



LAW
LETTER

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2010 promises to be a challenging year, not least for lawyers and their clients. This first edition of Law Letter deals with a variety of recent decisions of our courts which we are confident will enable our readers to keep abreast of legal developments in an entertaining and informative way. 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

Law of Property

■ No Room for Error

"We often discover what will do, by finding out what will not do; and probably he who never made a mistake never made a discovery."

– Samuel Smiles (1812 - 1904)

AN APPLICATION has been brought in the KwaZulu-Natal High Court by the lessee of an immovable property against the lessor and owner, to prevent them from dealing with the property and to compel them to register transfer in the name of the lessee. In terms of the lease agreement there was a written option in favour of the lessee to purchase the property being leased. The lessee claimed that he had exercised the option to purchase and now demanded transfer. The owner of the property opposed the application on the grounds that the alleged sale was null and void because it failed to comply with the provisions of Section 2(1) of the **Alienation of Land Act** of 1981 which requires the terms of the sale to be in writing signed by the parties or their agents acting on their written authority. The defence was that the description of the property in the lease agreement was an imprecise and inadequate description as it did not clearly identify the property with reasonable certainty. As a result, one of the legal requirements, namely an exact and precise description of the thing being sold, was absent and the Act had not been complied with.

Judge Ndlovu after a comprehensive examination of the law came to the conclusion that the description of the property in the lease agreement did create confusion and ambiguity as to the precise piece of land which was leased. That being the case, it could not be said that such description identified the leased property with reasonable certainty. The description in the lease was not the same description as in the title deed.

Where there is an option to purchase, both the option and its acceptance has to be in writing and, when read together, have to contain all the essential and material terms of the

contract of purchase and sale. In this case the peremptory requirements of the Act had not been complied with and the application was dismissed with costs.

This case emphasizes how vital it is that important contractual documentation strictly comply with the requirements of the law.

Lombaard v. Droprop CC & Others 2009 (6) SA 150 (NPD).



■ Delay, Dismay, Delight

"If we want things to stay as they are, things will have to change."

– Guiseppi di Lampedusa (1896 - 1957)

A DIFFERENT ANGLE to an option to purchase contained in a lease came before the Supreme Court of Appeal sitting in Bloemfontein. In this case the owner of a property was a trust which gave a company to whom the property was leased an option to purchase the property within two years of the commencement of the lease. The attorney for the trust had to draw up the contract of sale of the property envisaged in the option clause within the stipulated period but failed to do so.

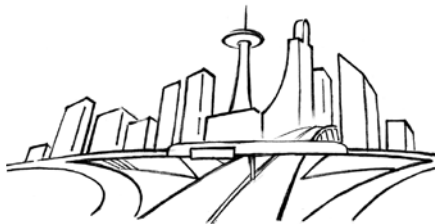
The company then applied to the High Court for an order compelling the trust and its attorney to draw up a written contract pursuant to the option and tendered payment of the purchase price. The High Court ordered that the written contract be drafted and that steps be taken by the trust to transfer the property to the company against payment of the agreed price. The trust appealed against that judgment.

Judge Carole Lewis of the Appeal Court decided that the company had correctly exercised its option and was entitled to take transfer. The option clause embodied all the essential terms of a contract of sale which the company

was entitled to enforce. If the trust deliberately frustrated the exercise of the option by failing to draw the contract of sale in the prescribed manner, the position is not that the option falls away but that the doctrine of fictional fulfilment comes into operation. Where a contract is subject to a condition that both parties must sign a document, one party cannot escape the contract by making it impossible for the other to sign. It was clear that the trust had deliberately frustrated the company's attempts to exercise the option. The deliberate frustration of the exercise by the company of its right to take transfer in the prescribed manner meant that under application of fictional fulfilment, the trust was deemed to have done so, all the necessary requirements had been complied with, and the company was entitled to take transfer. The appeal of the trust was dismissed with costs.

