
**LAW
LETTER**

June 2008



FAIRBRIDGES
ATTORNEYS
EST 1812



This mid-year edition of Law Letter illustrates the wide variety of disputes that come before our courts. Our spotlight falls on recent rulings in the Constitutional Court, the Labour Court, various divisions of the High Court, and the Pension Funds Adjudicator. 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

Labour Law

■ Courage and Conviction

"Distrust of authority should be the first civic duty."
– Norman Douglas (1868 - 1952)

THE PROTECTED DISCLOSURES ACT is intended to protect employees who blow the whistle on criminal and other offences being committed in the workplace. The Act protects employees against occupational detriments, which include dismissal, disciplinary action, suspension, demotion and harassment.

Mr Tshishonga, a Deputy Director-General in the Department of Justice and Constitutional Affairs, had occasion to be grateful for this protection. He was responsible for eradicating corruption in the Master's Office, particularly in respect of the appointment of liquidators. When Mr Tshishonga discovered irregularities arising out of the then Minister of Justice and Constitutional Affairs' close relationship with a particular liquidator, he reported the matter to the Director-General and eventually the Public Protector and the Auditor General. When it became apparent that no one was going to act on the allegations, Mr Tshishonga issued a press statement.

The Department responded by suspending Mr Tshishonga and charging him with misconduct. In the end, a settlement agreement was reached and Mr Tshishonga was paid compensation in return for resigning from his position.

Mr Tshishonga then went to the Labour Court and asked for compensation under the Protected Disclosures Act. This was the first claim brought under the Act and the court noted that the Act requires that four questions be answered.

- Firstly, was the information disclosed a disclosure as defined in the Act.
- If it was, then the next question is whether the disclosure is protected.

- It must then be determined whether the employee was subjected to any occupational detriment, and,
- If so, what compensation should be awarded.

The court decided that the media statement was a disclosure in that it contained allegations of criminal offences. Turning to whether the disclosure should be protected, the court noted that protection is granted if the disclosure was made in good faith, the employee had a reasonable belief that the allegations were substantially true and the disclosure was not made for personal gain.

Judge Pillay was satisfied that Mr Tshishonga had acted in good faith and that he reasonably believed the allegations to be true. Mr Tshishonga's concerns were based on two official departmental reports, his personal knowledge of some of the information and his observation of the conduct of the Minister, the Director-General and the liquidator concerned. The court also believed that Mr Tshishonga had not acted for personal gain.



Before concluding that the disclosure was protected, the court determined that Mr Tshishonga also had to show either that evidence of the alleged improprieties was likely to be destroyed or that Mr Tshishonga had previously disclosed the allegations to his employer and that no action had been taken within a reasonable period. The court was satisfied that both these requirements had been met.

Finally, the court considered whether a disclosure to the press was protected. The Judge noted the importance of the media in preserving democracy and exposing corruption, and found that the media statement was entirely appropriate. Whistleblowers were entitled to rely on the press to level the playing fields, especially when the whistleblower was taking on powerful persons.

It was clear that Mr Tshishonga had suffered an occupational detriment, having been suspended and charged with

misconduct. Even though he had resigned in terms of a settlement agreement, he had been denied the dignity of employment. The court considered compensation and awarded Mr Tshishonga an amount equivalent to twelve month's remuneration. It seems that, for once, the good guys won.

Tshishonga v. Minister of Justice & Constitutional Development & another (2007) 28 ILJ 195 (LC).

Restraints of Trade

■ Noose or Loose

"This contract is so one-sided that I am surprised to find it written on both sides of the paper."

– Lord Evershed

WHEN SLADE MANSFIELD and Jonathan Nienaber were employed as photographers by Hirt & Carter, a leading Durban advertising agency, they signed a restraint of trade agreement. Two years later, they resigned and opened their own photographic studio. Hirt & Carter noticed a visible drop in photographic work and some major clients stopped using their photographic services altogether. Hirt & Carter, decided to fight back.

