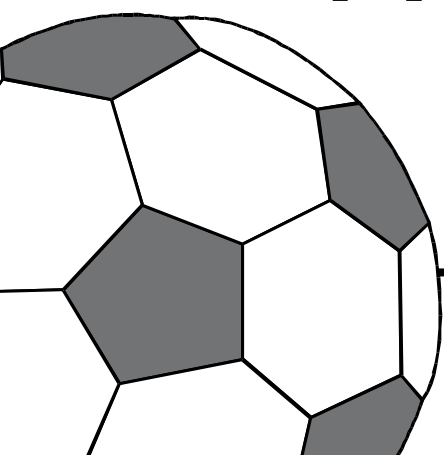

LAW
LETTER

June 2010



FAIRBRIDGES
ATTORNEYS
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While all attention is on the World Cup, life goes on in our busy courts of law. In this edition of Law Letter we turn our spotlight onto recent cases dealing with defamation, sectional titles, divorce, employment, unlawful arrest and circumstantial evidence. Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

KICK OFF

SOUTH AFRICA takes centre stage this month as host country of the long-anticipated 2010 FIFA World Cup, the largest and most-watched sporting spectacle the world has ever experienced.

Having proved itself as successful host of the Rugby World Cup, the African Cup of Nations, the Cricket World Cup, the IPL Cricket Tournament, numerous international tours as well as local classics like the Comrades marathon, the Dusi Canoe marathon, the Argus Pick 'n Pay Cycle Tour, the Two Oceans marathon and many other sporting events, there is every reason to be confident that South Africans will again rise to the occasion.

The opportunity for South Africa to present its attractions and potential to a huge global audience

is unprecedented. But tourists, investors and trading partners also require the assurance that South Africa provides a safe, secure and stable political, economic and social environment. The daunting challenge for all South Africans is to ensure that the constitutional promise of the rule of law, freedom, equality, democracy and the protection of human rights continues to shape the fundamental norms, values and culture of our diverse society.

It is to be hoped that despite all the commercial clamour of this multi-million dollar extravaganza, the true spirit of sportsmanship will be the ultimate victor. There is bound to be controversy both on the pitch and off the field, but the elements which attract soccer fans around the globe continue to be honest endeavour, tactical skills, athletic talent, courage, fair play, humility in victory, grace in defeat, team-spirit and respect for the best traditions of the game. May the beautiful game in 2010 bring rich and lasting rewards to all who are privileged to participate in this extraordinary event.

"Some people think football is a matter of life and death. I don't like that attitude. I can assure them it is much more serious than that."

– Bill Shankley (1914 – 1981)

RECENT CASES

Damages

■ Red Card

A POLICE OFFICER who arrests someone is required to apply his mind to whether the detention of the accused person pending his or her appearance in court is necessary. One of the factors to be considered is whether the offence for which the accused has been arrested will, upon conviction, attract a sentence of a fine or imprisonment. If a fine is likely to be imposed, it is undesirable to subject the accused to pre-trial detention. Failure on the part of the arresting officer to properly apply his mind can lead to a claim for damages against the Minister of Safety and Security.

Mvu was the father of twin teenage girls of the distinctly rebellious type. He was enraged to learn that his daughters had obtained cell phones from their gangster boyfriends, who were intent on luring the twins into drug trafficking. Mvu damaged the cell phones when he threw them to the floor in anger. To add insult to injury, the terrible twins then charged their father with malicious damage to property.

Mvu was himself an inspector in the police service. Upon learning of the charge, he went to the police station to clarify the situation with the officer dealing with the complaint. Much to his surprise, and despite his co-operation with the police, he was arrested and detained overnight with six other persons, including a suspected rapist. Mvu was released on a warning the next day by the magistrate and was subsequently found not guilty by the trial court.

Mvu then instituted an action against the Minister of Safety and Security for damages as a result of the emotional trauma suffered by him whilst being unlawfully detained.

Judge Willis pointed out that the Constitution affords every

citizen the right to freedom and security. This includes the right not to be arbitrarily deprived of freedom and to be released pending trial if the interests of justice permit.

