# LAW LETTER

*Connecting Attorney & Client*

**September 2012**

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Your strategic partner at law

***This Spring edition of Law Letter highlights the approach our courts adopt to the enforcement of rights – the right to assemble, the right to property, the right to receive and impart information, and the right to compensation for expropriation of property. 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

## Law of Property

### ■ *Passport Control*

*"The rich man in his castle,*
*The poor man at his gate,*
*God made them, high or lowly,*
*And order'd their estate."*
– Mrs Alexander (1818 - 1895)

A SPOLIATION ORDER is available where one party takes the law into its own hands and deprives another party of his or her possession of movable or immovable property. The spoliation order is aimed at restoring the *status quo* pending resolution of the legal rights and obligations of the parties. A resident in a village complex used this remedy when the Body Corporate barred the resident from gaining access to the village complex by deactivating the access disc that opened the security boom at the entrance to the complex.

When the resident attempted to gain access he could not do so. The Body Corporate claimed that it was entitled to deactivate the access disc because the resident was in arrears in respect of rates and levies.

*North Gauteng High Court, Pretoria*

The Body Corporate relied upon a provision in the rules of conduct of the Body Corporate in terms of which it claimed to be entitled to suspend the access tags of any resident if the resident failed to pay the monthly levy due to the Body Corporate.

The resident applied to the High Court in Pretoria on an urgent basis for an order restoring the resident's possession of, and access to his residence in the complex. The application was opposed by the Body Corporate but an order was granted in favour of the resident.

The Body Corporate argued that in reality it was only denying the resident vehicle access to the complex. Judge Legodi disagreed. He said that this was contrived because in effect the resident would either be able to drive from his residence as far as the gate but then have to seek transport further or, if his vehicle was outside the complex, he would have to ride to the gate, park his vehicle at the gate and then walk to his residence in the complex.

Under the circumstances the court granted an order restoring the resident's rights of access to the premises.

*Fisher v. Body Corporate Misty Bay 2012 (4) SA 215 (GNP).*

### ■ *No Longer Mine*

IN APRIL 2011 the North Gauteng High Court found in favour of AgriSA in a test case in which AgriSA endeavoured to prove that the enactment of the **Mineral and Petroleum Resources Development Act** of 2002 (MPRDA) did expropriate mineral rights and that compensation is payable to the erstwhile holders, as provided in Section 25 of the Constitution.

The Minister appealed to the Supreme Court of Appeal. The dispute revolved around the question: What did the holder of mineral rights have before the enactment of the MPRDA? Once this question was answered it would be possible to assess whether an expropriation of mineral rights occurred.

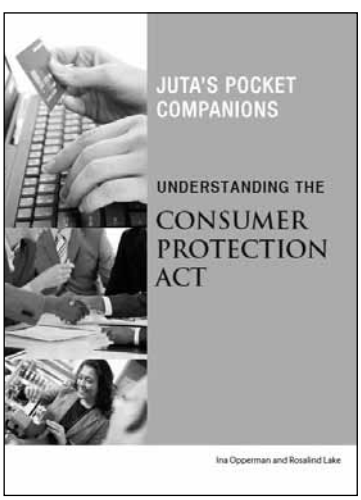
In order to answer this question Judge Malcolm Wallis embarked on an investigation of the history of mineral rights in South Africa starting at the common law and going right through the pre-Union and subsequent dispensations. He pointed out that in all these eras the right to mine, as opposed to the mineral rights, was always awarded by the State to whomever it chose from time to time. But without a right to mine, the mineral rights did not have much value.

# Book review

## Understanding the Consumer Protection Act

*By Ina Opperman & Rosalind Lake*
*(Juta's Pocket Companions)*
*(Juta & Co Ltd) www.jutalaw.co.za*

THE CONSUMER Protection Act of 2008 (CPA) is one of the most far-reaching pieces of legislation in South African law. Its aim is to protect consumers from inferior products and services. This has had an impact on many areas of the law including contract, company law, and access to information.