Curtis approached the Durban High Court for an order interdicting his former employees from competing with the company. Curtis relied on the restraints of trade which, amongst other things, precluded Mansfield and Nienaber from engaging in photographic work in relation to advertising, soliciting work from clients of Hirt & Carter and utilising any photographic knowledge they acquired while employed by the company.

Opposing the application, Mansfield and Nienaber argued that prospective clients use a photographer because of his personal style of photography and his ability to produce the type of material required by the client.

Acting Judge Naidu observed that customer goodwill and trade connections are proprietary interests worthy of protection through restraints of trade. However, restraints are only enforceable if they are reasonable and in the public interest. A restraint of trade agreement entered into purely for the purpose of eliminating or discouraging competition is unreasonable and serves to protect no real proprietary interest of the company. Such a restraint is not in the interests of the public.

Having considered the evidence, the court found in favour of Mansfield and Nienaber. The court believed that Hirt & Carter was simply trying to prevent Mansfield and Nienaber from competing against it. As such, the agreement was held to be against public policy and unenforceable.

The practical effect of this judgment is to confirm that an employer must have a specific and legitimate interest that it wishes to protect. It is not enough to simply want to protect one's turnover. A lesson Hirt & Carter learnt the hard way.

Hirt and Carter (Pty) Ltd v. Mansfield and another [2007] 4 ALL SA 1423 (D).



Compensation

■ A Double Whammy

"A man can be destroyed but not defeated."

– Ernest Hemingway (1899 - 1961)

MR MONJANE'S bad luck started when his boss crashed his car into him. Mr Monjane was walking along a pavement and was at work at the time. To make matters worse, when he claimed compensation from the Road Accident Fund, the Fund rejected Mr Monjane's claim on the basis of a legal technicality.

The **Road Accident Fund Act** provides that the Fund is not obliged to pay compensation to any person for injuries arising from an accident for which neither the driver nor the owner of the vehicle is liable. The Fund's lawyers must have been wide awake that day, because they directed the court to Section 35(1) of the **Compensation for Occupational Injuries and Diseases Act**. The section provides that an employee may not sue his or her employer for damages resulting from a workplace injury or illness. The employee's options are restricted to claiming compensation from the Compensation Commissioner. It followed, the lawyers argued, that if the boss was not liable to pay for damages to Mr Monjane, the Fund was likewise not obliged to pay up.

The High Court disagreed, finding that the relevant statutory provisions should be given a wide and generous interpretation. The purpose of the Compensation for Occupational Injuries and Diseases Act is to protect and compensate people who have been negligently injured in the workplace. The Legislature could not have intended that Act to exclude an injured employee from claiming from the Road Accident Fund simply because the driver of the vehicle was the injured person's employer.

Deputy Judge President Shongwe ruled that Mr Monjane was entitled to claim compensation from both the Road Accident Fund and the Compensation Commissioner. He was not, however, entitled to double compensation – any compensation granted by the Fund and the Commission could not exceed the amount to which Mr Monjane was legally entitled.

This is a good example of our courts taking a common sense approach to the interpretation of our law, with due regard for the purpose which such legislation seeks to achieve.

Monjane v. Road Accident Fund 2007 (2) SA 396 (T).

Family Trust

■ Who to Trust

“Money can’t buy friends but you get a better class of enemy.”
– Spike Milligan

WHEN GRANDPA set up his family trust, he imagined that the children were secure and he breathed a sigh of relief. The beneficiaries of the Jilelf Edwards Trust, however, came to view their trustees with some suspicion. In a move reminiscent of classic soap opera melodrama, the beneficiaries applied to court to have the trustees removed from their positions as trustees. The beneficiaries claimed that the trustees were guilty of maladministration, dishonesty and lack of good faith.

The trustees retaliated with an interim application, pointing out that the application, which was brought against them personally, should have cited them in their representative capacities as trustees. The trustees also asked the court to authorise the use of trust funds to finance their opposition of the application. The trustees relied on a clause in the trust deed that indemnified the trustees against claims arising from any loss of trust income or trust capital as a result of the exercise of their discretion.

