

# LAW LETTER

*Your Key to the Issues*

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Your strategic partner at law



*This Autumn edition of Law Letter examines recent decisions of our courts on the Electoral Commission, winding up of solvent companies, social networks, property transfers and trusts. 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.*

## Company Law

### ■ **Winding-up a Solvent Company – Fraud or Illegality**

JUDGE STEYN in the Durban High Court has set out the circumstances where a company can be placed into liquidation even though it is still solvent. Section 81(1)(e) of the **Companies Act** 71 of 2008 expressly provides that a court may order a solvent company to be wound up if a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that the directors, prescribed officers or other persons in control of a company are acting in a manner that is fraudulent or otherwise illegal, or the company's assets are being misapplied or wasted.

The judge said that the discretion to be exercised in terms of Section 81 is a very broad discretion. The onus of satisfying the court that the directors acted fraudulently or illegally requires an applicant to place sufficient evidence before a court that those grounds exist. In this case the directors of the company admitted that they had not issued financial statements for the years 2012 and 2013. Investigations by the shareholders led them to believe that the directors had either misapplied the monies belonging to the company or had wasted the monies. The directors admitted that R31 million was received by the company. A careful analysis of the answers given by the directors showed that they had not directly responded to the allegations, nor had they given reasonable explanations in response to the allegations made against them. It also appeared that one of the directors of the company had a previous conviction for fraud which had not been disclosed.

Having considered all the allegations and the responses of the directors, the judge was satisfied that in a number of instances misrepresentations had been made and there was a real likelihood that the investors relied on these misrepresentations when they invested, to their prejudice. The judge concluded that the applicants were entitled to an order winding-up the company.

*Pinfold and Others v. Edge to Edge Global Investments Ltd 2014 (1) SA 206 (KZD).*

*"The rights and obligations of minority shareholders who allege oppressive or prejudicial conduct by the majority must be considered."*

### ■ **Winding-up a Solvent Company – Just and Equitable**

SECTION 81(1)(d) of the **Companies Act** provides that a company may be wound up if it is just and equitable to do so. This may be done even though the company is still solvent. Judge Daffue in the Free State High Court in Bloemfontein was recently faced with such an application. The reasons given included deadlock in the management of the company's affairs and oppression. A company will be liquidated if there is a complete breakdown of mutual trust and confidence between the members. The judge referred to the thousands of pages of papers in what he called "a full-blown campaign – family war – being fought on several fronts". He said that it was apparent that members of the family in control of the

company "are at loggerheads with each other and that a family feud of tremendous proportions exists". There was reference to "disagreements, fights, disputes and litigation". An averment was made that the family is "extremely dysfunctional". No meaningful dialogue between the parties was possible. They could not approach any issue with open minds or in good faith. "Accusations of greed are rife."

Judge Daffue confirmed that it would be just and equitable for a company to be liquidated due to the breakdown in the relationship, of reasonableness, good faith, trust, honesty and mutual

confidence which should exist between the directors and / or shareholders of the company.

In all the circumstances, the judge was satisfied that it was just and equitable to grant an order for final winding-up.

*Knipe and Others v. Kameelhoek (Pty) Ltd and Another 2014 (1) SA 52 (FB).*



## BOOK REVIEW

### MODERN INSURANCE LAW IN SOUTH AFRICA

By Daleen Millard

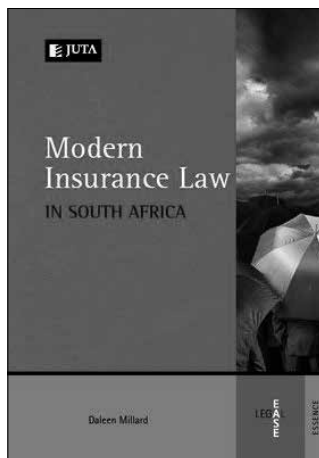
(170 pages) (Juta & Co. Ltd – [www.jutalaw.co.za](http://www.jutalaw.co.za))

WE LIVE in a risky world with many uncertainties. Despite our best efforts to avoid damage and disaster, we are all vulnerable to the unexpected and the unwelcome, from natural calamities such as fire and flooding to motor collisions, dreaded disease, crime and financial collapse. That is where insurance comes in, as protection and compensation for that day of catastrophe.