The arresting officer had clearly failed to apply his mind to the circumstances of the alleged offence. At the most, the officer should have released Mvu on a warning or on bail, rather than keep him in detention until he appeared in court. Mvu's detention was unlawful and the court awarded him damages in the amount of R30000.

Mvu v. Minister of Safety and Security and Another 2009 (6) SA 82 (GSJ).



■ Laws of the Game

"The important thing in life is not the victory but the contest."
– Pierre de Coubertin (1863 – 1937)

CLADALL ROOFING ordered 13 000 square metres of galvanised IBR roof sheeting from SS Profiling for a cooling facility in the Eastern Cape. Cladall specified sheeting of a particular thickness and strength, because the roof trusses were wide apart and the sheeting was required to withstand human traffic.

SS Profiling delivered the sheeting, but not of the required thickness and strength. Cladall, unaware that the product did not meet specifications, installed the sheeting at the facility. When Cladall realised some time later that the sheeting did not comply it claimed damages from SS Profiling for the reasonable cost of reinstating the roof according to the original specifications. Cladall also refused to pay the outstanding balance of the purchase price.

SS Profiling defended the claim for damages and also contested Cladall's right to withhold payment. SS Profiling argued that the claim was ruled out by the provisions of its standard terms and conditions, which formed part of the credit application that had been completed by Cladall. The standard terms and conditions imposed an obligation on the customer to inspect the goods on delivery and to give notice of any defect in the goods within three days of delivery. It was also recorded that the customer would not have the right to withhold payment for any reason whatsoever.

The dispute reached the Supreme Court of Appeal. Judges Navsa and Van Heerden ruled that the relevant clauses in the standard terms and conditions applied only where

SS Profiling had delivered goods of the type ordered, but suffering from some defect. These clauses could not assist SS Profiling where it had delivered goods that were entirely different from those ordered by the customer.

Cladall's claim succeeded. It was also entitled to withhold payment for the balance of the purchase price.

Cladall Roofing (Pty) Ltd v. SS Profiling (Pty) Ltd [2010] 1 All SA 114 (SCA).

Employment

■ Off the Bench

"What mighty contests rise from trivial things."
– Alexander Pope (1688 – 1744)

IT'S YOUR first day on the job. You're ecstatic about the future. You've signed your contract of employment and everything seems to be crystal clear: your job description, working hours, annual leave and salary. The journey starts in "black and white".

Mr Mafika was employed by the SABC as its chief legal advisor. In April 2007 Mafika was told that the SABC's audit committee would be investigating the law firm of which he was previously a director. Apparently the firm had been a service provider to the SABC and there had been allegations of irregularities. Mafika denied impropriety, but agreed to voluntarily take leave so that the audit committee could conduct its investigation.

Mafika travelled abroad and, on his return, met with Dali Mpofo, the Group CEO of the SABC. The possibility of resignation was discussed, but Mafika decided not to resign.

Then the SABC released a press statement confirming that Mafika had now been suspended pending a disciplinary enquiry. In the heat of the moment, Mafika sent an SMS to Mpofo informing him that he "quit with immediate effect".

After recollecting himself, Mafika decided that his SMS had been unwise and that he still wanted his job. In the meantime, the SABC had indicated its acceptance of his SMS. The SABC now refused to accept the withdrawal of Mafika's resignation.

Mafika took the matter to the Labour Court. His main argument was that the SMS did not constitute a valid resignation, as the **Basic Conditions of Employment Act** requires a notice of termination of employment to be in writing. An SMS, said Mafika, was not "in writing".

Judge André van Niekerk disagreed, making reference to the **Electronic Communications and Transactions Act**

which provides that any legal requirement for a document to be in writing is met if the document is in the form of a data message which is accessible for subsequent reference. The SMS sent by Mafika constituted a resignation “in writing” because an SMS is a data message and is capable of being saved on a cell phone and retrieved.

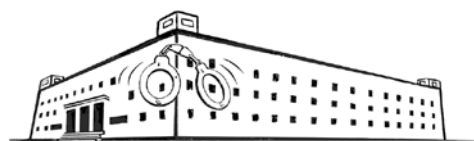
Mafika’s career at the SABC started in “black and white” and, it seems, ended in the same way.