The court noted that trustees act in their representative capacity where a trust is sued, but was not convinced that this was the position in this case. The Judge took the view that, in an application for the removal of a trustee, the matter is personal. The claim arises from conduct personal to the trustees and is not conduct that binds the trust. The beneficiaries had, therefore, properly brought the application against the trustees in their personal capacities.

Judge Erasmus then had to decide whether it was permissible for the trustees to withdraw funds from the trust to cover their legal fees. The general principle is that the losing party pays the winning party’s legal costs. So, if the trustees prevailed, the trust and the beneficiaries would have had to meet the trustees’ legal costs in due course.

The question was: could the trustees use trust funds to pay their legal fees upfront, even before the court had heard the application for their removal?

The court ruled that a trust cannot be expected to pay the legal costs of a trustee where his or her own administration is in question. The trustees would be reimbursed for their costs if they succeeded in establishing that they had in fact fulfilled their duties as trustees properly. The trustees would, however, if they wished to oppose the application, have to pay their own way for now.

Stander and Others v. Schwulst and Others 2008 (1) SA 81 (C).



Housing

■ Be Nice

“What difference does it make to the dead, the orphans, and the homeless, whether the mad destruction is wrought under the name of totalitarianism or the holy name of liberty or democracy.”

– Mohandas K. Gandhi (1869 - 1948)

THE JOHANNESBURG City Council declared inner city buildings unsafe and applied to the High Court for the eviction of some 400 occupiers. Unsuccessful in the High Court, the City approached the Supreme Court of Appeal, which ordered the eviction of the occupiers on condition that the City provided alternative accommodation to those that would be homeless as a result of the court order.

The occupiers took the matter to the Constitutional Court. The court ordered the City to first consult meaningfully with the occupiers regarding steps that could be taken to improve current living conditions and provide alternative accommodation. The court pointed out that municipalities are obliged to consult with their communities. People deserve to be treated as human beings and the Supreme Court of Appeal should not have granted the ejection order without prior meaningful engagement between the City and the occupiers.

Justice Zak Yacoob went on to say that, while the City does have a duty to eliminate unsafe and unhealthy buildings, it nevertheless has a constitutional duty to provide access to adequate housing. Homelessness must be taken into account by the City in its deliberations.

The court also commented on a provision in the **National Building Regulations and Building Standards Act** that provides that people who remain in a building after being served with an eviction notice by a municipality are guilty of a criminal offence. The court found that this provision was unconstitutional – an offence is only committed if the occupiers remain after a court has ordered the eviction.

The City and the occupiers consulted with each other in compliance with the court's order and the consultations must have been meaningful, because an agreement was reached and made an order of court. It was agreed that the occupiers would not be ejected. The City would, instead, upgrade the buildings and provide temporary accommodation to those rendered homeless by the upgrades.

Occupiers of 51 Olivia Road Berea Township & 197 Main Street Johannesburg v. City of Johannesburg [2008] JOL 21386 (CC).



Divorce & Pensions

■ Clean Break

"I heard a man say that brigands demand your money or your life, whereas women require both."

– Samuel Butler (1835 - 1902)

THE PENSION FUNDS ADJUDICATOR is tasked with receiving complaints against pension funds. The Office of the Pension Funds Adjudicator is established in terms of the **Pension Funds Act** and the Adjudicator is empowered to investigate complaints and make determinations binding on the fund and the complainant.

Ms Cockcroft was divorced in 2003. Her husband was a member of the Mine Employees Pension Fund and the divorce order provided that she was entitled to half of her husband's pension benefit. The order went on to state that Ms Cockcroft was entitled to be paid out, at her election, on finalization of the divorce or when the benefit accrues, whichever occurs sooner.

At the time of her divorce, the law provided that pension fund benefits were only payable to divorced spouses when the benefits accrue to the member. Furthermore, benefits generally only accrue on the happening of a contingent employment event, such as retirement, resignation,

retrenchment or dismissal. An amendment to the Pension Funds Act came into force on 23 September 2007. The amendment provided that a pension benefit is deemed to accrue at the time of divorce. This effectively converts the unquantifiable, future entitlement to pension benefits into precise, present day amount that can be transferred at the spouse's choice.

