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LAW

LETTER

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*June 2009*



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*In this mid-year edition of Law Letter, we review some recent cases on issues that affect many of us – parents and children, husband and wife, neighbourhood crime, dishonest dealing, public amenities and gambling. 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

### Family Law

#### ■ Home and Away

*"Oh, why does the wind blow upon me so wild?  
Is it because I'm nobody's child?"*

– Phila Henrietta Case

A SOUTH AFRICAN woman married an American and had a child in the United States of America. When the couple split, the wife "abducted" the child and brought her back to South Africa.

The father approached the Johannesburg High Court for an order directing the immediate return of the child to the USA. The application was brought under Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction Act, which was incorporated into South African Law by the **Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996**. The Convention provides for the mandatory and non-discretionary return of an abducted child if a period of less than one year has expired from the date of the removal of the child to the date of commencement of proceedings for the return of the child. Where more than one year has elapsed, the return of the child can still be ordered by a court unless "it is demonstrated that the child is now settled in its new environment".

In this case the father's application for the return of the child commenced almost two years after the removal of the child from the United States. Counsel for the father argued that the applicant should not be prejudiced by the delay in bringing the application, because the delays were due to the father's ignorance concerning his rights under the Convention, and poor advice given by his former attorneys.

Judge Van Oosten said that the Act does not give the court the discretion to condone the late commencement of proceedings. If the proceedings are launched more than a year after the removal of the child, mandatory return of the child could not be ordered. The court would have to consider if the child was settled in its new environment.

The judge then had to look at whether the child had settled down or not. He relied on evidence contained in the wife's affidavit and a report from a forensic social worker. The social worker found that the wife and the child had settled in a town house, with the child attending a nursery school. The child was involved in extramural activities with friends and often socialised with family. In short, the minor's needs were being catered for.

The father argued that he could not dispute the contents of the report, but argued that the report should carry little weight, as the social worker had not interviewed the father. The court once again did not agree with the father. The Convention focused on the child – whether or not she was settled – and an interview with the father would have been irrelevant. In custody proceedings, both parties are interviewed, but that is not required when considering an application for the return of abducted children under the Convention.

The court concluded that the child had become settled and dismissed the application brought by the father.

*Y v. B 2009 (1) SA 624 (W).*



### Matrimonial Law

#### ■ Stay out of the Kitchen

*"The extension of women's rights is the basic principle of all social progress."*

– Charles Fourier (1772 - 1837)

MRS GUMEDE was not a lady to be taken lightly. When her husband of 40 years initiated divorce proceedings against her in 2003, he could not have foreseen the passion with which she would fight for her rights.

Mr and Mrs Gumede were married in 1968 under Zulu customary law, which meant that, on divorce, Mrs Gumede had no claim to a share in the family property.

During the marriage, Mrs Gumede was not employed because her husband did not permit her to work. She maintained the family household and was the primary caregiver to the children. Those were the good times ... until Mr Gumede's divorce attorney got involved. Sadly for Mr Gumede his beloved wife had no intention of taking things lying down.

Before a divorce was granted, Mrs Gumede approached the Durban High Court to obtain an order invalidating, amongst other things, Section 7(1) of the **Recognition of Customary Marriages Act** of 1998. This Act provides that customary marriages concluded after 15 November 2000 (the date of commencement of the Act) were automatically in community of property, giving the wife a share in the family property. But this protection was not extended to women married before 15 November 2000 – their marriages would continue to be regulated entirely under customary law.

Mrs Gumede said that the failure of the Act to provide protection to women married before the Act came into effect was unfair discrimination on the grounds of gender and race. The Act contravened the Constitution. The High Court agreed with Mrs Gumede and declared the relevant sections of the Act and the customary law to be constitutionally invalid.



Our High Courts are not entitled to finally declare legislation to be constitutionally invalid. It is the Constitutional Court which must determine whether the High Court's order of constitutional invalidity should be confirmed. And so Mrs Gumede's case came before the highest court of our land.