Insurance products in South Africa are broadly classified as financial products. From life and disability to travel insurance, from funeral cover to credit insurance, the many insurance products are marketed and sold in terms of the Long-Term Insurance Act 52 of 1998, the Short Term Insurance Act 53 of 1998, and the Financial Advisory and Intermediary Services Act 37 of 2002. Many aspects of insurance are also still regulated by common law.

This welcome publication in the user-friendly Juta Legal Ease

series is geared not only for lawyers and law students, but also those who work in insurance as intermediaries, advisors, compliance officers and key individuals responsible for business and personal insurance in a corporate environment.



The text is written in plain language with a systematic explanation of the essential aspects of insurance law in the South African context. The contract of insurance, the role of the ombudsman and claims procedure are some of the aspects all dealt with clearly and concisely. Further reference sources including useful websites are listed.

This handbook is an excellent source of information and guidance with many helpful examples which illustrate typical insurance claims. Publishers Juta and the author Professor Daleen Millard Blur LLB (UP) LLD (UJ) are to be commended for this quality contribution to a very important area of the law.

## Law of Contract

### ■ *Dealing with a Trust*

INVESTEC BANK Ltd issued summons against the trustees of the Kudu Trust for payment of R13 million based on a suretyship. The trustees raised the defence that the Kudu Trust was not competent to execute the suretyship, as it fell outside the powers of the trust to do so in that the suretyship was not to the advantage of the trust and the beneficiaries. They said that the bank was duty-bound to have interrogated the transaction with greater diligence, to satisfy itself that it would be for the benefit of the trust and the beneficiaries.

Judge Jody Kollapen in the North Gauteng High Court in Pretoria said that in determining the scope and extent of the role that is expected from an outsider dealing with a trust, one must on the one hand ensure that outsiders by their actions are seen to be observing the provisions of the trust deed and should not act in flagrant violation of the trust deed. On the other hand, the trustees have the primary responsibility to act in accordance with the dictates of the trust deed.

One should guard against the unintended consequence of developing a quantitatively higher standard of diligence and care on the part of outsiders dealing with a trust, than on the part of the trustees themselves. The primary responsibility for compliance with formalities and for ensuring that contracts lie within the authority conferred by the trust deed lies with the trustees. One could not absolve the trust from the assessment it made regarding the profitability of the venture supported by the suretyship and hold the bank culpable for its failure to, as it were, second-guess the trust's own projections and motivations. Such an approach militates against simple logic and the dictates of business efficiency which should characterise the dealings between a trust and the outside world.

The judge concluded that it is the primary responsibility of the trust to satisfy itself that a contract that it intends concluding is for the benefit of the trust and its beneficiaries. He granted judgment in favour of the bank for the amount claimed together with interest and costs.

*Investec Bank Ltd v. Adriaanse and Other NNO 2014 (1) SA 84 (GNP).*

# Defamation

## ■ Social Network Potholes

*"Words are like leaves; and where they most abound,  
Much fruit of sense beneath is rarely found."*

– Alexander Pope (1688 – 1744)

WITH OVER a billion active monthly users, *Facebook* offers a useful and entertaining tool for keeping up to date with friends and acquaintances. Unfortunately, the relative safety and anonymity of sitting behind a keyboard can also bring out the worst in people. In this regard a recent judgment by the South Gauteng High Court serves as a warning to users to be careful when publishing, sharing, commenting on or allowing themselves to be tagged in potentially defamatory online postings.

The first defendant posted a series of comments on her *Facebook* page and in each case "tagged" her husband, the second defendant. The plaintiff, who was previously married to the second defendant, alleged that two of the comments were defamatory of her. She claimed that the first comment belittled her and that the second comment was aimed at damaging her reputation.

The court had to determine:

- whether the postings could be regarded as capable of referring to the plaintiff, and
- whether they had in fact led reasonable readers who knew the plaintiff to the conclusion that they referred to her.

