Glory Divine World Ministries (GDWM) to utilise the church on Sunday mornings after the DRC services were over. The DRC congregation diminished until there were so few that its minister, Van Rooyen, decided to sell the church. The DRC and Sooknunan could not agree on a purchase price and in 2011 the DRC sold the property to As-Salihoot Islamic Academy. Sooknunan (and through him, GDWM) were given notice that the occupancy of the church was terminated.

Sooknunan then started a publicity campaign against the DRC and Van Rooyen in an attempt to cause them to abandon the sale of the church. This involved newspaper articles, radio stations and facebook contributions. In response the DRC and Van Rooyen applied to court for an interdict to stop Sooknunan from publishing harmful allegations and comments. In regard to many of the various different published statements Judge Kathy Satchwell came down, generally, on the side of the constitutional right to freedom of expression. In regard to facebook she found, contrary to Sooknunan's denial that it was neither created nor administered by him, that it was his or his church's "page". The comments which had been posted on this site were, the judge said, no different from anonymous

messages on scraps of paper fixed on a felt notice board in a passage with a pin or piece of prestik. Sooknunan, having created and made available the facebook notice board had an obligation to take down the "scraps of paper" which were unlawful in content or impact. Although none of the postings on facebook were inflamatory or inciteful to any unlawful action, the disclosure of Van Rooyen's email address and that of the applicants' attorney on a public website was unlawful.

The court held that a few of the statements complained of by the applicants were injurious and harmful and should be interdicted and that the email addresses of Van Rooyen and the attorney acting for the DRC should be removed and this was ordered. But, because only a few of the complaints on which the applicants had founded their case had merit in law, the DRC and Van Rooyen were substantially unsuccessful in their application and they were ordered to pay the costs of the application.

Dutch Reformed Church Vergesig Johannesburg Congregation and another v. Sooknunan t/a Glory Divine World Ministries [2012] 3 All SA 322 (GSJ).

Taxation

■ *Give that Judge a Bells*

TAXPAYERS ARE often challenged on whether a payment received is of a capital or a revenue nature. If it is of a revenue nature it would need to be included in the taxpayer's gross income in the assessment for that tax year. In a recent case the Supreme Court of Appeal had to decide whether compensation paid for the loss of exclusive distribution rights was of a revenue or capital nature.

The taxpayer, Stellenbosch Farmers' Winery Ltd, was a wholesaler that imported and distributed Bells whisky in South Africa. It concluded an agreement with United Distillers, a United Kingdom based company, giving it 10-year exclusive distribution rights to Bells whisky in South Africa. Over time the venture became extremely profitable and the taxpayer built up the Bells brand to the position of a pre-eminent asset in South Africa, which it did not occupy anywhere else in the world. United Distillers prematurely cancelled the agreement more than three years before the earliest date on which the distribution agreement could be terminated. As a result, the taxpayer received R67 million in compensation from United Distillers. The Commissioner included the payment as part of the taxpayer's gross income in the assessment for tax. This was upheld by the tax court.

On appeal the taxpayer submitted that the payment was of a capital nature which attracted no tax liability. The Appeal Court agreed stating that the tax court misinterpreted the evidence when it reasoned that the payment received arose out of a calculation by the taxpayer of its future loss of profits, and therefore the payment was part of gross income. It was irrelevant that the taxpayer then used the R67 million to declare a dividend. The manner in which a taxpayer deals with a receipt does not determine the nature of the receipt. For example, if you sell a building the capital nature of the receipt is not affected if you then use the proceeds to pay a dividend.

Exclusive distribution rights held in terms of a distribution agreement are a capital asset. It follows that when the taxpayer's agreement was prematurely terminated it lost an asset. The amount received as compensation for the loss of that capital asset was therefore a receipt of a capital nature and not taxable.

Stellenbosch Farmers' Winery Ltd v. CSARS [2012] ZASCA 72.

Partnership

■ *Payback Time*

"Equality for women demands a change in the human psyche more profound than anything Marx dreamed of. It means valuing parenthood as much as we value banking."
– Polly Toynbee

FOR NEARLY 20 years the defendant, Mr Butters, and the plaintiff, Ms Mncora, lived together as man and wife. During

that time they had become engaged to be married for almost 10 years but had never done so. Their relationship terminated in 2008, by which time the defendant was a wealthy man but the plaintiff owned no assets worth of mention. She then instituted action against the defendant, claiming half of his assets on the basis that there was a tacit universal partnership between them in which they held equal shares. According to the evidence of the plaintiff, which the court accepted, it was during their years together that the defendant prospered and gathered many assets. Their common home and all other immovable properties acquired by him were registered in his name but the plaintiff understood, so she testified, that they were sharing everything. The defendant maintained, on the other hand, that whatever he had acquired was his alone. The plaintiff had been gainfully employed during the early years of the relationship but from about 1996 the defendant wanted her to stay at home with their children and she did so. Although she did not play any part in the business life of the defendant, the plaintiff claimed that she supported him, cared for him and the children and maintained the common home. The trial judge found in her favour, determined that her share in the partnership was 30% and awarded her an amount equal to that percentage of the defendant's net asset value at the date when the partnership came to an end.

The defendant appealed against this judgment. In the Supreme Court of Appeal, Judge Fritz Brand pointed out that the general rule of our law is that cohabitation does not give rise to special legal consequences. The supportive and protective measures established by family law are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period. Nonetheless a cohabitee can invoke one or more of the remedies available in private law provided he or she can establish the requirements for that remedy.

Our law – going back to Roman and Roman-Dutch times – recognised two types of universal partnership. In the one the parties agree to put in common all their property and in the other the parties agree that all they may acquire during the existence of the partnership, from every kind of commercial undertaking, will be partnership property. Although Judge Brand and two of his colleagues also found on the plaintiff's evidence that she had sufficiently established the requirements of a universal partnership, Judges Heher and Cachalia disagreed. They had no quarrel with the majority of the court in regard to their exposition of the law but held that, on the facts, the plaintiff's evidence did not sufficiently establish the necessary requirements to prove the partnership. The defendant's appeal was dismissed by the majority decision.

Butters v. Mncora 2012 (4) SA 1 (SCA).

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