The Constitutional Court agreed that the failure of the Act to provide retrospective protection to women married under customary law was clearly unfair discrimination on the grounds of gender. The reason was that only women are subject to unequal proprietary consequences on divorce. Having found the Act to be unfair on the basis of gender, the Minister of Home Affairs was required to provide an adequate justification for the discrimination. The Minister pointed to the provisions of Section 8(4)(a) of the Act, which provides that a court can still exercise its discretion in dividing property between husband and wife on divorce. But this was not a justification – this section did not cure the discrimination suffered by women married before the commencement of the Act.

Deputy Chief Justice Moseneke had no difficulty in

declaring the relevant sections of the Recognition of Customary Marriages Act, and the customary law, to be constitutionally invalid. Mrs Gumede was awarded her rightful entitlement and Mr Gumede felt the backlash of a woman scorned.

*Gumede (born Shange) v. President of the Republic of South Africa and Others 2009 (3) BCLR 243 (CC).*



## Damages

### ■ Sins of the Father

NEIL BROOKS had an affinity for alcohol and guns. This turned out to be a lethal combination, as he was also prone, when drunk, to violence and aggression. His family was usually the target of his alcohol-fuelled hostility.

On 25 October 1995, Brooks, after consuming copious amounts of liquor, murdered his wife and daughter. He also wounded his neighbour in the same attack. The weapons used to commit the crimes were two handguns, which he was licensed to possess.

Brooks was subsequently arrested by members of the South African Police Services, sentenced to a term of imprisonment and jailed. Of the members of Brooks' family, only his son Aaron survived the onslaught.

Brooks' neighbour, Van Duivenboden, whose timely intervention was the reason Aaron Brooks survived the attack, sued the Minister of Safety and Security for damages arising from bodily injuries sustained during Neil Brooks' shooting spree.

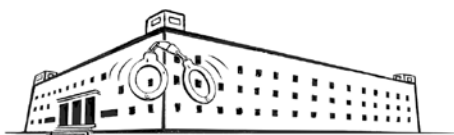
He contended that members of the South African Police Services were negligent in that they had obtained knowledge, prior to the tragic events that occurred, that Brooks was unfit to possess a firearm and that, despite such knowledge, they took no steps to deprive Brooks of the weapons that he would later use to wreak havoc. Van Duivenboden was successful, as it was found that there had been a culpable and negligent failure by members of the South African Police Services to take steps to deprive Brooks of the weapons before the tragedy occurred.

Aaron Brooks also opted to sue the Minister of Safety and Security for damages. He argued that the State's failure to deprive his father of the weapons was negligent, the cause of the tragedy and that the resultant arrest and

imprisonment of his father had deprived him of the support to which he was legally entitled. Aaron was not injured in the attack and his claim was limited to a loss of parental support.

The Supreme Court of Appeal rejected Aaron's argument. Since Neil Brooks had deliberately broken the law, his incarceration, and hence his inability to support his son, was a lawful consequence of his own criminal acts and of the law simply taking its course. Accordingly, no claim could lie against the Minister of Safety and Security for loss of support in these circumstances.

*Brooks v. Minister of Safety and Security 2009 (2) SA 94 (SCA).*



## ■ The Blame Game

IN OCTOBER 2001, Mr Govender's routine visit to his local fruit and veg shop took a nasty turn. After paying for his purchases, and heading towards the door, Govender was confronted by a robber. The robber held the barrel of his cocked revolver against Govender's chest and he was pushed back into the store until they were near the cash register. The robber then ordered the person behind the cash register to open the till and hand over money.

It's at this point that different versions of the event start to emerge. According to Govender, the owner of the store, Salgado, was manning the till at the time of the robbery. Despite the robber's repeated and increasingly agitated demands for money, Govender alleged that Salgado did not move. In his view, Salgado was playing for time, probably because he had alerted a security company via the panic button.