Mafika v. SABC Ltd [2010] 5 BLLR 542 (LC).



There was a lone dissenting voice. Appeal Judge Mthiyane said that the Promotion of National Unity and Reconciliation Act should not be extended beyond its real purpose, namely to prevent civil and criminal proceedings from being instituted against persons who have been granted amnesty and to remove historical criminal acts from the record. The Act, said Mthiyane, should not be interpreted to mean that past events cannot be spoken of. To do so would be to interpret the Act’s provisions in contrast to the spirit of the Constitution and the Bill of Rights, and would place an undue limitation on the right to freedom of expression.

The Citizen 1978 (Pty) Ltd and Others v. McBride [2010] 3 All SA 46 (SCA).



Defamation

■ Final Whistle

THESE DAYS you have to be careful about what you say, even if you think that your comment is based on fact. The truth, it seems, does not always set you free.

The Citizen newspaper published articles in September 2003 aimed at underlining the unsuitability of Robert McBride as a candidate for the position of Ekurhuleni Chief of Police. The articles stated that McBride was a “criminal” and a “murderer”, having bombed civilian targets during the apartheid era.

McBride sued *The Citizen* for damages, claiming that the published statements were defamatory in that they injured his dignity and reputation. *The Citizen* relied on one of the defences against a claim for defamation, namely that the statements were true.

The High Court found that McBride could no longer be referred to as a “criminal” or a “murderer” because he had been granted amnesty. Such comments therefore amounted to false statements. *The Citizen* appealed to the Supreme Court of Appeal in Bloemfontein.

The appeal judges focused on the interpretation of the **Promotion of National Unity and Reconciliation Act** and the effect that the granting of amnesty has on a convicted criminal. They concluded that, when a person is granted amnesty, all the consequences of conviction are expunged from the record. This means that a previously-convicted criminal is immune not only from civil and criminal proceedings, but also from being branded a criminal or murderer. *The Citizen* was out of line and was ordered to pay damages to McBride.

Evidence

■ Penalty Spot

CIRCUMSTANTIAL evidence often plays a role in criminal trials. A witness hears a bang and rushes into a room to find the suspect standing over the victim, a smoking gun in his hand. This is circumstantial evidence – the witness did not actually see the shot being fired, but the circumstances certainly suggest who committed the offence.

Mr Botomane, a ticket seller for PUTCO buses, was implicated as a possible suspect in the theft of a significant amount of money from his employer. Three policemen arrived at his home one night and told him that they were taking him to the Atteridgeville police station for questioning.

The policemen alleged that Botomane fled while they were trying to arrest another suspect. He was never seen again alive. His body was found on the N1 Highway a day later. His injuries were not inconsistent with a ‘hit and run’ incident but from the evidence it was possible that he might have been killed at a different location and removed to the highway. It also came out in the trial that Botomane had told his girlfriend that he was aware of the identities of the thieves and that he had been threatened by these unnamed persons.

The High Court convicted the policemen of murdering and kidnapping Botomane, based on the circumstantial evidence. Botomane had, after all, last been seen in the company of the policemen.

The policemen appealed to the Supreme Court of Appeal and their convictions were set aside on the basis that the circumstantial evidence had not been correctly assessed.

There are two well-established rules for dealing with circumstantial evidence. Firstly, the inference drawn by the High Court (that the policemen must have killed Mr Botomane, because he was last seen under their arrest) must be consistent with all the proved facts. Secondly, the proven facts must exclude every other possible reasonable inference (the inference that Mr Botomane may have been killed by unnamed thieves).

The inference drawn by the High Court was not consistent with the proved facts. The inference did not adequately account for the uncertainty about the cause of death. Secondly, the proven facts did not exclude every other possible reasonable inference – Mr Botomane could quite possibly have been murdered by unnamed persons who were the actual thieves. In these circumstances, said the Supreme Court of Appeal, the High Court should not have convicted the policemen based purely on circumstantial evidence.