The publication of this handy, soft cover, pocket-sized guide to the CPA will not only assist consumers in making informed choices when they spend their hard-earned money, but will help every business ensure that it treats its customers in accordance with the requirements of the law, and so avoid often time-consuming and costly claims and complaints.

Written in an accessible, non-legalistic style, the CPA is explained in plain and understandable language. Key points, short summaries and helpful comments are highlighted. Various chapters include those dealing with Prohibited Schemes, Marketing of Goods and Services, Industry Codes of Conduct, Auctions, Fair Value, Good Quality and Safety and Enforcement.

The authors are to be congratulated on the effective way they have unpicked and logically arranged their material. This is a further welcome addition to the popular Juta's Pocket Companion series. Other titles in the series include:

- Understanding the Labour Relations Act.
- Understanding the Employment Equity Act.
- Understanding the Basic Conditions of Employment Act.
- Understanding Land Tenure.
- Understanding Social Security Law.
- Understanding the CCMA Rules & Procedures.
- Understanding Broad-Based Black Economic Empowerment.
- Understanding the Mine Health & Safety Act.

This work again underscores the importance of making available tools to educate the general public about all aspects of the law that affects them in their daily lives. Law is too important to be left only to the lawyers.

In terms of the previous 1991 Act the holders of mineral rights were allocated an exclusive right to apply for a mining right, or to authorise a third party to apply for it. However, the State still had to grant a mining right to that applicant. Under the transitional provisions of the MPRDA the holder of an unused mineral right immediately before the enactment of the MPRDA was given a similar exclusive right to apply for a mining or prospecting right, but this right would only apply for a period of one year.

The significant change that came about with the enactment of the MPRDA in 2004 was that the holders of mineral rights were not the only persons who could apply for mining rights – once the exclusive right lapsed the rights would be awarded on a first-come-first-served-basis.

Therefore, the judge concluded, it was the failure of a holder of mineral rights to apply for a prospecting or mining right within the one year period that caused his mineral rights to be lost. The imposition of a time limit in which rights had to be exercised could not be an expropriation.

Judge Bob Nugent gave separate reasons for a similar conclusion. His finding was that allowing anybody to apply for mining rights did not expropriate mineral rights. It simply reduced the value of the property held by the erstwhile mineral rights holders. As a value cannot in itself be considered to be property there could not be an expropriation.

AgriSA has filed an application in the Constitutional Court for leave to appeal against the judgment of the Supreme Court of Appeal. The application is based on various grounds but the fundamental basis for the appeal is the fact that the Appeal Court judgment denies the owners of mineral rights the protection they enjoy in terms of Section 25 of the Constitution. AgriSA still maintains that the State has to pay compensation when property, such as mineral rights, is expropriated. The judgment of the Constitutional Court could have far-reaching implications not only for mining, but also other property rights.

*Minister of Minerals and Energy v. Agri South Africa (458/11) [2012] ZASCA 93.*

# Environmental Law

## ■ *No Easy Way Out*

*"Life is not to be bought with heaps of gold."*
– Alexander Pope (1688 - 1744)

THE NORTH Gauteng High Court in Pretoria has ruled that the fact that Harmony Gold Mining Company Limited sold a mine would not release it from its obligations in terms of a directive issued by the Department of Water Affairs prior to the sale.

It was common cause that gold mining activities by various companies in the Klerksdorp, Orkney, Stilfontein and Hartebeestfontein areas were a source of potential pollution to the underground water in the area. The directive called on Harmony and other mines to take measures to prevent that water pollution.

The directive was issued in November 2005 and was to operate until Harmony and the other mining houses had reached an agreement on the long term management of water arising from mining activities in the affected area. Harmony and other mines were called upon to manage, collect, treat or dispose of the subterranean water that might affect their current and future operations and to share the costs of taking these measures equally. The mining houses failed to conclude an agreement.