Doctrines of our law such as fictional fulfilment have developed over a long period of time specifically to deal with persons who seek to abuse the law, avoid their legal responsibilities and fail to meet their contractual obligations.

Du Plessis NO & Another v. Goldco Motor & Cycle Supplies (Pty) Ltd [2009] 4 All SA 203 (SCA).



■ The Fat Lady Sang

*"It isn't that they can't see the solution:
it is that they can't see the problem."*

– GK Chesterton (1874 - 1936)

JUDGE of Appeal Maya of the Supreme Court of Appeal presided over a dispute where the registered owners, a married couple, of a property in KwaZulu-Natal had sold their property in terms of a written agreement to a purchaser who was given possession and occupation of their property upon signature. However he subsequently failed to pay the purchase price within the period stipulated and the owners applied to the Durban High Court before Judge Swain to declare the contract cancelled and to evict the purchaser from the property.

The Durban High Court however decided that although the agreement had been validly cancelled, it was subsequently revived by the conduct of the parties and that such revived agreement did not have to meet the formal requirements of the **Alienation of Land Act** of 1981 to be valid.

The Appeal Court disagreed. For a cancelled agreement to be revived requires a fresh agreement and meeting of

the minds of the contracting parties. On the facts before the court and the affidavits filed, there was no basis for a finding that consensus between the parties had been reached after cancellation sufficient to revive the previous agreement. The conduct of the parties and their communications were not such that any inference could be drawn that there had been a meeting of the minds. For that reason the agreement of sale and its terms had not been revived and the appeal succeeded. The purchaser was ordered to vacate the premises and to pay the costs of the original application as well as the appeal.

This case again illustrates that in property transactions, where there is a failure to comply with the terms of the original agreement, whether as a result of late payment, extensions granted, or amendments agreed to, all these have to be reduced to writing and signed by both parties or their authorised representatives in a manner which complies with the requirements of the Alienation of Land Act to be valid.

Sewpersadh & Another v. Dookie [2009] 4 All SA 338 (SCA).



Law of Contract

■ No Bank Guarantee

*"Nothing knits man to man like the frequent passage
from hand to hand of cash."*

– Walter Sickert (1860 - 1942)

APPLICATION was made in the South Gauteng High Court Johannesburg by an international commodities trader against Standard Bank. As a result of the US Department of Treasuries Office of Foreign Assets Control listing the applicant because he had financially propped up the Mugabe regime in Zimbabwe, providing other support to a number of his high-ranking officials, and financed and provided logistical support to a number of Zimbabwean state entities, thereby enabling Mugabe to pursue policies that seriously undermined democratic processes and institutions in Zimbabwe, Standard Bank, on becoming aware of this, raised certain concerns regarding the likely serious implications for the bank, its investors and customers in continuing to maintain a relationship with the applicant. The bank therefore decided to cancel its contract with the applicant. It was a term of the contract with the bank that it was entitled to terminate any account or facility which might have been extended to the applicant for any reason, on reasonable notice.

The applicant then instituted proceedings in which he claimed that the bank was prohibited from cancelling the account contract in the absence of good cause. He also claimed that by virtue of the unequal bargaining positions of the applicant and the bank at the time of conclusion of the contract, the clause in question permitting the bank to cancel for any reason on reasonable notice was an "imposed term" and hence unenforceable. The bank's implementation of the clause was claimed to violate the standard of fairness set by the Constitution because, if the account was terminated at the will of the bank, for that reason alone, no other bank would take the applicant as a customer.

Judge Lamont who heard the matter concluded that the contract had been lawfully cancelled according to its terms. The facts did not show that the applicant was at a bargaining disadvantage or in a position of inequality relative to the bank, in contracting with the bank. That being so, the applicant had to be treated as if he were a person of equal bargaining capacity at the time the contract was concluded. The contract had to be treated as if it were concluded by contracting equals, each able to stipulate terms that each required to be inserted. It followed that the terms within the contract had to be treated on the basis that they were terms agreed to and intended to be agreed to by the contracting parties.