Counsel for the defendants argued that, to establish whether the postings referred to the plaintiff, the court should interpret each posting individually without having regard to the other. Judge Hiemstra rejected this argument. The first posting directly referred to the plaintiff and *Facebook* users who read it were reasonably able to connect it to the plaintiff. The second posting, which also happened to be the most scandalous, did not refer to the plaintiff by name. Read in isolation, it could not reasonably be understood as referring to her. However, when the second posting was read with reference to the previous one, there was no doubt as to whom it referred. The posting formed part of an exchange of messages posted on the defendants' page within a period of a few hours. Several persons reacted sarcastically to the postings, thereby compounding the damage to the plaintiff's reputation. As in the case of the first posting, they would not have reacted to the second posting had they not known to whom it referred. The judge made it clear that, where the circumstances require it, the court will consider previous publications.

Damages plus legal costs were awarded in favour of the plaintiff. The judge found both defendants jointly and severally liable in this regard. This is noteworthy, as the second defendant was not the author of the postings and did not even comment thereon. He merely knew about it and allowed

himself to be tagged. South African law does not require a defendant to be the author of a defamatory statement. Merely repeating a defamatory statement made by another person also constitutes defamation. In the context of a defamatory *Facebook* posting it therefore follows that allowing yourself to be tagged in or sharing a posting constitutes publication for purposes of a defamation claim.

This case illustrates that it is prudent for social network users to take steps in order to avoid potential liability. This might include the following:

- Control your visibility to other *Facebook* users and the public by adjusting your privacy settings. Should someone take legal action against you for posting a defamatory comment, the fact that fewer people saw it might reduce the amount of damages awarded to the plaintiff.
- Always check the posts in which you are tagged. If they are potentially defamatory, untag yourself immediately.
- Never repost potentially defamatory postings.
- Delete potentially defamatory postings as soon as possible and issue a public apology to the aggrieved party. This will hopefully dissuade that person from instituting legal action against you. It should also reduce the amount of any damages awarded to the plaintiff should he or she successfully institute legal action against you.

*Isparta v. Richter and Another (22452/12) [2013] ZAGPPHC 243.*



# Election Law

## ■ Free, Fair and Friendly

*"It's not the voting that's democracy, it's the counting"*

– Tom Stoppard

WITH THE 2014 general election looming on 07 May 2014, a recent judgment of a full bench of three judges of the Electoral Court gives an interesting insight into the duties of the Electoral Commission (EC).

A number of applicants who were prospective independent candidates in the Tlokwe municipal by-election approached the Electoral Court for an order postponing the election on the grounds that the EC had erroneously rejected their nominations. It appeared that at least some of these candidates had visited an EC official named Makodi at the EC offices so that he could check that their nominations met the statutory requirements. As it turned out, they did not, but Makodi never told the candidates or only did so when it was already too

late to correct the error. The result was that the applicants' nominations were rejected.

Section 190 of the **Constitution** sets out the functions of the EC, its powers and duties. Former Chief Justice Pius Langa in a Constitutional Court judgment in 1999 said that there is a constitutional obligation on organs of state to assist and protect the EC "in order to ensure its independence, impartiality, dignity and effectiveness."

Judge Wepener said that the views of the former Chief Justice conveyed that the duties of the EC do not end with mechanically implementing the letter of the law. It has not only to act as a verifying agent insofar as strict compliance with the legislation is concerned. Its duties include a duty to assist voters and candidates, and such assistance should not be limited to ensuring that participants have sufficient

knowledge of the electoral process. It should promote a culture of helpfulness to all involved in elections, and it should display willingness to assist those members of the public who wish to participate in elections, such assistance not being restricted to voters alone but also to candidates. In this case, had Makodi made good on his undertaking to check the documents and advised the applicants timeously of the non-compliance as he was duty-bound to do, their nominations would not have been rejected. The candidates were severely prejudiced by Makodi's failure to properly assist them, and their disqualification would compromise the free and fair character of the election. As a result their application for the postponement of the election was granted and the applicants were allowed to register as candidates in their respective wards.

*Johnson and Others v. Electoral Commission and Others 2014 (1) SA 71 (EC).*

## BOOK REVIEW

### JUSTICE: A PERSONAL ACCOUNT

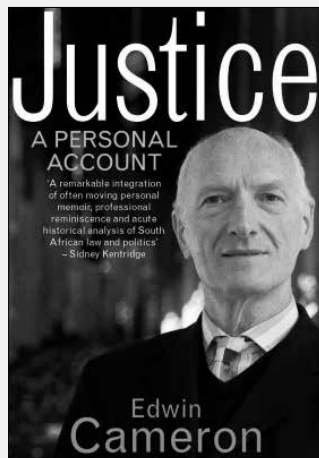
By Edwin Cameron  
n.b. Publications (208 pages)

JUSTICE EDWIN Cameron's latest book, *Justice: A Personal Account*, is about our country's most inspiring and hopeful feature – its big spirited, visionary constitution. Part memoir, part ode to the law, this gripping and revealing book tells the story of Cameron's journey from a poverty-stricken childhood to becoming a human rights lawyer during the apartheid era and eventually a Justice in the Constitutional Court.