Harmony had acquired the shares in the mining company which owned the land in question and had managed the mining operations on, and exercised control over, the land. Ownership in the land remained vested in the mining company. It sold the mine and land in August 2007 to Pamodzi Gold Orkney. From February 2008 Harmony ceased to manage the mine and no longer exercised control over the land on which the mine was based. Pamodzi took transfer of the land and assumed all of Harmony's obligations in respect of the mining operations. Pamodzi was placed in provisional liquidation in March 2008.

Harmony contended that the directive was no longer valid against it and called unsuccessfully on the Department to withdraw it. It applied to court for an order reviewing and setting aside the directive issued in 2005, or failing that, the decision in September 2009 not to withdraw the directive against it.

Harmony raised a number of attacks based on the fact that it was unreasonable and constitutionally impermissible for the directive to continue to apply to it as there was no longer any link between it and the land or the pollution. Judge Tati Makgoka dismissed these arguments, pointing out that the directive was issued while Harmony was in control of the land and that its unfulfilled obligations do not become discharged or nullified once it ceases to be in control.

The judge confirmed that the directive required Harmony to take measures, among others, for pollution that occurred while it was the land holder. *"There is therefore a clear causal and moral link between the directive and the applicant's pollution activities."* The argument was rejected that words should be read into the relevant section of the legislation by implication, namely that obligations would only continue while the person was the owner of the land, or was in control of the land or occupied the land. Harmony is accordingly obliged to continue paying for pumping and treating the water in and around the relevant mine in terms of the directive.

Harmony also failed to have the decision of the Department to issue the directive reviewed in terms of the **Promotion of Administrative Justice Act** of 2000 which requires that such review be brought within 180 days. The original directive had been issued some four years earlier and the court regarded the delay as an inordinate delay. Judge Makgoka also decided that the applicant had failed to exhaust internal remedies which included an appeal in terms of the **National Water Act** of 1998.

This dispute is now being taken on appeal.

*Harmony Gold Mining Company Ltd v. Regional Director: Free State Department of Water Affairs and Others (68161/2008) [2012] ZAGPPHC 127.*

# Constitutional Law

## ■ *Tobacco Advertising Up In Smoke*

*"A cigarette is the perfect type of a perfect pleasure. It is exquisite, and it leaves one unsatisfied. What more can one want?"*
– Oscar Wilde (1854 - 1900)

THE SUPREME Court of Appeal has now brought finality to the manner in which tobacco products manufacturers may advertise tobacco products. The verdict? No tobacco products may be advertised at all.

British American Tobacco (BAT) which has a substantial business presence in 180 countries around the world, argued that the **Tobacco Products Control Act** of 1993, as amended by the **Tobacco Products Amendment Act** of 2008 is unconstitutional in as far as Section 3(1)(a) provides that: "No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method." Simply put: not at all.

BAT argued that this section prohibits even its ability to communicate, one-to-one, with its consenting adult consumers and providing such consumers with information about its products, such as packaging changes, product developments, even whether a particular tobacco product is less harmful than another. It was further argued that this section prevented BAT from its constitutional right to freedom of expression which includes the 'freedom to receive or impart information'. These arguments were accepted by the court.

The Minister of Health argued that the restrictions were justified in terms of Section 36(1) of the Constitution in that these limitations were reasonable and justified in an open and democratic society based on human dignity, equality and freedom, when taking into account the nature of the right and the nature and extent of the limitation.

The Minister pointed out that the Department has been committed to limiting and preventing the spread of tobacco use among South Africans since the 1990s. The Act was amended to meet the following objectives:

1. To stem the growing use of tobacco products among the youth;
2. To reduce the number of existing smokers;
3. To ensure that those who stopped smoking do not start again; and
4. To protect non-smokers from being exposed to second-hand smoke.

South Africa subscribes and is a signatory to the World Health Organisation Framework Convention on Tobacco Control (FCTC) and South Africa is expected to comply with its obligations in terms of the FCTC's policies, agendas and purpose.

It was further argued that BAT's intent to communicate to its consenting adult consumers is similarly wrongful in that all that BAT attempts to communicate is designed, "…in some way or another, to promote the sale of its product and thus to maintain in place the mischief which the Act is designed to combat."