*The bank is entitled
to take up what it believes
to be a morally correct stance.*

The judge further pointed out that the bank was entitled to take up what it believed to be a morally correct stance. Part of having the freedom to contract and maintain dignity, within the parameters of avoiding discrimination, was the right to choose customers based on a morality it chose to apply. The process was procedurally fair. Constitutional fairness had to be assessed by comparing the impact of the bank's conduct upon the applicant with the impact of the continued relationship on the bank if the bank were not entitled to cancel. If the bank were allowed to cancel, then the applicant could seek banking facilities elsewhere. If the bank were not allowed to cancel, the bank was compelled to continue a relationship with a person with whom it did not wish to remain in contact, which continued relationship placed it at risk financially, locally and internationally. That would be unfair to the bank. It would significantly invade its right of freedom to contract. It would cause an indignity in that it would be forced to accept a position it found repugnant. The conclusion was that the bank's conduct in exercising its right of cancellation of the contract was constitutionally fair.

The onus rested on the applicant to establish that the unilateral cancellation of the contract alone would result in the applicant being unable to obtain alternative banking facilities. He had failed to do so. Accordingly, the unilateral termination of the facilities did not result in the applicant being "unbanked". Once it was accepted that the applicant was not unbanked by the bank's exercising of its right to cancel, the Constitution does not in such circumstances limit the bank's right to cancel the contract.

Breedenkamp v. Standard Bank of SA Ltd 2009 (6) SA 277 (GSJ).

Family Law



■ Much Ado About Nothing

"A married couple are well suited when both partners usually feel the need for a quarrel at the same time."

– Jean Rostand (1894 - 1977)

JUDGE MURPHY in the North Gauteng High Court in Pretoria came down hard on a married couple in the process of a divorce. The wife had applied for interim assistance pending finalisation of the divorce including maintenance for herself as provided for in terms of Rule 43 of the High Court Rules. This is a special procedure aimed at the expeditious and inexpensive resolution of issues such as maintenance while the proceedings are pending.

The documents filed by the wife however ran to 139 pages and her husband's opposing documents made up 46 pages. The complete set of papers before the judge amounted to 192 pages. The judge said that the affidavits of the wife were verbose and contained unnecessary and irrelevant information. This was also the case with the papers filed in response by the husband. This amounted to an abuse of process because it defeated the purpose or object of Rule 43. There was no justification for this inordinate profusion of documents in an interim application. The circumstances were not exceptional to the extent that they excused the unacceptable length of the papers. Litigants and their legal representatives have to be encouraged to fashion their pleadings in accordance with the spirit and purpose of Rule 43. Where there was an abuse of process, the court should take steps to censure this conduct. Furthermore, the tendency for parties in Rule 43 applications to misstate the true nature of their financial affairs by exaggerating their expenses and understating their income is unacceptable.

There is also a duty on litigants in such proceedings to act with the utmost good faith and to disclose fully all material information regarding their financial affairs. Any false disclosure or material non-disclosure would mean that he or she is not before the court with “clean hands” and the court would on those grounds alone be justified in refusing relief.

In this case the wife had failed to disclose an additional monthly income she received of R3,000. She had failed to act in good faith and as a result her application was struck off the roll and there was no order as to costs. It was further ordered that neither of the parties could be charged any fees by their attorneys in respect of the application and its opposition.

Du Preez v. Du Preez 2009 (6) SA 28 (TPD).



Law of Defamation

■ The Safety Zone

FOR A claim for defamation to succeed, it must be proved that there was publication to at least one other person of the defamatory statement. Judge Kathy Satchell of the South Gauteng High Court in Johannesburg recently heard an appeal from the Randburg Magistrates Court where Mr Errol Byrne claimed R50,000 for defamation on the basis that a letter from his previous employer advising him of the reasons for his dismissal was defamatory of him and had been “published” to the typist who typed out the letter.