Burger and Others v. The State (236/09) [2010] ZASCA 12 (12 March 2010).



Trustees

■ Relegation Zone

*“Serious sport has nothing to do with fair play,
It is war minus the shooting.”*

– George Orwell (1903 – 1950)

LOS ANGELES is Spanish for ‘the city of angels’. There could not have been a more inappropriate name for the Los Angeles sectional title scheme.

Seven trustees were in place, but they had been appointed through an election process that was seriously flawed. The trustees had also failed to manage the scheme properly for some time. Annual general meetings had not been convened, proper financial records had not been kept and outstanding levies had not been collected. The scheme was in arrears with rates, electricity and water, and other creditors were not being paid.

Dempa Investments, which owned a unit in the scheme, applied to court to have the trustees replaced by a court-appointed administrator in terms of Section 46 of

the **Sectional Titles Act**. An administrator is typically authorised to take over from the trustees, to take any essential steps and to convene an annual general meeting for the appointment of new trustees. The existing trustees of the Los Angeles sectional title scheme opposed the application, arguing that the court should not appoint an administrator because, firstly, trustees were in place and, secondly, these trustees had declared themselves willing and able to act as trustees.

Acting Judge Gautschi decided that the fact that trustees were in place, regardless of whether or not they had been duly elected, was not an obstacle to the court appointing an administrator. Neither was the fact that the trustees had declared themselves to be willing to act as trustees.

Section 46 did not define the circumstances in which a court could appoint an administrator, but the court directed that the following principles should apply: An administrator should be appointed only where special circumstances exist, namely some neglect, wilfulness or dishonesty by the trustees or some event beyond their control. An appointment should be made only if the owners are likely to suffer substantial prejudice and the problem is such that an administrator could be expected to add value where trustees could not. In making the decision, courts have to balance two competing concerns: firstly, the need to be slow to interfere in the management of a sectional title scheme by representatives chosen by the owners and, secondly, the need to be quick to help owners who might suffer substantial prejudice as a result of the actions or omissions of trustees.

Most sectional title schemes are run efficiently by competent, community-conscious volunteers, but every now and then a situation like this comes along. If you find yourself not living in a ‘city of angels’, you do not have to suffer in silence – consider whether you should not apply to court for the appointment of an administrator to protect your investment in your sectional title scheme.

Dempa Investments v. Body Corporate, Los Angeles 2010 (2) SA 69 (W).



Family Law

■ Own Goal

WHILE MARRIAGE is meant to last forever, the sad reality is that it does not always happen. Mr and Mrs Middleton had been married in community of property

and decided to divorce after many years of marriage. A written settlement agreement was reached whereby Mr Middleton was to take transfer of ownership of his wife's share in their various immovable properties.

The properties had originally been registered in the names of both spouses in equal undivided shares, so the registration of Mrs Middleton's half share into Mr Middleton's name was a legal requirement. Mr Middleton neglected to do the paperwork and he failed to have her half share transferred into his name. Unfortunately for him, Mrs Middleton then had judgment granted against her by a creditor. Her half share was attached in readiness for a sale in execution.

Mr Middleton brought an urgent application to court for an interdict restraining the creditor from proceeding with the sale in execution, as well as a declaration stating that he was the sole owner of the property.

An interim interdict was granted, but when the matter was finally decided by the court things did not pan out for Mr Middleton. He contended that the effect of the settlement agreement was that his ex-wife was divested of her share in the property, which then vested in him. If this was so, then he was the sole owner of the property.

Acting Judge Motala disagreed, pointing out that in our law transfer of ownership of immovable property does not happen by way of a contractual undertaking. This

can only be achieved by the registration of transfer in the Deeds Office. The settlement agreement merely created a contractual right in favour of Middleton for the acquisition of his ex-wife's undivided half share in the immovable property. Ownership did not pass until the transfer was registered. As Mrs Middleton still owned the half share, it could be rightly attached and sold in execution.

Middleton unfortunately had to suffer the consequences of his own delay and neglect.

Middleton v. Middleton and Another 2010 (1) SA 179 (D).



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