Appeal Judge Ian Farlam concluded that the public health considerations and the countervailing right to a healthy environment make a strong case for the limitation of the right which BAT seeks to enforce. He ruled that the limitation is reasonable and justified as required by Section 36(1) of the Constitution and that a proper interpretation of Section 3(1)(a) of the **Tobacco Products Control Act**, read with the definitions of 'advertise' and 'promotion' is not unconstitutional.

BAT applied to the Constitutional Court for leave to appeal, but this has been refused.

*British American Tobacco South Africa (Pty) Ltd v. Minister of Health (463/2011) [2012] ZASCA 107.*

## ■ *Damage Control*

*"And those people should not be listened to who keep saying the voice of the people is the voice of God, since the riotousness of the crowd is always very close to madness."*

– Alcuin (735 - 804)

THE CONSTITUTIONAL Court has handed down judgment concerning the constitutionality of a law which makes organisers of gatherings liable for damages caused by the gathering unless they took all reasonable steps within their power to avoid the damage and they did not reasonably foresee the damage.

The South African Transport and Allied Workers Union (SATAWU) had organised a gathering of thousands of people through the City of Cape Town to register employment-related concerns of its members within the security industry. Some 50 people had lost their lives in the course of SATAWU's protracted strike action before the gathering. During the gathering, much property including private property was damaged.

In response to a claim for damages made by people who claimed that they suffered loss as a result of the gathering, SATAWU challenged the constitutional validity of the law that regulates public gatherings by imposing liability on organisers for riot damage arising out of a gathering. This provision is contained in Section 11(2) of the **Regulation of Gatherings Act** of 1993. The Union argued that the obligation allowed by the law unjustifiably limits the right to freedom of assembly in the Constitution.

In a majority judgment Chief Justice Mogoeng held that the law in question aims to afford victims effective legal recourse where a gathering becomes destructive and results in injury, loss of property or life. The law is there to protect members of society, including those who do not have the resources or capability to identify and pursue the perpetrators of the riot damage for which they seek compensation. When a gathering imperils

the physical integrity, the lives and the sources of livelihood of the vulnerable, liability for damages arising therefrom must be borne by the organisers who are responsible for setting in motion the events which gave rise to the suffered loss.

The fact that every right must be exercised with due regard to the rights of others cannot be overemphasised. The organisers always have a choice between exercising the right to assemble and cancelling the gathering in the light of the reasonably foreseeable damage. By contrast, the victims of riot damage do not have any choice in relation to what happens to them or their belongings. For this reason, the decision to exercise the right to assemble is one that only the organisers may take. This must always be done with the consciousness of any foreseeable harm that may befall others as a consequence of the gathering. The organisers must therefore always reflect on and reconcile themselves with the risk of a violation of the rights of innocent bystanders which could result from forging ahead with the gathering.

The Chief Justice emphasised that the reasonable steps taken on the one hand and reasonable foreseeability on the other hand are inter-related. Organisers are required to be alive to the possibility of damage and to cater for it from the beginning of the planning of the protest action until the end of the protest action. At every stage in the process of planning, and during the gathering, organisers must always be satisfied of two things: that an act or omission causing damage is not reasonably foreseeable and that reasonable steps are continuously taken to ensure that the act or omission that becomes reasonably foreseeable is prevented.

In terms of the issue of whether the law unjustifiably limits the right to freedom of assembly the court held that the Act does not negate the right to freedom of assembly, but merely subjects the exercise of that right to strict conditions, in a way designed to moderate or prevent damage to property or injury to people.

The majority took the view that the limitation on the right to freedom of assembly in Section 17 of the Constitution is reasonable and justifiable, because it serves an important purpose and reasonably balances the conflicting rights of organisers, potential participants and often vulnerable and helpless victims of a gathering or demonstration which degenerates into violence.

For these reasons, the majority dismissed the appeal.

*South African Transport and Allied Workers Union & Another v. Garvas & Others (CCT112/11) [2012] ZACC 13.*





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