The judge pointed out that an employee is entitled to know the basis upon which any disciplinary action was taken against him and particularly where he is dismissed. Furthermore, an employer who failed to inform an employee of the reasons for his dismissal could possibly expose itself to a complaint of unfair dismissal on that ground alone. The employer had both a moral and social duty, as well as a legal duty, to communicate to the employee the reasons for his dismissal from employment.

Failing such courtesy and without such information, employees would feel unjustly treated and aggrieved and these feelings could lead to various forms of labour unrest. Failure to furnish reasons for dismissal would prejudice a former employee who wished to challenge or appeal such dismissal. Finally, the Code attached to the **Labour Relations Act** of 1995 required such reasons to be given.

Publication of the contents of the letter of dismissal to the typist by the employer was, in the circumstances, privileged. It was done in the exercise of a duty to inform the employee of the reasons for termination of his employment. Mr Byrne’s appeal was dismissed with costs.

Byrne v. Masters Squash Promotions CC & Another 2010 (1) SA 124 (GSJ).



Law of Insurance

■ Double Trouble

“The answer, my friend, is blowin’ in the wind.”

– Bob Dylan

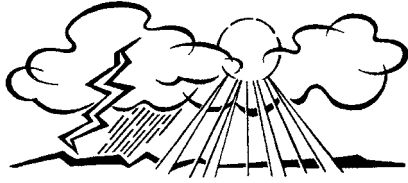
A PORTION of a parapet wall at the top of a motor vehicle dealership collapsed inwards onto the roof, plummeted through the ceiling and caused extensive damage to a number of motor vehicles on display in the dealership showroom. An insurance broker lodged a claim on behalf of the trust that owned the dealership with Mutual & Federal Insurance Company in respect of the loss suffered by the trust. Mutual & Federal repudiated liability on the basis that there was an exception to liability contained in the policy of insurance. This provided that the insurer was not liable if the loss or damage is caused by or arises directly or indirectly from weather conditions.

The trust instituted action in the High Court against Mutual & Federal. In the alternative, it also claimed against the broker on the basis that if the court found that Mutual & Federal was not liable to the trust, then the broker had breached his duty to the trust by failing to ensure that the trust was covered in accordance with its instruction that its stock in trade had to be “comprehensively” insured.

The expert witnesses at the trial agreed that “a combination of the prior deterioration of the wall and the prevailing winds on the day caused instability of the wall resulting in its collapse.”

The High Court concluded that Mutual & Federal had failed to prove that it was exempt from liability and was liable for the damage suffered by the trust. Mutual & Federal appealed to a full bench of the Eastern Cape High Court.

Judge Chetty, sitting with Judges Froneman and Dambuza, said that for Mutual & Federal to succeed it had to prove that the damage was caused "directly or indirectly by weather conditions". It had to show that the weather conditions in some material way probably contributed to the damage. On the evidence of the experts, the wind



factor must have had a material bearing on the collapse of the wall and the resulting damage sustained to the motor vehicles. The damage therefore fell within the specific terms of the exemption in the policy, thereby exempting Mutual & Federal from liability.

Where a loss is caused by two perils operating simultaneously at the time of the loss and being equal or nearly equal in causing the loss, the one being wholly excluded and the other falling within the risk as described, then an insurer will not be liable. The Appeal Court accordingly reversed the decision of the High Court.

Going on to deal with the alternative claim against the broker, the court pointed out that the duty of a broker is to exercise reasonable care and skill to elicit and convey material information both from and to the insured, including information about terms of the policy which, if contravened, might leave the insured without cover. It is part of a broker's general duty to an insured to use reasonable care to ensure that the insured is covered. In this case the broker clearly did not discharge his duty to the trust by ensuring that the trust's stock in trade was adequately insured. On the balance of probabilities, the trust had proved that the broker negligently breached the terms of his mandate and that he was liable to compensate the trust for the loss suffered by them.

As a result Mutual & Federal was off the hook and judgment was granted against the broker.

Mutual & Federal Insurance Co Ltd v. Ingram NO 2009 (6) SA 53 (ECD).

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