The frustrated robber then turned the gun on Govender and shot him twice. Govender alleged that he was shot in a show of force or determination, and that the owner's refusal to comply with the robber's demands inflamed the situation. He subsequently brought an action for damages for injuries he suffered against Salgado, on the basis that the owner had a duty of care to protect him and to ensure his safety while he was shopping in his store.

Evidence was then brought which revealed that it was not the owner who was behind the till, but an employee of the store. Salgado was in his office. There were also other employees and customers in the store when the robber entered. The robber fired a shot into the floor and instructed everyone to lie down. Govender, who was employed as a security guard, was wearing a civilian brown jacket with a zip, so his work uniform was not visible. He was also carrying a firearm in his holster. Evidence revealed that Govender refused to lie down when instructed to do so,

and was shot while attempting to pull his firearm out of its holster. The court concluded that it was Govender's actions that had caused the shooting, and that Salgado was not negligent in the circumstances.

Judge Mathopo noted that, in a country which was sadly too often witness to armed robberies in banks and shopping malls, it was impractical to impose a duty on retailers to comply with the unlawful demands of armed robbers. This would be casting the duty of care too wide.

Govender's action was dismissed with costs.

*Govender v. Salgados Fruiters t/a Lyndhurst Fruit Basket & Another 2009 (1) SA 500 (W).*



## Agreement of Sale

### ■ Putting Pen to Paper

*"Quarrels would not last long if the fault were only on one side."*

– Francois Rochefoucauld (1613 - 1680)

MR SHAIK owned a members' interest in a close corporation that, in turn, owned a unit in the Lazy Lizard, a sectional title development at Umdloti, on the KwaZulu-Natal north coast.

Mr Pillay signed a standard form agreement offering to buy Shaik's members' interest. Shaik never signed the agreement, but he authorised his attorneys to call for a deposit and guarantees from Shaik, and to obtain copies of ID documents and marriage certificates required for the transfer of the member's interest. Shaik then changed his mind, pointing out that he had not signed the agreement. Pillay argued that Shaik had accepted his offer, even though the agreement was not signed, and an enforceable sale agreement had been concluded.

The dispute found its way to the Supreme Court of Appeal. The court noted that the **Close Corporations Act** does not require the sale of a member's interest to be in writing, even where the corporation owns immovable property, and that there were no other statutes prescribing a signed written agreement. It was possible, therefore, that an unsigned agreement could be enforceable.

Judge Ian Farlam looked at the circumstances and found that the written agreement of sale did in fact require the seller to sign in order to be effective. Amongst other

things, the fact that the agreement provided spaces for the signatures of both parties at the end of the agreement, led the court to conclude that the intention of the parties was that acceptance could only be indicated by the seller signing the agreement.

This was good news for the seller in this case, but the story of the Lazy Lizard has a twist in the tail. The Supreme Court of Appeal went further and determined that although the agreement of sale did require that the seller's signature be obtained, the seller was nevertheless bound by the unsigned agreement because he had, by his conduct, led the buyer to reasonably believe that his offer had been accepted.

*Pillay and Another v. Shaik and Others (006/08) [2008] ZASCA 159.*



## Municipal Law

### ■ Oh, I do love to be beside the seaside

KIDDIES BEACH is situated on the western bank of the Kowie River in Port Alfred. In the past, it had been well utilized by the public, but in recent years locals had avoided the area as it had become run-down and was unsafe.

The Ndlambe Municipality did not have the manpower or finances to manage the area properly, so a Public-Private Partnership was proposed. A Public-Private Partnership is a commercial transaction between a municipality and a private party in terms of which, amongst other things, the private party performs a municipal function on behalf of the municipality, or acquires the management or use of municipal property, for its own commercial purposes. In terms of the proposed PPP, Keryn van der Walt would lease Kiddies Beach from the Municipality and run her diving school from the beach and lagoon. Keryn would erect a temporary structure as her office, but the public would still have full access to the beach. Keryn would, in return, have to meet certain obligations, including rehabilitating the surrounding vegetation, maintaining a safe swimming area and the prevention of illegal dumping and littering.