The Pension Fund refused to pay out Ms Cockcroft's share of the pension benefit and she approached the Pension Funds Adjudicator for help.

The Pension Fund argued that, in terms of the law applying when Ms Cockcroft's divorce was granted, pension fund benefits are only payable when the benefits accrue in respect of the member. As none of the contingent employment events had occurred, the husband had not been paid out and Ms Cockcroft was not yet entitled to her share of the pension benefit.

It was clear that the amendment applied to divorces granted after 23 September 2007, but what about those issued before this date? The Pension Funds Adjudicator decided that the amendment was intended to rectify the unfair status of spouses under the pre-2007 position – spouses had to wait for their former spouses to retire, resign, be retrenched or be dismissed. The Adjudicator held that the amendment applied to divorces granted before 23 September 2007.

In granting divorces, the courts favour the principle of giving former spouses a clean break. The Pension Funds Adjudicator has given substance to the idea of a clean break for those spouses who are entitled to a portion of pension fund benefits.

Cockcroft v. Mine Employees Pension Fund [2007] JOL 20897 (PEA).



Evidence

■ Cell Block Blues

"There is no safety in numbers, or in anything else."

– James Thurber (1894 - 1961)

MPIMPI, canary, fink, stoolie, sneaker, snitcher and squealer! These are just some of the terms used by criminals to express their contempt for informers. Criminals have long been using cellphones to co-ordinate the commission

of crimes, but an accused person recently found that his trusty cellphone had rattled on him.

Thieves held up Fidelity Guards during a routine money collection at a Clicks store in Johannesburg. Mr Molimi was convicted along with a number of other accused. The evidence against Mr Molimi included his own confession,



incriminating statements made by his co-accused and his cellphone records. It seemed that Mr Molimi had phoned his co-accused before and on the day of the robbery. Mr Molimi contended that his phone calls had nothing to do with the robbery. He claimed he was in the process of selling some motorcar wheel rims to the other co-accused. The court was not convinced and convicted Mr Molimi.

Mr Molimi took the matter to the Supreme Court of Appeal, but the judges were equally sceptical about his explanation and upheld his conviction. Insisting on his innocence,

Mr Molimi took his case to the Constitutional Court, the highest court in the land.

The Constitutional Court determined that the confession and the statements of co-accused were inadmissible for technical reasons. This left the cellphone records as the only admissible evidence. But were the records enough to convict Mr Molimi?

Justice Nkabinde noted that the obligation was on the State to prove Mr Molimi's guilt; there was no onus on Mr Molimi to establish his innocence. The cellphone records, although incriminating, were not enough to sustain Mr Molimi's conviction. The mere fact that Mr Molimi's explanation was not believable was not sufficient and he was acquitted.

Molimi v. S [2008] JOL 21324 (CC).

Electronic copies are available on request from:
attorneys@fairbridges.co.za

© Copyright 2008
Faithful reproduction with acknowledgement welcomed.



- 16th Floor Main Tower Standard Bank Centre
Heerengracht Cape Town 8001
P O Box 536 Cape Town 8000 South Africa
Tel: +27 21 405 7300 | Telefax: +27 21 419 5135
- Ground Floor Sear del House Alphen Park
Constantia Main Road Constantia 7806
P O Box 536 Cape Town 8000 South Africa
Tel: +27 21 794 0911 | Telefax: +27 21 794 0922
- 1st Floor Thrupps Illovo Centre
204 Oxford Road Illovo 2196 Gauteng
P O Box 55277 Northlands 2116 South Africa
Tel: +27 11 268 0250 | Telefax: +27 11 268 0254

attorneys@fairbridges.co.za | www.fairbridges.co.za

Fairbridges is the South African member firm of TERRALEX, the worldwide network of 175 member law firms in almost 100 countries around the globe.

E-mail: terralex@gate.net
Internet: www.terralex.org