The book opens with Cameron's recollection of his sister's funeral when he was just seven years old. She died after being hit by a car while riding her bicycle. Having been briefly let out of prison for the occasion, his father was allowed to attend the funeral, but was accompanied by two uniformed prison officials. As a child Cameron imagined Zonderwater prison to be a rehabilitation centre for alcoholics. This is why his father was sent there, the young Cameron naively believed. This was Cameron's very traumatic first encounter with the law, about which he pondered: "Was it only an instrument of rebuke and correction and subjection? Or could it be more? I did not know it then, but this vivid encounter imprinted and impelled my future life and career."

In telling his story, Cameron, who was the first senior South African official to state publicly that he was living with HIV/

Aids, blends his own life experiences with enthralling and inspiring stories of how citizens, lawyers and judges can make the law work to secure justice. Drawing on his childhood hardship, a youth spent in a children's home and struggles with sexuality and stigma, he illustrates the power and limitations of the law.



In the book Cameron explains some features of the pre-democracy legal system, and how our country made the extraordinary transformation from apartheid to democracy, under the world's most generous-spirited constitution. Cameron reflects on where we are after nearly two decades of constitutionalism. He describes our democracy as a baby that has shown that it is far beyond crawling, that has taken its first steps and is already

on its way to adulthood. He believes that we have achieved more than we think we have, however we still have a long way to go. Cameron states his case – that the constitution offers South Africa its best chance for a just future – with compelling elegance.

*"A remarkable integration of fascinating and often moving memoir, professional reminiscence and acute historical analysis of South African law, politics and society."*

– Sir Sydney Kentridge, QC

## Law of Property

### ■ **Acting for the seller or the buyer?**

*"Let every eye negotiate for itself, And trust no agent!"*  
– William Shakespeare in *Much Ado about Nothing*

A SELLER CONCLUDED a written agreement of sale with the buyer for the purchase of certain immovable property. The deposit was paid by the buyer into the conveyancer's trust account as required in terms of the deed of sale, such amount to be paid to the seller on the day of registration of transfer. Funds were however misappropriated and the full amount of the deposit was not paid to the seller. The balance of the purchase price was paid by the buyer into the conveyancer's trust account and this was duly paid to the seller. The seller sued the buyer, the conveyancer and his legal firm for recovery of the unpaid amount.

The buyer's case was that its payment obligations in terms of the contract had been fulfilled because it had paid the full deposit and the full balance of the purchase price. According to the buyer, the seller had to take recourse against the conveyancer alone. Judge Hiemstra in the North Gauteng High Court, in determining whether the buyer was liable for the outstanding amount, considered the relationship between the conveyancer and the parties to the transaction. He concluded that the terms of the deed of sale did not confer authority on the conveyancer to act as agent for the seller in the acceptance of the purchase

price. That money had therefore not been paid to the seller. The buyer accordingly remained liable for the shortfall not paid over to the seller. The buyer took the matter on appeal, contending that the court should have based its finding on a question of the performance of the buyer and not on the basis of agency.

The Supreme Court of Appeal was divided. The majority of three judges took the view that the central issue was indeed whether the conveyancer was the agent of the seller for receiving payment of the purchase price from the buyer. If not, the buyer's defence of payment to the seller could not succeed. Whether the conveyancer was the agent of the seller in this case depended solely on the terms of the deed of sale. No other authorisation had been relied upon. On a proper construction of the deed of sale the North Gauteng High Court had correctly concluded that the conveyancer was not the agent of the seller in receiving payment of the purchase price. Payment to the conveyancer was not equivalent to payment to the seller. It therefore did not discharge the buyers obligation to pay the purchase price to the seller. As a result the appeal was dismissed.

*Minister of Agriculture and Land Affairs and Another v. De Klerk and Others 2014 (1) SA 212 (SCA).*

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