The proposed PPP was advertised and the Port Alfred Riverhouse Property (Pty) Limited, which owned land situated directly across the Kowie River from Kiddies Beach, opposed the lease agreement. It alleged that, because of the proximity of its land to Kiddies Beach and because it was a ratepayer, it had a direct interest in the lawfulness of any lease entered into by the Municipality.

On 25 June 2007, the company lodged an application in the Eastern Cape Division of the High Court for an order reviewing and setting aside the decision of the Municipality to lease the property to Van der Walt, as well as directing the Municipality to evict Van der Walt's business from Kiddies Beach. The Municipality opposed the application.

The company argued that the lease contravened a restrictive condition in the title deed of the property, which provided that the property should only be used as a "public open space". The company was of the view that allowing Van der Walt to conduct a business on the property was a direct contravention of this condition. The Municipality agreed that the usage of the property was subject to the restrictive condition, but argued that the business of offering recreational activities to the public was not a contravention of the condition. The Municipality went on to say that "it must be a material and predominant feature of 'public open space' that the public must have access to the property for recreational purposes without restriction" and, in this case, public access had not been restricted.

Acting Judge Crouse had to decide whether the lease of Kiddies Beach was a contravention of the restrictive condition. The judge found that, within the meaning of the town-planning scheme, 'public open space' is land to which the general public must have access. Objectively viewed, the conduct of Van der Walt's business did not prejudice the general public's access to Kiddies Beach. If anything, the arrangement enhanced the public's use of the beach.

Judge Crouse decided that the proposed lease was not a contravention of the restrictive condition and the review application failed.

*Port Alfred Riverhouse Property (Pty) Ltd v. Ndlambe Municipality and Another (1223/2007) [2008] ZAECHC 126.*



## Promotional Competitions

### ■ Taking a Chance

*"I am not arguing with you – I am telling you."*

– from *The Gentle Art of Making Enemies*  
by James Whistler (1834 - 1903)

HOPES AND DREAMS, crossed fingers, lucky stars . . . at some point or another most of us have chanced fate and

participated in a lottery or similar competition, especially if it is in aid of a charitable cause.

The trustees of the South African Children's Charity Trust ran the popular Winikhaya competition to raise funds for charity. This competition was televised by the SABC and offered a grand weekly prize of R500 000 towards the building of a home.

The National Lotteries Board challenged the lawfulness of the Winikhaya lottery. The **Lotteries Act** 57 of 1997 prohibits unregulated lotteries, but allows promotional competitions which are "conducted for the purpose of promoting the sale of any goods or service". The Lotteries Board argued that Winikhaya was not a promotional competition.

The High Court, before considering the merits, dismissed the application on the ground that the Board lacked the requisite authority to obtain the declaratory order which it sought. The Board then appealed to the Supreme Court of Appeal.

Acting Judge Boruchowitz concluded that the Board did have authority as its functions are to monitor, regulate and police competitions falling within the Act. The court then went on to examine the term 'promotional competition'.

The trustees argued that Winikhaya was a promotional competition because the competition provided numerous sponsored products which related to the houses to be acquired through the weekly grand prizes.

The judges of appeal took the view that it is artificial and incorrect to regard Winikhaya as the promotion of goods or services, as its exclusive aim was to raise funds and nothing else. The court accordingly held that despite the merits of the Winikhaya competition, it did not comply with the Act and must therefore be discontinued. The SABC was held jointly and severally liable with the trustees of the South African Children's Charity Trust, for legal costs incurred by the Lotteries Board. This was because the SABC continued to screen Winikhaya despite the intervention of the Board in 2006.

*National Lotteries Board v. Bruss and Others (730/2007) [2008] ZASCA 167 (2008).*

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